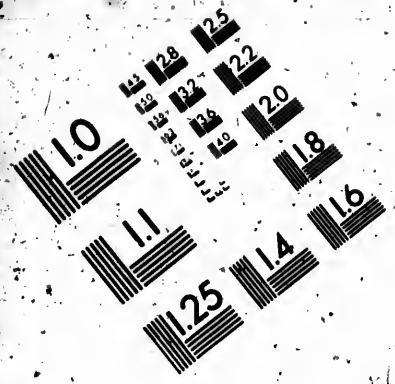

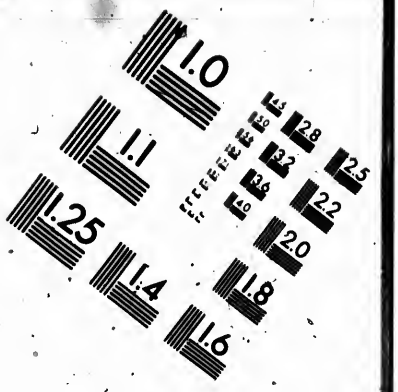

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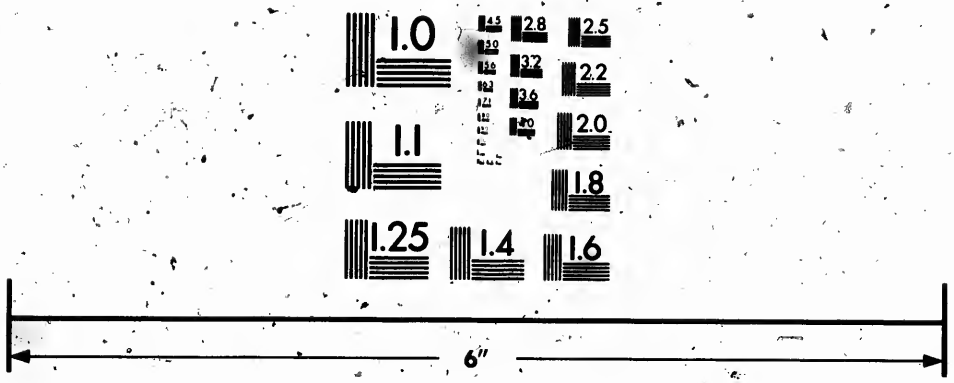

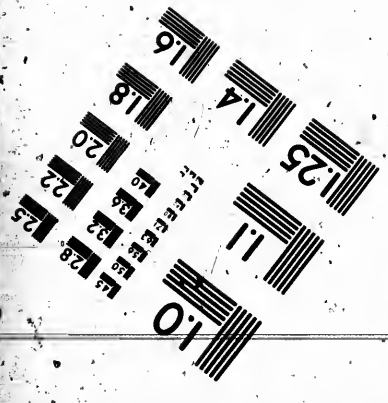

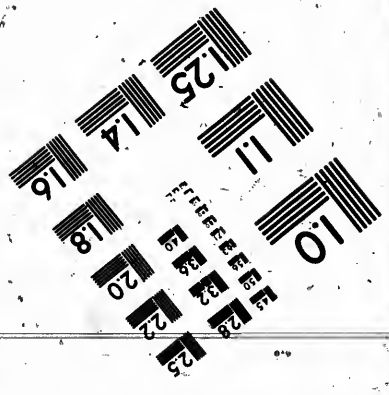

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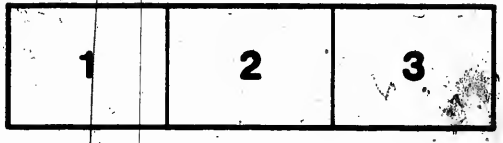

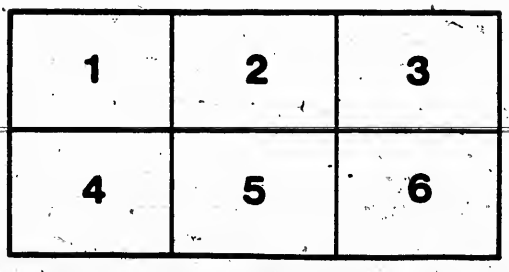

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THE

LOWER CANADA

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DU

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THE INDICES

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Correction.—In Lareau vs. La Compagnie d'Imprimerie de la Minerve, p. 339, read *C. Le Boeuf* for the plaintiff, instead of *J. E. Robidoux.*

THE

LOWER CANADA JURIST.

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 24TH NOVEMBER, 1882.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

No. 342.

REFORD ET AL.,

APPELLANTS;

AND

LES ECCLÉSIASTIQUES DU SÉMINAIRE DE MONTRÉAL,

RESPONDENTS.

Appellants purchased from P. R. cadastral lot 1716 St. Antoine ward, and the balance of purchase money was transferred by various deeds to C., and, by sale of the property to B., the latter became liable to pay this balance to the exoneration of appellants. B. then made an exchange with respondents of said lot for lot 1661, s. 74 in same ward; and, to guarantee respondents against said balance of purchase money, hypothecated the greater part of last-mentioned lot in their favor. Subsequently B. sold a portion of 1661, s. 74, to P. S. R. and others, and obliged them to pay the balance of purchase money so payable to C, and to this deed respondents became parties and accepted P. S R. and others in lieu and place of B., and discharged B. "from all personal responsibility in their favor." C. then sued respondents hypothecarily for three instalments of interest due on said balance of purchase money, and respondents paid, taking a notarial discharge in which they claimed the benefit of legal subrogation under § 2 of art. 1150 C. C., and sued appellants as the personal debtors of the amount.

HELD:—That appellants were liable to pay the amount demanded, and could not invoke the benefit of said release in favor of B.

This was an appeal from the following judgment rendered by the Superior Court at Montreal (RAINVILLE, J.), on the 31st of March, 1881:—"La Cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure, les pièces produites et délibéré:"

"Attendu que les demandeurs réclament des défendeurs la somme de $1840 pour autant qu'ils ont payé au nommé James Cunningham comme tiers détenteur d'une certaine propriété, et comme étant subrogés aux droits du créancier qu'ils ont payé; au paiement de laquelle somme les dits défendeurs sont personnellement tenus.

"Attendu que les demandeurs allèguent que par acte de vente du 20 juin 1872, passé devant Maître J. S. Hunter, notaire, Peter Redpath vendit aux défendeurs, pour la somme de $32,000, le lot numéro 1716, du cadastre du quartier St. Antoine; que le dit Redpath a transporté la dite somme à l'Université McGill, qui l'a transportée au dit Cunningham; que par acte de vente en date du douze novembre 1873, passé devant J. S. Hunter, notaire, les

Retord et al. and Les Ecclésiastiques du Séminaire de Montréal.

défendeurs ont vendu le dit lot 1716 à George B. Burland; que le quatorze novembre, 1873, le dit Burland a échangé le dit lot avec les demandeurs, qui lui ont donné en contre-échange, le lot numéro 1664 S. 74: que pour garantie d'une certaine soulte de $10,235 que le dit Burland s'engageait à payer aux demandeurs, et pour garantie de l'hypothèque de $20,000 grevant le lot cédé par le dit Burland, cette dernière somme étant la balance due au dit Redpath, ou représentants, le dit Burland a hypothéqué le dit lot 1654, S. 74, moins une petite partie.

"Attendu que les dits défendeurs plaident que par certain acte de vente en date du 29 mai 1874 le dit Burland a vendu aux dits Philip S. Ross et autres, une partie du dit lot 1654, S. 74, et qu'au dit acte les dit demandeurs sont intervenus, et ont déchargé le dit Burland de toute responsabilité personnelle en leur faveur, et qu'en conséquence ils ne peuvent réclamer le montant de leur action en autant que les dits demandeurs ont perdu tout recours personnel contre le dit Burland.

"Considérant que par le paiement qu'ils ont fait au dit Cunningham, les demandeurs, comme tiers détenteurs du dit immeuble 1716, ont été subrogés de plein droit aux droits du dit Cunningham, aux termes de l'article 1156 du Code Civil.

"Considérant que lors de leur dite intervention au dit acte du 29 mai 1874, les dits demandeurs n'étaient pas alors créanciers du dit Burland pour la dite somme de $20,000, ni pour aucune partie d'icelle: qu'ils n'avaient alors contre lui qu'un recours conditionnel en garantie, dans le cas où ils seraient troublés.

"Considérant que le dit Burland était alors débiteur personnel de la dite somme de $20,000, et que la décharge accordée au dit Burland par les dits demandeurs, ne peut s'appliquer qu'au recours en garantie qu'avaient les dits demandeurs, et non à l'obligation personnelle qui incombait au dit Burland de payer la dite somme de $20,000 aux créanciers d'icelle: qu'interpréter l'article autrement aurait l'effet de décharger le dit Burland d'une obligation personnelle sans considération de sa part: qu'enfin, si on donnait une semblable interprétation à la dite clause, il faudrait dire que si le dit Burland était poursuivi personnellement par les créanciers de la dite somme, il aurait une action en garantie contre les demandeurs, pour se faire acquitter et garantir de l'obligation de payer la dite somme, ce qui serait contraire aux dispositions de l'article 1509 du Code Civil, en autant que le vendeur, même non soumis à aucune garantie, demeure cependant obligé à la garantie de ses faits personnels, toute convention contraire étant nulle.

"Considérant, enfin, qu'une telle interprétation serait contraire à l'intention évidente des parties.

"Déboute les défendeurs de leur défense, et les condamne à payer aux demandeurs la dite somme de $2,840.20, cours actuel, représentant l'intérêt à sept pour-cent sur la dite somme de $20,000, échue depuis le premier de juillet 1878 jusqu'au 1er juillet 1880, et les frais sur l'action No. 760, intentée par le dit Cunningham contre les demandeurs, pour le recouvrement du dit intérêt; avec intérêt sur icelle, à compter du 28 septembre 1880 jusqu'à paiement, et les dépens distraits à Messieurs Geoffrion, Rinfret, Dorion et Laviolette, avocats des demandeurs."

Reford et al. and Les Ecclésiastiques du Séminaire de Montréal.

RAMSAY, J. (*dissentiens*):—This case gives rise to an interesting question. Mr. Peter Redpath sold to the appellants a piece of real estate. They paid a portion of the price, leaving $20,000 secured on the property, payable in ten years, with interest. This balance Mr. Redpath gave to McGill College, and the appellants accepted the transfer. Appellants then sold to Burland, who bound himself personally to pay the debt, and the property remained hypothecated to secure the debt. Burland then exchanged the property with the Seminary for another property; and as the property coming from appellants was mortgaged as well for the balance of the original price, the $20,000 made over to McGill, as for the extra price Burland agreed to pay, Burland hypothecated to the Seminary the property they gave him in exchange. Burland then sold to Ross and others the property he had acquired from the Seminary. The Seminary became parties to this last deed, and they discharged Burland of all his personal liability to them on these transactions, and accepted Ross and others in his stead.

Subsequently the rights of McGill devolved on one Cunningham who notified the Seminary of this transfer. Interest on the $20,000 fell due, and as it was not paid by any of the parties personally liable, Cunningham sued the Seminary hypothecarily. The Seminary paid the debt, and were subrogated in the rights of Cunningham. They then sued appellants, who pleaded the transactions between Burland and the Seminary as an answer to the demand. The question then before us is, what was the effect of the personal discharge of Burland by the Seminary.

It is argued it has no effect at all in this action. The Seminary paid the debt to avoid an hypothecary condemnation, and it had a right to be subrogated in all the rights of the original creditor. Appellants were personally liable to Cunningham, and therefore to the Seminary, as being subrogated in his rights. By the deed between the Seminary and Burland they say they had not interfered in any way with the guarantee of Burland, who was still *garant* of appellants.

This is all perfectly true in a sense, but respondents overlook a great principle of our law, and it is this, that one cannot by a circuit of actions avoid for an instant an ultimate liability. In a word, *toutes nos actions sont de bonne foi.* What I contend is this, that all this circumlocution is only an effort on the part of the Seminary to put off the evil day, which is inevitable, and that, sooner or later, the Seminary must be brought face to face with Burland, as they really were when the adroit movement of changing their position and attacking Burland from the other side occurred to them.

The only way to come at the real rights of the Seminary in this suit is to work out all its possible results.

Let us suppose that appellants pay the Seminary, it is evident that immediately an hypothecary action will lie against the Seminary. In answer to this action there are only three things the Seminary can do, they can pay, *délaisser*, or plead the exception *de discussion*. That is, they can oppose to appellants exactly what they could have opposed to Cunningham. But as the exception of

Reford et al. and Les Ecclésiastiques du Séminaire de Montréal.

discussion is necessarily the discussion of Burland, it is out of their reach on the new suit by appellants, exactly as it was on the old suit by Cunningham. It would be useless for them to attempt the former tactics, for that would place them face to face with Burland directly. The Seminary, therefore, would have only one of two things to do, to *délaisser* or to pay, and to seek the hypothecary and personal protection it retained.

I am therefore of opinion that the judgment of the Court below should be reversed.

Cross, J.:—On the 20th June, 1873, Peter Redpath sells to Reford & Dillon a lot of land on Sherbrooke street, Cadastral No. 1716 St. Antoine ward, for the price of $23,856, whereof $3,856 were paid, and the balance of $20,000 was payable to the vendor in 10 years, with interest, for which a *bailleur de fonds* hypotheque was reserved.

The vendor transferred this balance to the Royal Institution for the Advancement of Learning, who transferred it to James Cunningham, of Ottawa, gentleman.

On the 12th November, 1873, Reford & Dillon sold this property to Geo. B. Burland for $37,077.97½, whereof $5,077.97½ were paid, and the balance of $32,000 the purchaser undertook to pay as follows: $20,000 to the exoneration of the vendor, to the Royal Institution for the Advancement of Learning, at that time the transferees and holders of Peter Redpath's claim as vendor of this property to Reford & Dillon, and the balance of $12,000 in two years, with interest, for which sums a *bailleur de fonds hypothèque* was reserved by Reford & Dillon.

On the 14th November, 1873, Burland exchanged this property with The Gentlemen Ecclesiastics of the Seminary for a lot on St. Catherine street, part of Cadastral No. 1654 St. Antoine ward. Burland agreed to give, by way of boot, *soulte ou retour*, a sum of $10,235, payable in ten annual instalments, with interest, for the payment whereof they limited their hypotheque to a part only of the property by them given in exchange, liberating a part; but inasmuch as the property received in exchange was charged with a *bailleur de fonds hypothèque* in favor of the transferee of Redpath, and a further sum of $12,000 in favor of Reford & Dillon, both being mentioned as a balance of $32,000 due under Reford & Dillon's deed to Burland, it was stipulated in the exchange that the limitation by The Ecclesiastics of their hypotheque for the *soulte* was without prejudice to their recourse or right of hypotheque by way of warranty on the land they so conveyed for securing them against the said sum or balance of $32,000, which it was thereby declared the said Burland owed, in virtue of said sale by Reford & Dillon to Burland, and to the amount of which sum of $32,000 the land they conveyed to Burland was thereby declared to be specially affected and hypothecated in their favor for surety of the payment of the said sum by Burland.

On the 29th of May, 1874, Burland sold the St. Catherine street property to Ross, Smith and Starke, the vendor declaring the property free and clear of incumbrances, save the *soulte* of $10,235, and interest, which was assumed by

the purchasers, and also a *hypothèque en garantie* created by the said exchange for a balance or remaining sum of $20,000, which the purchasers promised to discharge.

The price was $35,740, whereof $5,505 was paid as part thereof.

Other part thereof, $10,235, the purchasers promised to pay in discharge of the vendor Burland, to The Ecclesiastics of the Seminary of St. Sulpice, the now respondents; being the amount declared payable to them by said exchange at the times and in the manner therein stated; and the balance of $20,000 to the exoneration of Burland (the vendor) to The Royal Institution for the Advancement of Learning.

The Gentlemen Ecclesiastics intervened, and became parties to this deed, accepting the purchasers in lieu and stead of Burland for the payment to them of the *soulte* or *retour* of $10,235 and interest, and for the discharge, to the exoneration of the said Ecclesiastics, of the said hypothèque for $20,000 and interest payable to the Royal Institution, and affecting said lot 1716 St. Antoine ward, for guaranteeing the payment whereof the property thereby sold was hypothecated to the said Gentlemen Ecclesiastics, being a balance then still due of the larger sum of $32,000, the whole, however, without novation and without any derogation of the hypothecs then subsisting in their favor, but discharging said Burland from all personal responsibility in their favor.

On the 4th March, 1880, Cunningham sued The Gentlemen Ecclesiastics hypothecarily, for the payment of $2,100 for three annual instalments of interest due on the 1st January, 1880.

The respondents, The Gentlemen Ecclesiastics, paid the amount sued for with costs, and another half-yearly instalment of interest due 1st July, 1880, and took notarial discharge, executed before Lafleur, notary, 25th June, 1880, claiming subrogation of Cunningham's rights against Reford & Dillon, the appellants, in conformity with § 2 of Art. 1150 C. C.

These facts were submitted to the Superior Court at Montreal in a suit brought by the respondents, The Gentlemen Ecclesiastics, against the appellants, Reford & Dillon, for the amount they, the respondents, were thus obliged to pay to Cunningham. The appellants' pretensions were overruled, and judgment given for the respondents which judgment is now appealed from.

I think the respondents neither had the power nor did they pretend to discharge the recourse of the appellants against Burland for the payment to their exoneration of the money due to Redpath transferred to the Royal Institution and from them to Cunningham. In the exchange of the 14th November, 1873, the respondents conveyed to Burland an unincumbered property, and received in exchange one encumbered by a liability to the Royal Institution or to Cunningham. To prevent their position being seriously affected by the encumbrance, they exacted from Burland, that the property he received should remain hypothecated in their favor for the sum requisite to protect them against that encumbrance. Burland never was their personal debtor for this sum, and the hypothecque could only have availed them in case of an hypothecary action brought against them by Redpath or his successors. They discharged Burland from personal

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claims, but not from this, as it was only on the land, and against the land they had parted with, and when that land passed to another, they preserved their hypothequo and claims against the land and against Burland's successor the holder of the land, in respect of the obligations which Burland had undertaken towards them, but no other. Their own personal demand against Reford & Dillon arose from the fact, and from the time that they paid Cunningham, as successor to Redpath. Against this demand Burland is not discharged, nor his liability as guarantee of Reford & Dillon in any manner interfered with. What Burland undertook to pay in discharge of Reford & Dillon is still Burland's debt, and is primarily Reford & Dillon's debt, as by them undertaken to pay to Redpath.

By the exchange between Reford and Dillon and the Seminary, each party in theory was supposed to receive an equivalent for what he gave, and if both properties had been free of charges and of equal value, no obligation would have remained to be fulfilled on either side. The gentlemen of the Seminary gave a property free of charges and of superior value,—they on their side fulfilled and more than fulfilled their obligations; Burland on his part gave a property of less value, and encumbered with a personal obligation on his part as well as an hypotheeary liability towards Reford & Dillon. By putting this property into the hands of the gentlemen of the Seminary the hypotheeary charge remained attached to it, but it did not in any manner make the debt and personal liability of Burland to Reford & Dillon the debt of the gentlemen of the Seminary, it remained the debt and personal liability of Burland, although the property which had become the property of the gentlemen of the Seminary continued to be liable for it. The gentlemen of the Seminary were not the debtors, and what is more important, they never were the creditors of this claim, and, therefore, could not discharge it.

In allowing the valuable unencumbered property which they held, to pass out of their hands in return for one that was encumbered and of less value, they took the necessary and reasonable precaution of stipulating that for their warranty, and to protect them against the hypotheeary claims that might fall upon the property that had passed to them, they should have a hypothec upon the unincumbered property they had parted with, as well as a hypothec for the *soulte* or *retour* which they were to receive, the latter being all the amount for which they were actually creditors; the former being an amount they had no claim to, but which might come against their new property if Burland failed to fulfil his obligations by paying his own, not their debt, nor being a debt for which they were a direct creditor. When Burland sold to Smith *et al.* the property he had received from the Seminary, Burland was their personal debtor for the amount of the *soulte* or *retour* which was his own debt, and one for which they were the direct creditors. Burland had, besides, come under obligations to them to pay his own debt to Reford & Dillon, and to see that it did not fall back upon the property he had put into the hands of the gentlemen of the Seminary; their claim upon him was limited to enforcing these two obligations. These they could discharge, and no more; they could not discharge the debt which Burland owed to Reford & Dillon, for they, the gentlemen of the Seminary,

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did not own that claim, and had no control over it. What personal claims against Burland did they then discharge in becoming a party to the deed to Smith *et al.*, and signing the release in the terms therein mentioned? They discharged: 1st, their personal claim against Burland for the sum due by him to themselves for the amount of the *soulte* or *retour* he had undertaken to pay them. And they discharged, in the second place, the new obligation which he had contracted in their favor, to hold them harmless against his own debt to Reford & Dillon, but they did not nor could not discharge him, Burland, from his own debt, which he, Burland, then owed and continued to owe Reford & Dillon. To the extent thus explained, and to that alone, did the gentlemen of the Seminary discharge Burland personally, contenting themselves with the right to follow hypothecarily the property which he, Burland, had transmitted to Smith *et al.*, and accepting Smith *et al.* in place of Burland, for the personal obligations of Burland to them, of the nature and extent above explained.

When the gentlemen of the Seminary were called upon hypothecarily to pay part of the debt of Burland, primarily the debt of Reford & Dillon, they were required to pay something that they had never either owned or discharged, and by paying it, and claiming subrogation, new relations arose between them and Reford & Dillon. By force of the subrogation to which they were entitled, they from thenceforth became the creditors of Reford & Dillon, and had a right to call upon them for reimbursement, hence their present action, to which I hold they are fully entitled; and the judgment they obtained for it in the Superior Court should be confirmed; and this being the opinion of the majority of the Court, said judgment is consequently confirmed.

Judgment of S. C. confirmed.

Girouard & Wurtele, for appellants.
Strachan Bethune, Q. C., Counsel.
Geoffrion & Co., for respondents.

(S. B.)

SUPERIOR COURT, 1881.

MONTREAL, 24TH DECEMBER, 1881.

Coram MATHIEU, J.

No. 589.

The Windsor Hotel Co. vs. *Date.*

HELD:—1. That a stock subscription to a Company to be incorporated is binding on the subscriber notwithstanding that the Act of Incorporation subsequently obtained by persons other than the subscriber declares that the corporation shall consist of the persons named in the Act (of whom the subscriber is not one) and of such persons as should thereafter subscribe for shares in said corporation, and notwithstanding that the person so subscribing never renewed his subscription and never took part in any way in the affairs of said corporation.

2. That when the plaintiff organized under its Act of Incorporation, the amount required to be paid on its stock was really and *bona fide* paid in.

3. That although the Directors who made the calls might not have been all duly qualified, they nevertheless acted *bona fide*, and their acts were not consequently null.

4. That any irregularities in calls were covered by the subsequent acts of the Directors and shareholders.

The questions raised by the pleadings are fully disclosed in the judgment of the Court, which was in the following words:

The Windsor Hotel Co. vs Dale.

La Cour * * * considérant que la demanderesse allègue dans sa déclaration que le dit défendeur possède dix actions dans le fonds capital de la dite compagnie, demanderesse, sous et en vertu des dispositions de l'acte des clauses générales des compagnies à fonds social, passé par la législature de cette Province, dans la trente et unième année du règne de sa Majesté, et qu'il doit à la dite demanderesse la somme de cinq cents piastres pour cinq versements de dix piastres chaque sur chacune des dites actions, savoir: les premier, second, troisième, quatrième et cinquième versements sur le dit capital qui sont tous échus, et que la demanderesse a le droit de réclamer du dit défendeur la somme de cinq cents piastres montant des dits versements;

Considérant que le dit défendeur allègue dans son plaidoyer que l'acte public de la Législature de la Province de Québec, auquel il est référé dans la déclaration de la demanderesse, incorporant la dite compagnie, est le statut 38 Victoria, chapitre 91, et qu'il a été sanctionné le 23 février 1875; que le dit acte n'est devenu en force que le 24 avril 1875, soixante jours après le jour où il fut ainsi sanctionné; que par le dit acte, la compagnie ainsi formée, fut déclarée composée d'Andrew Allan, Alexander Buntin, William E. Phillips, Horatio A. Nelson, James D. Gibb, Frederick W. Kay, et Matthew H. Gault, avec telles autres personnes qui deviendront ci-après actionnaires dans la dite compagnie; que quoiqu'il soit vrai que le défendeur avant la passation du dit acte, ait souscrit dix actions de cent piastres chacune dans une compagnie d'hôtel projetée sous le dit nom, il n'est en aucun temps devenu actionnaire dans la dite compagnie ainsi organisée par le dit acte; que le premier versement a été demandé avant la date à laquelle le dit statut a été sanctionné, et est devenu payable le premier jour de mars 1875, avant la date à laquelle le dit acte d'incorporation est devenu en force; que les directeurs provisoires mentionnés dans le dit acte, n'avaient que le droit de convoquer une assemblée pour l'élection des directeurs de la dite compagnie aussitôt que la somme de $400,000 serait souscrite, et que la somme de $40,000 serait payée et déposée dans une des banques incorporées dans la cité de Montréal; que le 29 octobre 1875, les dits directeurs provisoires ont convoqué une assemblée générale des actionnaires de la dite compagnie, pour l'élection des directeurs qui devait se tenir le 9 novembre 1875; que lorsque la dite assemblée fut ainsi convoquée, le montant total payé actuellement sur le fonds capital de la dite compagnie n'était que de la somme de $36,600, et que les directeurs provisoires, afin de tromper les actionnaires de la dite compagnie, ont emprunté une somme de $4,000 et l'ont déposée dans une des banques incorporées dans la dite cité de Montréal, et ont obtenu un certificat faux et frauduleux, constatant que le montant ainsi requis par le dit acte, avait été actuellement payé sur le fonds capital souscrit de la dite compagnie et déposé comme susdit, et qu'ils ont exhibé ce certificat à la dite assemblée, et ont faussement et frauduleusement représenté aux actionnaires alors présents, que la dite somme de $40,000 avait été actuellement payée et déposée, tandis que de fait le seul montant alors payé était de $36,600; que suivant les dispositions du dit statut, les affaires de la dite compagnie doivent être administrées et gérées par un bureau de sept directeurs, et qu'aucune personne ne peut être élue ou agir comme

directeur à moins qu'elle ne soit actionnaire, en son nom, dans la dite compagnie, au montant d'au-moins vingt-cinq parts du fonds capital de la dite compagnie et qu'elle ne doive aucun arrérage sur les versements échus; que le deuxième versement demandé et mentionné dans la dite déclaration de dix par cent sur le fonds capital souscrit de la dite compagnie a été demandé le 7 octobre 1875, et fait payable le 15 octobre de la même année; qu'à la dite prétendue assemblée, ainsi tenue le 9 novembre 1875, les actionnaires de la dite compagnie alors présents, ont élu les personnes suivantes, directeurs de la dite compagnie: Andrew Allan, James D. Gibb, Matthew H. Gault, William E. Phillips, Horatio A. Nelson, J. Worthington et W. C. Macdonald; que le dit Horatio A. Nelson au temps de la dite prétendue élection n'était pas un actionnaire, en son nom, dans la dite compagnie, et que les dits James D. Gibb et William E. Phillips devaient tous deux des arrérages sur les dits versements, et que leur élection est nulle; que les versements, troisième, quatrième et cinquième furent demandés le 16 mars 1876 par les personnes qui prétendaient avoir été ainsi élues, le 9 novembre 1875, et que le dit Horatio A. Nelson n'était pas même alors, le 16 mars 1876, un actionnaire en son nom d'aucune action dans la dite compagnie; que le défendeur n'a jamais pris part aux affaires de la dite compagnie, n'a jamais assisté aux assemblées et qu'il ne doit rien à la demanderesse;

Considérant que la dite demanderesse répond au plaidoyer du dit défendeur, que ce dernier a souscrit le nombre de parts sus-mentionnées dans la dite compagnie et qu'il l'a souvent reconnu depuis, et que s'il y eût aucune irrégularité dans les demandes des versements mentionnés dans sa déclaration, ces demandes de versements ont été dûment ratifiées par la dite compagnie et le bureau des directeurs, et que le défendeur ne peut se prévaloir d'aucune de ces irrégularités maintenant; que le 9 octobre 1875, $400,000 avaient été souscrites dans le fonds capital de la dite compagnie et $40,000 sur ce fonds capital avaient été payées et déposées;

Considérant qu'il est prouvé que le défendeur en cette cause a souscrit le 5 janvier 1875, dix actions, de cent piastres chacune dans le fonds capital de la compagnie de l'Hotel Windsor de Montréal, au capital de $500,000, qu'il s'obligea de payer tous les versements demandés sur les dites actions lorsque la compagnie aurait été dûment organisée suivant la loi, et qu'il s'obligea de payer dix par cent du dit fonds capital souscrit par lui lorsque requis au crédit de la dite compagnie dans aucune banque incorporée, nommée par les directeurs provisoires;

Considérant que le 5me jour de janvier 1875, lorsque le défendeur a signé le livre dans lequel se trouvait l'engagement qu'il a souscrit, comportant que le dit défendeur avec les autres mentionnés au dit livre de souscription, souscrivait et s'engageait à prendre le montant de capital et le nombre des actions mentionnés, vis-à-vis son nom dans la compagnie de l'Hotel Windsor de Montréal, qu'il promettait pour lui, ses exécuteurs et administrateurs et ses héritiers, et s'engageait de payer tous les versements demandés par les officiers compétents lorsque la dite compagnie aurait été dûment organisée suivant la loi, et qu'il s'obligeait de payer dix par cent du dit capital souscrit par lui lorsque requis, au crédit de la compagnie dans aucune banque incorporée nommée par les directeurs pro-

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visoires, le dit défendeur est alors entré en société avec les autres personnes qui ont signé le dit écrit et le dit livre de souscription ; et que le dit écrit et engagement ainsi pris par le dit défendeur en signant le dit écrit, constitue un contrat de société qui s'est formé par le seul consentement des parties au dit écrit, qu'ils sont devenus sociétaires dès l'instant de la signature du dit écrit et de leur consentement donné à la formation de la dite société, et que la dite société a commencé à exister à l'instant même du contrat, vû qu'aucune autre époque n'y était indiquée conformément à l'article 1832 du Code Civil ;

Considérant que du moment que la dite société fut formée par le consentement du dit défendeur et de ses co-associés et la signature du dit écrit, le dit défendeur est devenu débiteur envers la société, de tout ce qu'il a promis apporter conformément à l'article 1839 du Code Civil, et que conformément à l'article 1840 du Code Civil il est devenu débiteur des intérêts sur cette somme à compter du jour qu'elle devait être payée ;

Considérant que les sociétés commerciales par actions sont de véritables sociétés régies par les principes ordinaires du droit civil, et que l'incorporation ne constitue pas la société qui y existait auparavant comme société ordinaire, mais que cette incorporation crée au profit des associés des priviléges qui sont mentionnés dans l'acte et constitue un être moral pour représenter les dits associés.

Considérant que dans le cas où l'incorporation n'a pas lieu, il n'en est pas moins vrai que la société existe par le consentement des parties, mais qu'en ce cas seulement les associés ne jouissent pas des priviléges mentionnés dans l'acte.

Considérant que l'acte d'incorporation, savoir ; le chapitre 91 des Statuts de Québec de 1875, 38 Victoria, a été obtenu par les co-associés du dit défendeur et pour son bénéfice et avantage, et dans son intérêt, et que cet acte lui est avantageux et utile en autant surtout qu'il limite sa responsabilité qui autrement serait illimitée.

Considérant que le dit défendeur s'est obligé par le dit écrit, et en signant le dit livre de souscription, à payer la somme de dix par cent sur le montant du capital par lui souscrit, pour payer les dépenses nécessaires à l'organisation de la dite société et commencer les opérations de la dite société ;

Considérant que les autres versements demandés paraissent l'avoir été régulièrement, et en supposant qu'il y eût quelques irrégularités dans la demande des dits versements, ces irrégularités sont depuis longtemps couvertes, vû que les dites demandes de versements ont été ratifiées par la dite Compagnie, et les directeurs de la dite Compagnie ;

Considérant que les directeurs que le défendeur prétend avoir agi sans être qualifiés comme tels, agissaient *bona fide* comme directeurs de la dite Compagnie et que leur manque de qualification ne peut rendre nuls leurs actes faits *bonâ fide* comme tels directeurs ;

Considérant qu'il est prouvé que le neuf octobre 1875, jour de l'élection des directeurs, il avait été déposé *bona fide* au crédit de la dite Compagnie à la Banque des Marchands du Canada, à Montréal, une somme, d'au-delà de $40,000, produit des premier et deuxième versements, ainsi que cela appert par le certificat du gérant de la dite Banque et le certificat du secrétaire de la dite demanderesse ;

Considérant que l'action de la demanderesse est bien fondée et que les défenses du dit défendeur sont mal fondées ; The Windsor Hotel Co. vs. Date.

A renvoyé et renvoie les défenses du dit défendeur et a maintenu et maintient l'action de la dite demanderesse, et condamne le dit défendeur à payer à la dite demanderesse, la somme de $500 courant, montant des premier, deuxième, troisième, quatrième et cinquième versements sur la somme de $1,000 souscrite par le dit défendeur dans le fonds capital de la dite société représentée par la demanderesse en cette cause, avec intérêt sur la somme de $100 à compter du premier jour de mars 1875, sur la somme de $100 à compter du quinze octobre 1875, sur la somme de $100 à compter du vingt et un mars 1876, sur la somme de $100 à compter du vingt et un mai 1876, et sur $100 à compter du vingt et un juillet 1876, dates respectives auxquelles les dits versements devinrent dus, jusqu'au paiement, et les dépens.*

Judgment for plaintiff.

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

COURT OF REVIEW, 1881.

MONTREAL, 24TH DECEMBER, 1881.

Coram JOHNSON, J., RAINVILLE, J., JETTÉ, J.

No. 2103.

Roy vs. *Pagé et al.*

HELD :—That justices of the peace, acting within the limit of their authority and without malice, are not liable in damages for an erroneous judgment.

JOHNSON, J.—This was an action of trespass against three magistrates and also against the complainant in a case before them, in which they had convicted the present plaintiff of an assault, and had imposed a fine and the payment of costs, without fixing in the conviction the term of imprisonment due in case the fine and costs were not paid. Subsequently, the fine not being paid, they awarded imprisonment, and he was incarcerated under their warrant, but got out of prison on a writ of *habeas corpus*, and immediately brought his action against the magistrates, and also against Pagé, who had prosecuted him. It is not necessary here to go into the question of the legality or illegality of the cause of detention expressed in the commitment. Assuming it to be, as was held by the learned judge before whom the writ was returned, insufficient in law, the question would still remain, what constitutes a sufficient ground of action against justices of the peace under such circumstances. In the case which gave rise to the present action, they were acting within the limit of their authority; and the utmost contended for against them is that they acted in their magisterial office contrary to law in issuing a warrant of commitment to prison without the term of imprisonment having been fixed in the conviction.

* *Vide* The Union Navigation Co. & Couillard, 21 L. C. J., 74, and Rascony & La Compagnie de Navigation Union, 24th L. C. J., 133. Reporter's note.

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We heard all the plaintiff had to say, and we dispensed with argument for the defendant, therefore we have nothing to expound upon points that have been discussed; but on the plaintiff's own showing we are all clear that he has no case to bring into court. The general rule of law as to actions of trespass against persons having a limited authority is, that if they do an act *beyond the limit* of their authority, they thereby subject themselves to an action; but if the act be done within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not liable. (See Dodswell v. Impey, 1 B. & C. 169, and Lowther v. Radnor, 8 East, 113, and Mills vs. Collett, 6 Bingh. 85.) As to Page's liability under any circumstances, it is not easy to see on what principle it can be made to rest except upon an alleged abuse of legal process; and there is no shadow of proof of malice or want of probable cause either in his case or in that of the justices. The learned judge in the Superior Court held that the magistrates had jurisdiction over the case, and there was no proof of malice whatever. On that point we are here unanimously of the same opinion. As to the legality of the imprisonment, it is not necessary to say anything; but I should wish to be understood, however, as not implying that there was anything illegal or even irregular in it under sec. 43 of the 32 and 33 Vic. c. 20, for the fine and costs have to be paid immediately unless a delay is granted, which was not granted here. Again, I would draw attention to the 71st sec. of c. 31, 32-33 Vic. Under it *no warrant of commitment is to be held void* by reason of *any defect therein, if it be alleged therein that the party has been convicted, and if there is a valid conviction.* So that the learned judge was in my opinion extremely indulgent in enlarging the prisoner under the *habeas corpus.*

Judgment confirmed.

De la Bruyère & Co., for plaintiff.
H. Mercier, Q.C., for defendants.

(J. K.)

COURT OF REVIEW, 1882.

MONTREAL, 31ST OCTOBER, 1882.

Coram TORRANCE, J., JETTÉ, J., MATHIEU, J.

No. 2440.

Denis vs. *Theoret.*

HELD.—1. That damage may be presumed from the publication of a slander to one or more individuals.

2. Where the declaration alleged that a slander was uttered in the year 1881, and the plea denied the utterance then or *at any other time*, and the proof established utterance in 1879 and 1880, that the variance was not material.

The case was explained as follows by the Judge who rendered the judgment complained of:—

MACKAY, J. The plaintiff sues for $500 damages for slander.

It appears that the defendant frequently, in the house of the Lalonde family,

speaking of plaintiff, called her a *putain*. This was in the intimacy of the family, and occurred, perhaps, in 1879, witnesses say in 1879 and 1880. In August, 1880, defendant was prohibited visiting the Lalondes.

In May, 1881, Azilda Lalonde, aged 21, informed plaintiff of what had occurred, and in August, 1881, this action is instituted.

It seems that the Lalondes kept secret the fact of defendant's having spoken of the plaintiff as he did.

Mr. and Mrs. Lalonde swear to never having reported it. Azilda mischievously told plaintiff. Before the institution of this suit nobody but the Lalondes and plaintiff had heard anything about it.

That the speeches and slander attributed to defendant were performed there is proof by three witnesses. I find that plaintiff's action is not prescribed.

The defendant denies the fact of the speaking, and says that but for plaintiff's suit the public would never have heard of it, and he says that the plaintiff has suffered no damage, and he brings up many witnesses to prove plaintiff's reputation and character perfectly good, and so he pleaded.

Had plaintiff right to sue, under the circumstances? I find that she had. A maiden, marriageable girl, of good character, has right to complain of such slander; the slander was most serious; and I find that plaintiff was justifiable in suing in the Superior Court. I will not say that she ought to have sued only in a lower Court, for under a hundred dollars.

It is vain for defendant to say that, even if he did speak as the Lalondes say, there was no publication, and no damage; I find that there was communication, to three persons. Had there been only to two, or to one, that would have sufficed.

"If damage is to be presumed from a publication to many, some damage may be presumed from a publication to a single individual, especially as that individual may afterwards publish the slander indefinitely," p. 44, Starkie, 3rd Edition.

No. 122, p. 96, 1 Grellet-Dumazeau: "Cette communication (speaking of slander) en quelque lieu qu'elle soit faite, quelque soit le nombre des personnels qui la reçoivent, engendre une responsabilité légale," etc.

Finding that plaintiff is entitled to reparation, and that her action is not barred in any way, I condemn the defendant in fifty dollars damages, with interest from to-day, and costs of the Superior Court, as in an action for $250; the damages amount being by me moderated in consideration of no specia damages proved, of defendants' plea admitting plaintiff's good character, and also of the large costs of this Court, all of which defendant must pay.

In Review, the judgment was confirmed.

TORRANCE, J.:—The case is one of slander, and defendant has been condemned to pay $50 and costs as in a cause over $100.

The chief points made by the defendant who appeals are: 1st. That prescription has accrued; and, 2nd. That there is a variance between the date alleged and the date proved. As to the prescription of C.C. 2262 of one year, it does not apply, because the slander complained of did not come to the knowledge of

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plaintiff until a short time before the action. Then as to the variance, the slander was uttered in 1879 and 1880, and the declaration alleges the utterance in 1881. The defendant denied that he had uttered the slander then or at any other time. The variance in time is not material here. Phillips, Evidence, 2nd vol., 861, 2. The issue was fairly tried, and the defendant was rightly condemned. The epithet again and again applied to the plaintiff was of the most brutal description, though it was in the privacy of one family only, and the defendant has only to thank himself if the consequences are ruinous to him. The plaintiff had done nothing to merit the slander.

As to the motion to amend, made by plaintiff, which the judgment has taken no notice of, viewing the evidence as I do, the omission is of no consequence. The defendant complains of a mere matter of form, which in no way affects the rights of the parties or the substantial justice of the case. In the Privy Council, in the celebrated Guibord case, the judges there refused to pass upon matters of form, when they could do substantial justice between the litigants by passing them by.

Judgment confirmed.

St. Pierre & Saulon, for plaintiff.
T. & C. C. DeLorimier, for defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 24TH MARCH, 1882.

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

No. 192.

THE CANADA SHIPPING COMPANY
(*Plaintiffs in the Court below*),
APPELLANTS;
AND
THE V. HUDON COTTON COMPANY
(*Defendants in the Court below*),
RESPONDENTS.

T. M. & Co., without disclosing that they were acting for the plaintiffs, sold to the defendants a cargo of coal to arrive. By the conditions of sale the purchasers had the option of taking the coal at the weight stated in the bill of lading, or of having it re-weighed at the vendors' expense. The purchasers accepted delivery of the coal without re-weighing, but afterwards, without notice to the vendors, weighed it in their own yard and mixed it with other coal. Having found a deficiency they declined to pay for more than they had received. Being sued by the undisclosed principals the purchasers pleaded first, that they did not know or contract with the plaintiffs. Secondly, without waiver, they tendered the price of the quantity admitted to have been received. No fraud was proved on the part of the vendors; on the contrary it appeared that they had paid for the cargo per bill of lading.

HELD:—1. (Dorion, C. J., and Ramsay, J., diss.) That the undisclosed principals were entitled to sue in their own name on the contract made by their agents.

2. That, in any case, the tender of the price of the coal admitted to have been received was an acknowledgment of the plaintiffs' right of action.

3. On the merits (by the whole Court), that the purchasers by accepting the coal without re-weighing, and by weighing it privately on their own scales, without notice to the vendors, and mixing it with other coal, forfeited their rights in respect to a deficiency, and were bound to take the coal at the weight stated in the bill of lading.

The appeal was from a judgment of the Superior Court, Montreal, 31st March, 1880 (Hon. Mr. Justice MACKAY), dismissing an action brought by the appellants to recover the price of a cargo of coal.

The declaration alleged:—

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1. That previous to and since the 13th of August, 1879, Thompson, Murray & Co. were the general agents of appellants, in this Province, authorized to act in their behalf.

2. That on the said 13th of August the appellants acting by Thompson, Murray & Co., through their broker, James S. Noad, sold appellants a cargo of coal, then to arrive on the S.S. "Lake Ontario," at $3.75 per ton of 2,240 pounds, Custom duty paid ex ship.

That said cargo according to the bill of lading contained 810 tons 5 cwt.

3. The terms of payment were to be net cash or at thirty days with interest added, at respondents' option, and with the further option of taking the cargo at the weight given on the face of the bill of lading, or of having it re-weighed at sellers' expense, the brokerage payable by appellants.

4. Noad delivered, according to custom, bought and sold notes, the latter of which was in the following terms:—

No. 3,435. MONTREAL, 13th August, 1879.

MESSRS. THOMPSON, MURRAY & CO.,

I have this day sold for your account, to arrive, to the V. Hudon Cotton Mills Company, the 810 tons 5 cwt. best South Wales Black Vein Steam Coal, per bill of lading, per "Lake Ontario," at $3.75 per ton of 2,240 lbs., duty paid, ex ship, ship to have prompt despatch.

Terms, net cash on delivery, or 30 days adding interest, buyers' option.

Brokerage payable by you, buyer to have privilege of taking bill of lading or re-weighing at sellers' expense.

Your obedient servant,

(Signed,) J. S. NOAD, *Broker.*

5. The respondents stated to accept the cargo according to the weight on the bill of lading, were thereby entitled to the benefit of any surplus, and accepted the risk of any deficit.

6. Respondents, in fact, refused to have the coal re-weighed, and further chose to pay in thirty days with interest, which interest by the usage of trade stood at 7 per cent.

7. The coal was duly delivered.

8. Although said bought and sold notes and the invoice delivered, according to the usage of trade, bore the name of Thompson, Murray & Co., the coal was ever the property of the appellants, who were really the principals in the transaction, and the sale was made in their interest and on their behalf, and all this respondents well know.

9. The total value of the cargo was $3,038.44, and this amount the appellants are entitled to have with interest at 7 per cent. from the 3rd of September, 1879.

10. Assumpsit counts followed.

The respondents pleaded to this action first, that they never knew the plaintiffs, never had any dealings with them, but that in all the transactions mentioned in the declaration the respondents contracted only with the firm of Thompson, Murray & Co.

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By a second plea to the same action, and without waiver of the foregoing plea, the respondents alleged:

That true it is that on the 13th of August, 1879, they bought from the said firm of Thompson, Murray & Co., through James S. Noad, a cargo of 810 tons and 5 cwt. of the best South Wales Black Vein steam coal, mentioned in the bill of lading thereof as being on board the ship "Lake Ontario," then on her voyage and expected to arrive within a few days at Montreal, at the price of $3.75 per ton;

That true it is that said ship the "Lake Ontario" shortly afterwards arrived at the said City of Montreal and proceeded to deliver to respondents a quantity of coal which they thereupon caused to be weighed on an approved scale, and that instead of the said coal weighing 810 tons 5 cwt., as mentioned in said bill of lading, the same weighed only 735 tons and 580 pounds, said quantity being of the value, at said price, of $2,868.72;

That by the custom and usage of merchants the vendor of a cargo of coal as per bill of lading is always understood to sell the quantity mentioned in the bill of lading, and without any large or important variance therefrom, the purchaser being at all events understood to pay only for the quantity delivered;

That vessels of the class and description of the said vessel the "Lake Ontario" in transporting coal are well known to the mercantile community not to vary to an extent exceeding five or six tons, the surplus or deficiency in the quantity being always considerably less than ten tons; but that the deficiency in the cargo of coal in question is of a larger and extraordinary quantity, to wit, of about 55 tons;

That in purchasing said cargo of coal, and in making option to receive the same as per bill of lading instead of having said coal weighed at the expense of the vendor, the respondents never agreed or intended, and could never have been understood according to the custom and usage of trade to have agreed or intended, to assume the risk of a deficiency in said coal of more than ten tons;

That said Company, the plaintiffs, were at the time of the shipment of said coal on board said vessel the "Lake Ontario," and at the time of said contract and of the delivery of said coal, and now are, the owners of said vessel;

That the Captain or Master of said vessel as servant of the plaintiffs represented, in signing said bill of lading, filed in this cause, that the quantity named in said bill of lading was on board the said vessel; and that it was on the faith of such representations as contained in said bill of lading, and of similar representations made by said firm of Thompson, Murray & Co., that the respondents agreed to take the said cargo as per bill of lading without asking the re-weighing thereof;

That the said plaintiffs and said Thompson, Murray & Co. were aware that the master of said vessel had been in the habit of signing bills of lading for cargoes of coal without ascertaining the quantity thereof, and had allowed him to do so, assuming themselves the responsibility incurred in consequence.

That to the knowledge of plaintiffs and of Thompson, Murray & Co. the said ship was not loaded in the ordinary and regular way, and said cargo was not

weighed at the time nor at the place where the said coal was put on board said vessel the "Lake Ontario."

That neither the plaintiffs nor Thompson, Murray & Co. ever paid for any more than the quantity of 755 tons and 580 pounds, the quantity delivered to respondents, as aforesaid, and said plaintiffs and Thompson, Murray & Co. well knew that said cargo was not of the quantity of 810 tons and 5 cwt., but only of the quantity delivered as aforesaid; and that Thompson, Murray & Co., in offering said cargo to be accepted for a cargo of 810 tons and 5 cwt. practised a fraud upon the respondents.

That on the 13th of October last past (1879) the respondents protested Thompson, Murray & Co., tendering the sum of $2,890.72, being the amount of the value of the said 758 tons and 580 pounds of coal delivered to respondents, together with the value of ten tons, which respondents were willing to allow in order to avoid litigation and as the extreme limit of variance in such a cargo of coal allowed according to the custom of trade, and with interest thereon from the 3rd of September last past; but that said tender was refused by Thompson, Murray & Co.

That respondents were always ready to pay said firm of Thompson, Murray & Co. the said sum of $2890.72, and now renewed their offer and tender.

The respondents accordingly, without acknowledging any indebtedness towards the plaintiffs, prayed that said tender and offer might be declared good and sufficient, and that plaintiffs' action for any further and greater amount might be dismissed.

Then followed a *défense en fond en fait.*

The appellants answered specially that they never had any notice of the weighing of said coal; that it was done upon the private scales of respondents, situated at some distance from the ship's side, and was wholly irregular, illegal and of no effect;

That the bill of lading was signed by the Captain of the "Lake Ontario" in good faith, after the customary weighing at the point of shipment;

That said cargo of coal was bought on account of and for the appellants, who paid the price thereof and the Canadian customs duties thereon upon the basis of the total weight set forth in said bill of lading;

That the respondents received and accepted said cargo according to said contract and their said option to take the same as per bill of lading; and for more than a month after receipt and acceptance did not pretend or object that they were not liable because of any of the matters alleged in said plea, and they have never tendered back said cargo.

The respondents, by a special answer to appellants' answer, alleged that they were not bound or obliged to tender back the cargo of coal; that, moreover, said coal was on the receipt thereof mixed with other coal in the possession of respondents, and it was therefore impossible for them to tender the same to appellants.

The judgment of the Court below dismissed the action upon the first plea. The *considérants* were as follows:

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"Considering that plaintiffs have failed to prove liability of defendants' Company towards them, as alleged;

"Considering that the sale of coals in this cause was by Thompson, Murray & Company to defendants, and that the broker's notes, and also letter of 13th August, 1879, show that, considering that from them the defendants could not discover the plaintiffs as the vendors;

"Considering that Thompson, Murray & Company sold the coals referred to to the defendants' Company; that Thompson, Murray & Company kept silence as to existence of quality of mere agents in them, acted in their firm particular name, and did not take quality of agents in or at the contract of sale; that Thompson, Murray & Company ought, under the circumstances, to be held for all the purposes of this case or suit the veritable sellers (*vide* No. 522 Troplong *Mandat*), and so the defendants' first plea must be maintained;

"Considering that in and at that sale of coals, Thompson, Murray & Company did not engage *pour autrui*, nor did defendants promise towards any *commettant*, but only towards Thompson, Murray & Company;—

"Doth dismiss plaintiffs' action, with costs *distraits*, etc."

DORION, C. J., *dissentiens*:—

This action was instituted by the present appellants to recover $3,038.44, being the price of 810 tons 5 cwt. of steam coal, sold by their agents, Thompson, Murray & Co., through J. S. Noad, broker, as per following bought and sold notes [His Honor read the documents as printed above]:

The respondents met the demand by a plea that the contract was with Thompson, Murray & Co., personally, and that the appellants had no action, and, by a second plea, that the cargo contained only 755 tons 580 lbs, the price of which was $2,868.72, which they had offered to Thompson, Murray & Co., together with the price of ten tons more to avoid litigation, in all $2,890.72, which they brought into Court without acknowledging their liability to the appellants, and prayed that their action be dismissed as to any further or greater sum.

It is proved that the respondents made option to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

Hence the two questions: (1) Can a principal bring an action upon a contract made by an agent acting in his own name and without disclosing his principal? (2) Are the respondents, under the circumstances, bound to pay for the quantity of coal mentioned in the bill of lading, or are they entitled to a reduction for the deficiency according to their own weighing?

On the second question we are, I believe, all of opinion that the respondents having made their option to take the cargo of coal for the quantity mentioned in the bill of lading, instead of having it re-weighed with the sellers, as they were entitled to, cannot claim a reduction in the price on account of

deficiency in the quantity, except on the ground of fraud, and there is no fraud proved in this case. It would be extremely dangerous to allow a purchaser who has chosen to receive delivery in bulk and without weighing, to assert, two or three weeks after such delivery, and after the coal has been mixed with other coal, so as to prevent any verification by the seller, that there was, according to his own calculation, a deficiency for which he is entitled to a reduction in the price of his contract. The respondents are, we consider, by the option which they have made to receive the coal in bulk, precluded against claiming a reduction of the price of the coal. Moreover, their laches in not giving notice of their intention to weigh the coal, and in mixing it with other coal, so as to prevent verification, before they informed the sellers of the pretended deficiency, would, in any ordinary case, be sufficient to reject their claim for a reduction; and we are, therefore, of opinion that on both these grounds the tender made by the respondents is insufficient.

On the other question, that is, as to the right of the appellants to bring an action on the contract made by their agents, Thompson, Murray & Co., acting in their own name, there is a difference of opinion, and on that point I have the misfortune, with the learned Judge on my left (RAMSAY, J.) to dissent from the judgment about to be rendered.

If this question had to be decided according to English practice, there might perhaps be no objection to an action being taken by a principal on a contract made by his agent in his own name and without disclosing his principal. Yet this practice seems to be based on a mere rule of expediency, for it would appear that the principal cannot bring an action upon a contract made under seal, by an agent acting in his own individual name. (Story on Agency, p. 498 § 422; Sims vs. Bond, 5 B. & Ad. 393; 2 Smith's Leading Cases, Thompson vs. Davenport, p. 397).

Some of the courts in the United States seem to have gone even further and to have held that an action cannot be maintained by an undisclosed principal on a contract in writing made by his agent, unless such principal could maintain an action in *assumpsit*.—(Dunlap's Paley on Agency, 4th Am. Ed., p. 324, note *a*, where the opinions of Livingston, J., in the case of United States vs. Parmelee, 1 Paine's C. C., p. 258, and of Jewett, J., in Newcomb vs. Clarke, 1 Denio 226, to that effect are cited. See also the case of Taintor vs. Prendergast, 1 American Leading Cases, 626, and note 642).

Those distinctions between actions on a contract under seal and those on a contract not under seal do not exist with us. We have not therefore to consider what is the practice elsewhere, but our own which is derived from the civil law.

Story on Agency, after stating, under §154 and notes, the practice both in England and the United States, at §163 thus refers to the rules of the Roman law: "In general the principal, although bound by the act of his agent, was not personally and directly liable to the other contracting party, nor could he enforce the contract against the latter. The only direct remedy (*actio directa*) was between the immediate parties to the contract, that is, the agent

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and the other contractor. Thus Pothier states it as the undoubted rule (and he is confirmed by other civilians), *ex contractu procuratoris actio regulariter procuratori et adversus procuratorem quæritur; non autem domino aut adversus dominum.* There were exceptions to this rule, as has been before intimated, but they were principally introduced by the prætor as a matter of equity, and hence called *actiones utiles*, in which the contract of an agent would be enforced against his principal; as, for example, in cases of exercitors or owners of ships, by the *actio exercitoria*, and in other agencies of a common nature in trade, such as the *actio institoria* against shopkeepers and others acting through agents (*institores* or *procuratores*), in favor of commerce."

At § 425 the author says: "By the Roman law, as it originally stood, the principal could not ordinarily sue or be sued on the contract made through the instrumentality of his agent, but the latter was generally treated as the sole contracting party. This was subsequently altered by the edicts of the prætor, *so far as it respected the rights of third persons to institute suits against the principal*, in cases falling within the reach of the exercitorial and institorial actions. But the exercitorial action did not lie in favor of the owner or employer (*exercitor*) against the other party contracting with the master."

§ 426. "The institorial action was also, in its terms, apparently limited to suits *against the principal. Æquum prætori visum est, sicut commoda sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum, et conveniri.* But no like action lay against the other contracting party by the principal."

Story, § 163, already cited, says: "And it would seem that in the modern nations recognizing the civil law as the basis of their jurisprudence, the like action (*actio utilis*) will generally lie by or against the principal upon the contract of his agent."

This may be admitted to be correct if the rule is limited to cases to which the *actio exercitoria* and the *actio institoria* applied, that is, to cases when the agent is generally and publicly known to be acting as a *préposé*, such as the master of a ship, the manager of a bank, of a manufacturing company, shop, or other commercial enterprise, because then third parties know they are dealing with an agent, acting in most cases for a known principal; but it does not apply as regards the action of the principal against third parties in the case of an ordinary agent acting in his own name and without, as in the present case, disclosing either his principal or his quality of agent, and the authorities which Story cites in support of his proposition do not extend its application beyond the limits we have just stated. Pothier, Obligations, Nos. 82, 447, 448; Mandat, No. 88: 1 Bell's Commentaries, 5th Ed., pp. 479, 480; 1 Stair's Inst. by Brodie, Bk. 1, T. 12, § 16.

Casaregis, Disc. 96, No. 2, cited by Delamarre and LePoitvin, Vol. 3, p. 71, No. 41, says: "Lorsque le mandataire contracte purement et simplement sans parler de son mandat, le contrat *s'enracine* tellement en lui, qu'il ne peut compéter aucune action au mandant contre le tiers." *Et enim quando mandatarius simpliciter contrahit non expresso mandato, adeo in eo radicatur contractus, ut mandati amplius contra tertium nulla competere possit actio.*" The same

writers also cite, at p. 74, No. 44, of the same volume, the text of the articles of the Spanish and Portuguese codes, to show that they have followed the rules of the civil law.

If we come to our own Code, we find that the matter has been disposed of in articles 1716 and 1727, which are as follows:

1716. "A mandatary who acts in his own name is liable to the third party with whom he contracts, *without prejudice to the rights of the latter against the mandator also.*"

1727. "The mandator is bound in favor of third persons for all the acts of his mandatary, etc."

This last article completes the first in this, that it declares that in every case except the one provided by art. 1738 and the usages of trade, the mandator is liable towards third persons who have contracted with his agent, without any distinction as to whether such agent acted in his own name or not. This is perfectly consistent with art. 1716, which reserves to third parties their rights against the undisclosed mandator, in addition to their recourse against the agent who has acted in his own name.

The Commissioners who prepared the Code, in their comment upon this section of their work commencing with Art. 23, now Art. 1727, of the Code say: "There are five articles in this section; the first of them, numbered 23, announces the general rule of the liability of the mandator, and does not materially differ from art. 1998 of the Code Napoleon. Troplong, however, puts the construction upon that Article that the mandator is not bound when the contract is in the name of the mandatary without the name of the other being disclosed, except in certain cases. This is in harmony with the doctrine of the Roman law; but it is directly against the rule declared by Pothier, with whom the English, Scotch and American law coincides. The article we submit is based upon Pothier's statement of the rule, and includes all acts of the mandatary, whether in his own name or in that of his principal; the only exceptions being those indicated in the Article."

The intention of the Commissioners is here clearly enunciated. They intended to follow the rule as stated by Pothier, who, while he gives to a third party who has contracted with an agent acting in his own name an action against the principal, gives none to the principal against the third party. (Pothier, Obligations, Nos. 82, 447, 448, and Mandat, No. 88). This rule has been strictly followed in Articles 1716 and 1727, and is made still more evident by the fact that in other cases, such as those provided for by Articles 2390 and 2408, the Code has expressly given an action to the principal against third parties who have contracted with an agent acting in his own name. This would not have been necessary if the general rule had been that the principal could always sue in his own name.

The principal is not, however, without recourse against third parties, but he must either obtain a transfer of the rights of his agent (C. C. 1571), or he must exercise them by a special action, under the provisions of C. C. 1031. That this is the view taken by the modern French writers is shown by the following

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references to their works:—Duranton, vol. 18, p. 262, No. 262; Paul Pont, vol. 1, Petits Contrats, on Art. 1998 of the French Code, Nos. 1060 and 1061; Zachariæ, vol. III, p. 133, § 405, No. 3; Troplong, du Mandat, Nos. 522, 535 and 543; Delamarre & LePoitvin, vol. 3, p. 93, Nos. 55 and 57; p. 182, No 123; Demolombe, vol. 24, p. 271, No. 287; Aubry & Rau, vol. 4, p. 652, § 416, No. 8; Laurent, vol. 15, p. 633, No. 555, and vol. 28, p. 62, No. 62, p. 64, No. 63; Audiey c. Hannapier & Louzeau-Coudrais, 26 juillet 1843; Sirey 1844, 1, 194, and notes 1, 2 and 3. Most of these authors seem to deny as Troplong does, the right of the third party to bring an action against the undisclosed principal, but that is no doubt due to the fact that the French Code contains no provision corresponding to Art. 1716 of our own Code.

From these considerations I have come to the conclusion that under the provisions of our Civil Code the appellants had no right to sue upon the contract made by Thompson, Murray & Co.*

It has, however, been suggested that the respondents had by their tender waived this objection. I do not think so. The respondents by their first plea have contested the right of action of the appellants upon the legal ground that they had never contracted with them. By their second plea, without admitting the appellant's right of action, but, on the contrary, under reserve of the conclusions taken by their first plea, they say that if the appellants have any right of action they are only entitled to the sum they have tendered to Thompson, Murray & Co., which sum they bring into court. I think this cannot be considered as a waiver of the first plea. The second plea is subsidiary to the first, and contains a tender in case the first plea is overruled. We have first to decide on the merits of the first plea; if well founded, the action was rightly dismissed; if it is unfounded, then we have to consider whether or not the appellants are entitled to more than the amount brought into Court, and which has been refused by the appellants. Taking this view of the case I would confirm the judgment of the Court below.

RAMSAY, J. (*diss.*) The appellant sued the respondent for the price of a quantity of coal, $810.05, on a special action setting up that Thompson, Murray & Co. were their agents for a long period, and that through them appellants sold to respondents the coal in question.

The respondents met this action by a plea in which they said they never knew appellants in the matter; that they bought from Thompson, Murray & Co., and that they were ready to pay them, and were not bound to pay appellants.

It appears that in England a special action of this sort can be brought, even when there is a contract in writing, provided the contract be not under seal, Collyer on Partnership, 653; and the contract may probably be produced in

* There are only two reported cases in which this question seems to have been raised before our Courts. The first is the case of Reid vs. Birks (2 L. C. J. 161), in which Mr. Justice Mondelet, on the authority of Smith's Mercantile Law, maintained the action of the principal against the third party. The second case is that of Labelle vs. Patrie (4 Rev. Leg. 530), in which Mr. Justice Loranger also maintained the action, but condemned the plaintiff to pay all costs, intimating thereby that he thought the action had not been properly brought. These cases were both decided in the Circuit Court.

proof. But the action cannot be brought *on* the writing. Dunlap's Paley Ag., No. 324, Note (A). It seems to me that such a rule is contrary to strict principle, and English writers know well enough that the rule of the civil law differs from the rule of the common law. Story, Ag. 163. We must be governed by the law of France on the point. It seems perfectly clear that under our system no such action can be brought. Many authors hold that not only the principal cannot sue, but he cannot be sued. It was argued that this was true, but that our Code had laid down a rule that necessarily implied that the principal must have such an action. Art. 1727 C. C. Having given to the purchaser the right to sue the undiscovered principal to force him to fulfil the obligations of his agent, the reciprocal action must lie. But I do not see that this follows, and in France many writers held with Pothier that the purchaser might go past the agent and attack the principal directly. See Troplong, Mandat, 435 and following, and the decisions he reviews. The principle is this: a legal relation is created by equity between the undiscovered mandator and the other party, and not by the contract. There is no inconvenience in his proceeding without calling in the mandatary, or at any rate it is an inconvenience only to himself. But if the undiscovered principal sues the other party without putting the mandatary *en cause* the defendant is liable to another suit. No evidence, not even an admission, would put him in the position he has a right to be in. He is entitled to be enabled to plead the *res judicata*.

It has been said, if the agent is insolvent, cannot you follow your property? I think you can; but that case involves different principles; and the necessity of putting the interested parties *en cause* equally exists.

MONK, J., giving the judgment of the Court, remarked that the respondents by tendering the price of the quantity of coal which they admitted they had received, and asking for the dismissal of the action as to the surplus, acquiesced in the right of action. But, irrespective of the tender, his Honor was of opinion that the right of action was clear. As he read the law the right of the undisclosed principal to bring a direct action against the purchaser is unquestionable. There was not a single decision of our Courts to the contrary. The Roman law had been referred to to support the respondents' pretension, but his Honor was not convinced by the citations that the principal was deprived of his right of action on the contract made by his agent in his own name. His Honor referred to the writers on the French law, which is somewhat unsettled in this respect, but there appeared to be nothing in the French system which directly conflicts with the appellants' pretensions. Coming to our own law, the Code does not say that the *mandator* shall not have an action against the third party. On the contrary, Article 1716 says that a mandatary who acts in his own name is liable to the third party with whom he contracts, *without prejudice to the rights of the latter against the mandator also*. Here the principal is made liable to third parties for the acts of his agent acting in his own name. It is only fair to assume that the liability is reciprocal, and that actions which could be urged by third parties against a principal not named in the contract may be enforced by the principal against third parties. The respondents here would have had an action against the appellants on the contract made by Thompson, Murray & Co.,

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and under the circumstances it appears to me it would be unfair to hold that the principal shall be deprived of the right of action upon the contract of his agent. Such a doctrine I consider contrary to Roman law; it is not entirely in accordance with French law; it is not the doctrine of the American law; it is entirely opposed to English law; and, as already stated, no precedent can be found for it in our own law. On the merits, we are all agreed that the respondents have no valid defence to the present action. They chose to take the coal away to their own yard, and weighed it there while delivery was going on during some fifteen days. The coal was mixed up with other coal so that verification was impossible. We are all agreed that the respondents have no rights in respect of a deficiency which they can urge in defence to the present action; and, therefore, upon both grounds the majority of the Court are of opinion to reverse the judgment.

The judgment in appeal is as follows:—

"The Court, etc.

"Considering that the appellants, plaintiffs below, have proved, by legal and sufficient evidence, the liability of defendants' company, the now respondents, towards them as alleged in this demand;

"Considering that on the 13th of August, 1879, the appellants acting by Thompson, Murray & Co. through their broker, James S. Noad, sold to respondents a cargo of coal, then to arrive, on the ship "Lake Ontario," at $3.75 per ton of 2,240 lbs., said cargo to contain, according to the bill of lading, 810 tons 5 cwt., and the terms of payment being net cash, or at 30 days with interest added, at respondents' option, and with the further option of taking the cargo at the weight given on the face of the bill of lading, or of having it re-weighed at the expense of said appellants, brokerage payable by the latter;

"Considering that the said appellants through their said agents, Thompson, Murray & Co., acting as aforesaid by the said James S. Noad, delivered the said cargo to the respondents, who accepted the same without having it re-weighed at sellers' expense as they had a right to do, according to the terms of the said sale, such as mentioned in the bought and sold note, addressed by the said J. S. Noad to the said Thompson, Murray & Co., on the said 13th of August, 1879;

"Considering that it was only after the delivery of the said coal and its acceptance that the respondents caused it to be weighed, and found that the said coal was considerably defective in quantity, it being in fact short of 55 tons;

"But considering that said weighing was so made by the said respondents in the absence of the appellants, and without notice to them, and that at a time when the said respondents were bound by the option they had previously made, and therefore had no right to refuse payment for the said cargo on the ground of a deficiency in the delivery;

"Considering that the liability of the principal towards third parties for the acts of his agents is reciprocal, and that actions and remedies which could be waged by third parties against a principal not named in the contract could also

be enforced by the principal against third parties, according to the nature and extent of the former's rights;

"Considering that the appellants are a Canadian corporation, and would have been jointly with their said agents or severally liable towards the respondents for the said deficiency of 55 tons in the quantity of coal sold by them to the respondents through their said agents acting as aforesaid, had not the said respondents forfeited their rights in that respect by their acceptance of the coal as above stated;

"Considering, moreover, that the respondents, in tendering, as they have done, in this suit, and depositing into court, the sum of $2,890.72 as the value of the quantity of coal actually received by them, have acknowledged their liability towards the said appellants, and that the action in this cause has been properly brought, and should have been maintained by the judgment appealed from, and that such tender is insufficient;

"Considering, therefore, that in the said judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal on the 31st of March, 1880, by which the action of the plaintiffs, now appellants, was dismissed with costs, there is error;

"The Court now here proceeding to render the judgment which the said Court below ought to have rendered, doth condemn the defendants, now respondents, to pay to the appellants, plaintiffs below, the sum of $3,038.44 as the value of the said cargo of coal, according to the said bill of lading, with interest from the 3rd of September, 1879, at the rate of 6 per cent. per annum, and the costs incurred by the said plaintiffs, appellants, as well in the Court below as in this Court. The Hon. Sir A. A. Dorion, C.J., and Mr. Justice Ramsay dissenting."

Judgment reversed.

Davidson, Monk & Cross, for appellants.
Hon. R. Laflamme, Q.C., counsel for appellants.
Beique & McGoun, for respondents.
(J.K.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 27TH JANUARY, 1883.

Coram DORION, C. J., MONK, J., TESSIER, J., and BABY, J.

No. 364.

DAME LAURA R. DOUTRE
(*Defendant in Court below*),
APPELLANT;

AND

RICE SHARPLEY ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

HELD:—That Article 556 of the Code of Civil Procedure, which permits the debtor to select and keep from seizure "2. The ordinary and necessary wearing apparel of himself and his "family," does not include or apply to a dress belonging to the debtor, which from its style and make can only be appropriately worn at balls.

The appeal was from a judgment rendered in the Superior Court, District of Montreal (MACKAY, J.), 28th May, 1881.

Dame Laura R. Doutre and Rice Sharpley et al.

The case is fully explained in the observations of the Honorable Judge who rendered the judgment in the Court below.

To explain the reference to social position it may be remarked that the appellant was the wife of an advocate.

MACKAY, J.—The plaintiff having a judgment against the defendant has attached or seized in the possession of the garnishee a ball dress, the property of the debtor.

The seizure is opposed for various reasons, some of form, but principally because (says defendant) a ball dress is exempt from seizure. The plaintiff denies this.

The objections of form have nothing in them, the defendant's first plea being to the merits and so a waiver of form matter.

For the determination of the chief question we must of course keep to our own law. It does not declare free from seizure under execution the clothes belonging to the debtor (as does the Louisiana Code), nor does it make liable to seizure all the clothes except the *habit dont le saisi est vêtu et couvert* (as does the law of France). Our law does not declare to be free from seizure the apparel and clothing of the *saisi*, largely; it allows that some may be seized; it has in view that the *saisi* may have clothing, or *vêtements*, seizable; these are the *vêtements* not necessary, or not ordinary; it frees from seizure only a certain quality of clothing, to wit, the ordinary *and* necessary, the other must go to satisfy the *saisi's* creditors, who, after all, have rights.

In the present case an expensive ball dress belonging to the debtor has been seized in the possession of a dress maker; question is as to whether such an article is free from liability to pay the claims of creditors. Unless when seized it be necessary *and* ordinary, wearing apparel of the debtor it is not, and *vice versâ*. The word necessary is commonly defined to mean "needful," "indispensably requisite," and the word ordinary to mean "plain, not handsome," "customary," "of common kind, or rank."

Is a ball dress both necessary and ordinary? Is it necessary for unmarried women, for all married women, rich or poor?

It can only be used at balls. We do not ordinarily see persons married or unmarried walking about wearing ball dress, or apparelled so. A ball dress (says the creditor here) is an article of luxury and extravagance, not ordinary, not an article of common kind, nor indispensably requisite; if suitable to rich persons it is not to poor ones, who can't pay their debts, etc.

The ball dress seized in this case is of about eighty dollars value. That is a large sum. The debtor says that the dress was no more than necessary and suitable to a person in defendant's class in society.

I see from this case that the Courts may hereafter have to decide with great nicety of what character is clothing seized; ordinary or not? necessary or not? *All* clothing being certainly *not free*, is a ball dress lying at a dressmaker's free? Would *two* go free? Would a fancy ball dress go free? Would they if sworn to be "no more than necessary, and suitable to the defendant," though not at all rich, but in debt?

We see in other countries what difficulties are in the way of determining what is necessary clothing; judges and juries are bothered with such questions, which are best and most promptly settled by juries, supreme judges of matters of fact.

Smith on Contracts and the cases on this subject, referred to in it, are bewildering. Passing as a jury might upon the question, I find, for the plaintiffs, that the ball dress here when seized was not *necessary* for defendant, *and* was not *ordinary* wearing apparel to be freed from seizure; so the *saisie-arrêt* is maintained, and the defendant's pleas overruled, with costs against defendant.

The text of the judgment appealed from was as follows:—

"The Court, having heard the parties by their respective counsel upon the merit of the *saisie-arrêt* after judgment and of the contestation thereof by the female defendant, examined the proceedings, proof of record and evidence, and deliberated;

"Considering that the clothes of a defendant are not free, except limitedly, from seizure; that, under our law, clothing other than ordinary and necessary is seizable; considering that in the class ordinary and necessary the ball dress, white satin dress, in this case referred to, and in the hands of the *tiers-saisie*, cannot be put, and that therefore the plaintiffs might and may attach it; Doth dismiss the said contestation or *défenses* pleaded by said female defendant, and doth maintain the attachment *saisie-arrêt* made in the hands of the said *tiers-saisie*, Maria O'Dowd, and it is ordered that the said Maria O'Dowd do, within fifteen days after service upon her of this judgment, deliver up to the bailiff charged with the writ of execution in this cause the white satin dress which she has declared to have in her possession, as belonging to said female defendant, in order that the same be sold according to law, and the net proceeds of the sale applied to the payment and satisfaction of the sum of $175, with interest on the same from the 12th May, 1879, due under a judgment of plaintiffs against the said defendants on the 30th April, 1880, and the further sum of $26.05, costs taxed on said judgment and *distraits* to MM. Monk and Company, plaintiffs' attorneys, and the costs of the present *saisie-arrêt* and contestation, to which the said female defendant hereby is condemned.

"And to the delivery of the said dress the said *tiers-saisie*, Maria O'Dowd, shall be held and constrained by all legal ways and means, and in so doing duly discharged; the Court not hereby meaning to derogate from any privilege (out of the proceeds of sale) that the *tiers-saisie* may have (if any) for outlays upon the very robe or dress in question."

The appellant submitted by her factum:—

"La Cour Inférieure a jugé *a priori*, qu'une robe de bal n'était pas un vêtement *nécessaire ou ordinaire*.

"Est-ce là l'intention de la loi? N'est-il pas plus prudent, plus sage et plus rationel d'examiner les circonstances qui entourent chaque cas particulier et de décider d'après l'examen des faits? Il va sans dire qu'une robe de bal, un habit de riche fourrure, etc., seraient des objets de luxe pour la classe ouvrière; ils ne seraient pas des vêtements *ordinaires* à cette classe; mais lorsqu'il s'agit

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de personnes occupant un certain rang dans la société, ces vêtements sont *ordinairement* en usage. Dans l'espèce, la véritable question est de savoir si une robe de bal est un article de toilette nécessaire à une personne du sexe qui vit dans un milieu social l'obligeant à porter une semblable toilette. Or c'est le cas ici, et cette distinction aurait dû apporter un tempérament au principe énoncé dans le jugement. Il est prouvé en fait par deux témoins (preuve qui n'a pas été contredite) que la robe en question était nécessaire à l'appelante, que c'est un article de toilette *ordinairement* porté par les dames de la position sociale de l'appelante.

"Malheureusement, il semble que cette preuve a passé inaperçue.

"Donc, dans l'espèce, il est faux de dire que la robe en question n'était pas un vêtement *nécessaire* et *ordinaire* à la défenderesse.

"M. J. E. Robidoux, avocat, déclare: "Je n'hésite pas à dire que la con-"dition de fortune et l'état social de la défenderesse lui permettaient d'avoir "une robe de bal et même plus, *elle ne pouvait pas se passer d'un tel* "*habillement.*"

"Le jugement de la Cour Inférieure peut pousser à d'étranges conséquences. De la sorte on peut dépouiller un débiteur de tous ses vêtements. Autrefois, il en était ainsi; mais c'était l'époque d'un droit barbare et qui avait encore toute sa rudesse de forme. Nos statuts ont modifié ces dispositions et il est convenu qu'on ne peut saisir un vêtement qui est nécessaire au débiteur pour se vêtir suivant sa position et les convenances sociales. Si un créancier a droit de saisir la robe de bal de la femme d'un avocat, il pourra également saisir l'habit de cérémonie du mari, sous le prétexte que c'est un article de luxe.

"Mais ce qui est aujourd'hui un habit de soirée ou robe de bal peut se convertir demain en vêtement ordinaire, et rentrer dans la classe des vêtements ordinaires. Le jugement de la Cour Inférieure s'attaque donc plus au nom du vêtement qu'au vêtement lui-même. Ainsi, un vêtement sous telle forme serait saisissable, et le même vêtement dans une autre forme ne le serait pas. Alors, il faudra donc entrer dans l'examen des questions de tissus, de modes, de coupes, etc.

"Une autre considération. On dira peut-être: "Il sera permis à un dé-"biteur de se vêtir avec luxe, et ne pas payer ses dettes; voilà le côté immo-"ral."—D'abord une robe de bal ne prouve pas un luxe effréné. Ensuite, lorsque les MM. Sharpley ont donné crédit à l'appelante et à son mari, ils ne comptaient pas sur une robe de bal pour se rembourser. S'ils n'ont compté que sur cela, ils ont agi imprudemment."

In appeal,

The COURT unanimously confirmed the judgment, merely remarking that it was undoubtedly based on a correct interpretation of the law.

Judgment confirmed.

Lareau & Lebeuf, for appellant.
Butler & Cooke, for respondents.
(J.K.)

COURT DE CIRCUIT, 1883.

MONTREAL, 22 JANVIER 1883.

Coram JETTE, J.

No. 7743.

Michaels vs. *Plimsoll.*

JUGE:—1o. Que le coût d'une lettre d'avocat, savoir $1.50, est exigible et peut être recouvré en justice du débiteur à qui elle a été écrite pour lui demander le paiement de sa dette.
2o. Qu'en ce cas, l'action peut être instituée au nom du créancier.

Par l'action en cette cause, le demandeur réclamait du défendeur la somme de $1.50, prix d'une lettre d'avocat, écrite au défendeur pour lui réclamer un compte dû et exigible.

Le défendeur contesta la demande, prétendant qu'elle devait être rejetée pour les raisons suivantes:

1o. Parce que la lettre en question, n'avait pas été écrite dans l'intérêt du défendeur.

2o. Parce que la somme de $1.50, coût de la dite lettre, n'était pas recouvrable en justice; que le tarif ne faisait aucune mention d'un tel honoraire, qui, par conséquent, ne pouvait être taxé au désir de la loi.

Lors de l'audition, le demandeur prétendit que sa demande, aussi juste qu'équitable, devait être accueillie favorablement par le tribunal; que la lettre en question avait été écrite dans l'intérêt du défendeur et pour lui éviter des frais plus considérables. Du reste, la question n'était pas nouvelle et la jurisprudence de cette Cour était depuis longtemps établie sur ce point. Et à l'appui de cette assertion, il appela l'attention de la Cour sur deux jugements de l'honorable juge Rainville, rapportés au 3 L. N. pp. 25 et 37. Il cita de plus les causes suivantes:

Héroux vs. Clément, Gill, J., 13 septembre 1880, 10 R. L. 589.

Lennox vs. Angus, Loranger, J., 4 décembre 1882, 6 L. N. p. 8.

PER CURIAM. Le demandeur a fait écrire une lettre d'avocat au défendeur, lui réclamant le montant d'un compte dû et exigible. Le défendeur s'est rendu au bureau des avocats du demandeur et leur a payé son compte, mais a refusé de payer la lettre, et il a obtenu d'eux un reçu par lequel ils réservaient leur recours pour le prix de cette lettre.

Il est vrai que l'action n'a pas été instituée au nom des avocats, mais ce sont eux-mêmes qui ont agi dans les deux cas, c'est-à-dire, qui ont écrit la lettre et représenté le demandeur dans la présente cause, et je ne vois aucun inconvénient à ce que l'action ait été portée au nom du créancier. D'ailleurs, n'est-il pas de principe incontestable et incontesté, qu'à moins que l'avocat n'ait obtenu distraction de dépens, son client est réputé créancier des frais et en peut donner valable quittance au débiteur? En ce cas, le client est seul responsable envers son avocat: cette règle s'applique parfaitement dans le cas actuel.

Quant au coût de la lettre, $1.50, je n'hésite donc pas à l'accorder au demandeur.

Michaud vs. Philibert.

Je considère sa demande d'autant plus équitable, que la lettre en question a été écrite dans l'intérêt du défendeur et pour lui éviter les frais d'une poursuite.

Action maintenue.

Quinn & Weir, pour le demandeur.
Lane, pour le défendeur.
(J. G. D.)

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 21st MARCH, 1882.

Coram MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 210.

JAMES LORD *et al.*

(*Defendants in the Court below*),

APPELLANTS;

AND

JOHN ELLIOTT *et al.*

(*Plaintiffs in the Court below*),

RESPONDENTS.

The respondents entered into a charter party with the appellants for the chartering of a steamship, owned by respondents, then in Liverpool, which was to proceed to Sydney, C.B., and take on board a cargo of coals. In the charter party was this stipulation: "Taking her "turn with other steamers, and taking precedence of sailing vessels, and receive prompt "despatch in loading and unloading." Sydney is a coaling port, and the coal is brought straight from the pit to the pier at which vessels load. There were a number of steamers and other vessels waiting to load, and the respondents' steamship did not get a cargo until seventeen days after the captain protested the appellants. In an action for demurrage by the respondents,

HELD:—That the appellants, not being bound to load within a specified time, were only obliged to use diligence, according to the custom of the port, and that no delay being proved except what was occasioned by the custom of the port, the respondents were not entitled to damages for detention.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), 21st May, 1880, condemning the appellants to pay to the respondents the sum of $4,136.66 for damages by way of demurrage.

The respondents by their declaration alleged that at Montreal, on the 12th of June, 1873, acting by their agent, John G. Sidey, they chartered from plaintiffs the steamer "Gresham" of $\frac{1861}{1163}$ tons or thereabouts, then in Liverpool, England, to proceed to Sydney, in Cape Breton, and there load from the appellants a full and complete cargo of coal, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt dispatch in loading and discharging, and to load and discharge always afloat, carrying capacity about 1800 tons; and that said vessel being so loaded should proceed to Montreal and deliver the said cargo on being paid freight at the rate of $3.25 per ton.

The respondents, after setting up the usual clauses of the charter party, averred that the "Gresham" proceeded from Liverpool to Sydney, and arrived there on the 19th July, 1873, and that they immediately notified the appellants,

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through their agents there, that the "Gresham" was ready to receive her cargo, in accordance with the terms of the charter party; but that notwithstanding repeated notifications and protest, the "Gresham" was detained at Sydney for more than seventeen days after she was ready to receive her cargo before appellants commenced to load her, whereby the respondents suffered damage to the extent of £850 sterling, equal to $4136.66 in and about the maintaining the Master and Mariners of said vessel and in paying Harbour dues and other necessary charges attendant and resulting from the said detention, and owing to the loss of profits the vessel could have earned during the seventeen days the "Gresham" was unduly detained at Sydney, and that by reason of the premises, and the law and the usage and custom of the port of Sydney, the said sum of $4136.66 was due and payable by the appellants to respondents.

The defendants' first plea was abandoned at the argument before the Court of Queen's Bench, and therefore need not be referred to.

By the second plea the appellants alleged that in all things they complied with the conditions of the charter party, and that the SS. "Gresham" had her turn with other steamers, taking precedence of sailing vessels according to the custom and usage of the port of Sydney, and had prompt dispatch in loading.

The third plea was a *défense en fait*.

The judgment of the Court below maintained the action for the full amount claimed. The *considérants* were as follows:

"Considering that defendants have failed to prove the allegations of their pleas, doth over-rule the same; And considering that the plaintiffs have proved that the steamer "Gresham" did not receive from the defendants due dispatch at the port of Sydney, Cape Breton, as required by the charter party entered into between the said parties, and bearing date the 12th day of June, 1873, but was unduly detained for seventeen days, for which demurrage at the rate of fifty pounds sterling per diem is payable by defendants to plaintiffs, doth adjudge and condemn the said defendants jointly and severally to pay and satisfy to said plaintiffs the sum of £850, said sterling money, equal and equivalent to $4,136.66 currency of Canada, with interest, &c., and costs."

Kerr, Q.C., for the appellants:

The evidence in support of the action consists of the depositions of the captain and the chief officer. The former states that the "Gresham" arrived on the morning of the 19th July, and that he notified Mr. Archibald that the vessel was ready to receive and load her cargo; that the appellants did not proceed to load the steamship in her turn with other steamers, but that other steamers which were berthed after the "Gresham," and some small craft, were loaded at the same time as the "Gresham." And he states that the detention amounted to 17 days, and that in his opinion £850 sterling would be the amount of damage suffered. The chief officer gives evidence to the same effect, alleging that prompt despatch was not afforded, and that the cause of detention was the loading of other steamers and the want of facilities for loading and trimming. On the part of the appellants (defendants) Mr. Gisborne was

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examined. This witness was in Sydney in 1873 as engineer to two or three coal companies, and he stated that vessels were loaded in the order in which they were booked, except that bunker coal vessels, in accordance with the custom of all coal ports, had the preference. He asserted that no steamers that were berthed after the "Gresham" were loaded before her. This evidence, it is submitted, rebuts that of the captain and first officer. As a principle of law, the custom of the port has to be taken into consideration, though no reference be made to the custom in the charter party. In the case of Postlethwaite vs. Freeland, L.R. 5 App. Cases, Lord Chan. Selborne laid down the principle in these terms:—"There is no doubt that in general the duty of providing and making "use of sufficient means for discharging cargo when a ship arrives at its destina- "tion, and is ready to discharge, lies upon the charterer. If by the terms of "the charter party he has agreed to discharge it within a fixed period of time, "that is an absolute and unconditional engagement, for the non-performance of "which he is answerable, whatever the nature of the impediments which prevent "him from performing it, and which cause the ship to be detained in his service, "beyond the stipulated time. If, on the other hand, there is no time fixed, "the law implies an agreement to discharge the cargo within a reasonable time "under the circumstances. Difficult questions may sometimes arise as to the cir- "cumstances which ought to be taken into consideration in determining what "time is reasonable. If an obligation, indefinite as to time, is qualified or "practically defined by express or implied reference to the custom or practice of "a particular port, every impediment arising from or out of that practice, which "the charterers could not have overcome by the use of any reasonable diligence, "ought, in my opinion, to be taken into consideration." It is contended by the appellants that whether the loading or unloading is expressed in the charter party, as to be done according to the custom of the port, or no mention of the custom is made, is a matter of indifference—in the latter case such loading or unloading, according to the custom, is implied. The pretensions of the appellants, then, are, First, that although there was no reference to the custom of the port of Sydney in the charter party in this case, yet that it formed, impliedly, a portion of the conditions thereof.

Secondly, that the right to "turn," the order of precedence, &c., are regulated by the custom of the port, and every impediment arising from or out of that practice which the charterers could not have overcome by the use of any reasonable diligence, ought to be taken into consideration. (Postlethwaite vs. Freeland, 28 W. R. 833, per Lord Selborne, L. C.)

Thirdly, that the respondents must be presumed to have known the regulations or custom of the port of Sydney relating to precedence granted to bunker coal steamers, &c.

Fourthly, that if the delay was caused by any deficiency of the appliances in use at the port, the appellants cannot be held liable.

Fifthly, that the only witness who did or could depose to the custom of the port (Mr. Gisborne) proved conclusively that the "Gresham" had her proper

turn with other steamers taking precedence of sailing vessels, and had prompt despatch in loading according to the custom of the Port of Sydney.

Dunlop, for the respondents:

By the terms of the charter party it was agreed that the "Gresham" was to proceed to Sydney, and there load from the agents of the appellants a full cargo. She did proceed there, but no cargo was ready for her. This was not owing to a crowd of steamships loading before her in turn, but, as sworn by Gisborne, owing to the production of the mines not being sufficient to provide a cargo for the vessel with prompt despatch, and owing to the coal companies not having sufficient cars to forward what was produced to the pier. There is no proof whatever that, owing to a crowd of steamships, each loaded in turn, it was impossible to load the "Gresham" in less than twenty-six days, and that this was a reasonable time. On the other hand, the respondents have proved that the "Gresham" could easily have been loaded at Sydney in five or six days under ordinary circumstances. Other steamers were loaded in much less time. The "Hibernia" received 1,901 tons in six days; the "Alpha" 1,959 tons in nine days; the "Kangaroo" 761 tons in five days, while it took twenty days to give the "Gresham" 1,830 tons. The usages of the port apply, but not the rules of a particular colliery. It is unreasonable to extend the custom of the port to the mine whence the supplies are drawn. The appellants, in fact, entered into an improvident contract. They brought large and expensive steamers from England, and the cargoes were not ready for them. The coal had to be dug out of the mines.

RAMSAY, J.:—This is an action for damages by way of demurrage. There is no stipulation for a limited number of lay days,—what the freighter undertook to do was to give "prompt despatch." It seems to be well established that when the charter-party fixes certain lay days, all delays beyond those days until the ship is loaded and ready to sail, are at the charge of the freighter, unless directly attributable to the act of the owner. Smith's Merc. Law, 371; Abbott, 310. But when prompt despatch is alone promised, the freighter only warrants diligence (Abbott, 312-3), and diligence evidently means such proceedings as are usual in the port. (Ib. 313.) Now whether that diligence has been used here is almost purely a question of fact. Want of diligence—that is negligence, has to be established by the plaintiff. In this case I do not see that any negligence has been proved. It is pretended that the coal had to be procured after the vessel was ready to load, and that this was a cause of delay; but it is evident that Sydney is a coaling port, and that the coal is brought straight from the pit and is entered on board. Again, it does not appear that the steamer lost her turn, and certainly it does not appear she lost it by the fault of appellants or their agents. I am to reverse with costs, and that is the judgment of the majority of the Court.

CROSS, J. (*dissentiens*):—This action was instituted by the owners of the steamship "Gresham" against Messrs. Lord, Magor & Munn, charterers of that vessel, claiming from them £850 stg., for seventeen days' detention of their

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ship at the Port of Sydney, Cape Breton, from the 19th July to the 5th of August, 1873, waiting for a cargo of coal promised by said charterers.

Various points of minor importance were raised for the defence, but the principal point, and the only one I deem it necessary to notice, was the plea of the charterers that they gave the vessel despatch, and loaded her in turn according to the custom and rules of the port.

The Court of original jurisdiction, at Montreal, on the 21st of May, 1880, gave the owners of the ship judgment against the charterers for £850 stg., being for seventeen days' detention at the rate of £50 stg. per diem. The correctness of this judgment is now brought in question by the present appeal.

The charter party was produced by the owners, executed at Montreal on the 12th June, 1872. It provides that the vessel (which was then at Liverpool) should proceed to Sydney, Cape Breton, and there load from the factors of the charterers a full and complete cargo of coal, taking her turn with other steamers and taking precedence of sailing vessels, and to receive prompt despatch; carrying capacity about 1800 tons.

The owners, plaintiffs in the cause, examined the captain and first officer of the ship, who testified to the effect that the "Gresham" arrived at the Port of Sydney early in the morning of the 19th July. At nine o'clock the same morning, Bulkeley, the captain, notified Archibald & Co., the agents of the charterers there, of the arrival and of the readiness of the ship to receive and load her cargo, to which Archibald & Co., on the 22nd, replied that they had wired to Montreal, and would let the captain know as soon as possible. The captain also, on the same day, that is on the 19th, telegraphed a like notice to Sidey, the ship's agent at Montreal, to urge diligence on the charterers; and no less than thirteen telegrams passed between him and Sidey, beginning 19th July and ending 5th August, containing emphatic complaints by the captain on the subject of the delay, and representations by Sidey that he had complained to the charterers, who promised to give the vessel prompt despatch. Sidey, also, examined as a witness, speaks to these telegrams and the continued complaints and expostulations on his part, as well as the promises on the part of the charterers that the ship would have prompt despatch. The captain, also, on the 28th July, by the ministry of Murray Dodd, Notary, protested against the charterers for the detention, claiming damages. Their protest is produced.

The captain and first officer further prove that the first coal received by the "Gresham" was the small quantity of four tons on the 25th July, being bunker coal for consumption, and not cargo, and that she only commenced to receive cargo on the 4th of August, and her loading was not completed until the 13th; that from five to five and a half days was a reasonable time for her to load a full cargo, that she had been unnecessarily detained for the space of 17 days, and that the steamers "Alpha," "R. M. Hunt n," and "Crosby," as well as several small sailing vessels which had arrived after the "Gresham," were given preference over and were loaded before her. The loss sustained by the detention of the "Gresham," at the rate of £50 stg. per diem, is also proved by their

evidence, and also by a number of other competent witnesses examined for the owners.

For the defence but one witness was examined, M. F. Gisborne, who, at the time of the shipment in question, was acting as agent for the company who furnished the coal. He produces a printed paper, dated 1st July, 1873, which is 18 days subsequent to the execution of the charter party in question. It purports to be regulations of the Glasgow and Cape Breton (N.S.) Coal and Railway Co., limited, as to berthing vessels at the pier.

These regulations, among other things, provide: 1st The pier head always to be supplied preferentially with coal (so as never to remain idle), and to be open to steamers over 1,000 tons capacity, and vessels carrying over 1,000 tons cargo *in regular turn*; but the sailing ships to vacate their berth when half loaded if so required by the pier master.

3rd. Sailing vessels drawing over twenty feet, when loaded, to complete cargo at the end of the pier, without removal for a steamer or any other vessel.

4th. A vessel shall be considered to be in turn after she casts anchor off the company's pier, and is reported at Mr. Gisborne's office as ready to take in cargo.

These regulations, reasonable in themselves, made by a private company for their own convenience, to facilitate their operations, were not of that public or authoritative character which imposed upon vessels arriving at the port the obligation of a knowledge of their existence. They were, to some extent, inconsistent with the charter party now in question, which certainly was not made in view of these provisions, and, if obligatory, it was incumbent upon the charterers to find out their requirements, and to see to their being complied with.

Mr. Gisborne also produces a memorandum of extracts from a Shipping Book which, he says, was kept at the port. In this, although in general the date of the arrival of other vessels is noted, that of the steamers affecting the question of priority in this case is not mentioned. The first entry is as follows:—

SS. "Kangaroo." Telegraph Cable Fleet. Commenced loading 19th July, completed 24th; cargo, 761 tons.

The entry of the "Gresham" is the second on the list, and is as follows: SS. "Gresham." Reported July 22nd. Commenced loading 25th, completed August 13th; cargo, 1830½ tons. While that of the "Hibernia" is the sixth on this list, and is as follows:—SS. "Hibernia" Telegraph Fleet. Reported 19th July, commenced loading 30th, completed August 5th; cargo, 1901 tons.

From these entries it is apparent that they were not made consecutively as the facts transpired; they are, therefore, in themselves, and, without extrinsic proof, unreliable. They are especially valueless as to the date of the arrival of the steamships coming in competition, as regards preferential loading. From anything thereby made to appear, both the "Kangaroo" and the "Hiberoia" may have arrived after the "Gresham." The "Kangaroo," being under 1,000 tons capacity, had no right, by the alleged regulations, to load preferentially at the pier head. She occupied six days in loading.

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In proceeding with his evidence Mr. Gisborne says that, according to the rules of the port, vessels got priority in the order in which they were reported to him, and entered in the shipping books. The "Gresham" was only reported to him on the 22nd July; the "Hibernia" on the 19th, got coal before the "Gresham," as well on account of her priority of report as from her being one of the Telegraph Fleet, a tender to the steamer "Great Eastern," then engaged in laying an Atlantic cable; that the "Gresham" actually got coal on the 25th July, before she was entitled to any, that is, before the "Hibernia" had completed her cargo, while she was trimming. For the same reason the "Alpha" got coal while the "Gresham" was trimming. He also states that none of the steamships that were reported or berthed after the "Gresham" were loaded before her, and that the stipulations of the charter party were carried out, except as to the explanations given about the schooners at the inside berths, with regard to which, four in number, that got their cargoes before the "Gresham," he says the small sailing vessels received coal while the larger vessels were trimming or shifting their positions to get under the shoots, and to clear the cars, which could thus discharge by the side shoots where only small vessels could lie in shallow water,—this coal not being, under the circumstances, available for the large vessels, and its discharge into the smaller ones rendering the track available for full trains.

He further states that, according to the rules of all coal ports, vessels requiring bunker coal, that is coal for consumption, have a preference over those taking coal as cargo; that the steamers "R. M. Hunton" and "Crosby" came for bunker coal only, and got it by preference, according to the rules of the port.

He admits, at the conclusion of his testimony, that the "Hibernia" came in during the time the "Gresham" was in port. This establishes the priority of the arrival of the "Gresham."

I think the case does not depend upon the question of the priority of the different vessels, but if it did, I should consider Mr. Gisborne's evidence insufficient to show a valid excuse for the delay.

The "Gresham" really ought to have got her cargo beginning on the 19th, the day of her arrival, as the "Kangaroo" was not of the capacity to occupy the pier head, and the omission to report was not the fault of the captain, but of Archibald & Co., the agents of the charterers. She would then have had her load completed on the 24th.

The memorandum produced by Mr. Gisborne gives the dates of the reporting of the "Gresham" and "Hibernia," and the days on which they and the "Kangaroo" began respectively to load, also respective days on which they completed the reception of cargo, but gives no precise information as to whether the loading was continuous, whether interrupted otherwise than for trimming, when the interruptions for trimming or otherwise commenced, and how long they were continued, how much coal was furnished to the smaller vessels at the side shoots, at what times and from what sources, whether the loading of the larger vessels went on at the same time, and whether there was on hand, continuously,

a sufficient supply of coal to keep up the operation of loading. Such precise information would be necessary so as to make the absolute deductions from the long space of time intervening between the arrival of the "Gresham" on the 10th July, and the completion of her cargo on the 13th August, allowing for the necessary time, say five and a half days, to load the "Gresham" herself, and three days previous to the 22nd July, if the ship herself was in fault about reporting.

There is nothing whatever by which to measure the time, if any, lost by trimming. On the contrary, the explanations go to show that, on the whole, no loss of time was thereby occasioned.

His remarks are no more satisfactory as to the "Gresham" getting coal before she was entitled to on the 25th July, while the "Hibernia" was trimming. Trimming seems to be a necessary operation, and is performed by the persons loading the vessel. It occupies at most some four or five hours usually, probably much less time. If one ship is interrupted for this purpose its successor has naturally her turn temporarily until the trimming is finished. She is, of course, the next in turn to avail herself of this temporary interruption, and if not, a loss of time would occur advantageous to none. Besides, the four tons of bunker coal, received by the "Gresham" on the 25th, could have occupied but a few minutes at most in loading.

I find no good reason either in the application of the rule which he says exists as regards bunker coal having a preference at all coal ports. In the first place, the terms of the charter party in this case would exclude its operation: they are express "to have preference in turn before sailing vessels." In the next place, neither the "Kangaroo" nor the "Hibernia" took only bunker coal; as regards themselves, they took cargoes; whatever they might be on board the "Great Eastern," the mere fact of her being engaged in laying a cable could not convert the cargoes of coal she was getting by other vessels into bunker coal on board these vessels.

But the real reason why the "Gresham" did not get her cargo in season, as gathered from the evidence, was not the interruptions adverted to, but because the coal did not exist there at the port, it had to be waited for from the mine.

It is to be borne in mind that the contract in question was not one with the owners of the mine, but was one between the owners of the vessel and the charterers. The owners of the mine might excuse themselves as regards the charterers, but the contract of these latter towards the owners of the "Gresham" was to have a cargo of coal ready at Sydney, and to ship it on demand. If any obstacles to its shipment had to be overcome, such as complying with conditions exacted by the coal company, it was the business of the charterers to have these obstacles removed, they were the parties to furnish and load the coal, and to get it from the coal company. If they required the captain to conform to any formality, such as reporting his ship, they ought to have requested him to do so. It does not appear but that this report could have been made by Archibald & Co., themselves, and in all the telegrams that passed between the parties it was never either urged by the charterers or their agents, that the captain was in default or should have reported the ship to Gisborne.

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As regards the charterers, I think the demand made on them for cargo on the 19th July was sufficient to put them in default, and that the owners' right to have a cargo furnished began on that day.

I think it is shown by the evidence that up to the 4th of August they continued to fail to have a cargo ready for the "Gresham," the principal reason being that the production of the mines was not adequate to the demand.

I quote from Mr. Gisborne's evidence :—

Q. Did you give the "Gresham" coal as fast as she could take it?

A. We gave her coal as fast as we could deliver it; as fast as facilities of the mines would allow.

Q. What were the facilities of the port during that year for loading?

A. The facilities of the pier were greater than the production of the mines.

Q. Am I to understand that the facilities for loading vessels at the port of Sydney in that year were very good?

A. They were very good considering they were a new company just starting in business.

Q. And were the facilities of the pier good?

A. Yes.

Q. Then the vessels could have been loaded in a shorter time and with more dispatch if the facilities at the mines had been better?

A. Yes.

Q. How many tons of coal could you put on a vessel in a day?

A. We could put on more than we could receive from the mines. We could put on 240 tons in an hour.

In my opinion the Judge of the lower Court construed the evidence correctly, at least in refusing to consider the very long detention sufficiently accounted for. Without going into the precise figures as to the amount, I think the Court below were right in giving the owners judgment.

On the evidence as I read it, there seems to me to be no important question of law remaining to decide. I think no case can be found which goes so far as to hold that the supply drawn from a mine at some distance must be waited for, and its sufficiency or insufficiency from the force of production, or the facilities of railway transit from the mine, considered to form part of the rules and regulations of the port. The case of Kearson vs. Pearson, cited by the owners, 31 L. J., Exch. R. p. 1, is directly contrary. See also the case of Ashcroft vs. The Crow Orchard Colliery Co., L. R., 9 Q. B. 541.

It seems to me that if the "Gresham" failed to get reported to Gisborne before the "Hibernia," it was the fault of Archibald & Co., the agents of the charterers, who ought to have informed themselves on the subject, and to have at least warned Captain Bulkeley of the necessity of reporting to Gisborne, if they did not make the report themselves; that the "Kangaroo," according to the Company's rules, had no right to continue loading at the pier head in preference to the "Gresham"; that neither the "Kangaroo" nor the "Hibernia" could be considered as only shipping bunker coals; that the "Gresham" should have been loaded within five and a half days of the 19th, that day inclusive; that as far as the charterers are concerned, they have failed to show any suffi-

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cient excuse for the detention of the "Gresham," and I think the owners entitled to judgment in their favor.

I quite admit that if rules of the port had existed, established by any properly constituted public authority, all parties might have been bound to ascertain their provisions and conform thereto at their peril. I do not think that any such existed in the present case, but allowing the charterers the extremest latitude in this respect, I do not think the whole delay nor the greater part of it is accounted for by the non-observance of these regulations, and the inobservance as far as important, that is reporting the vessel to Gisborne, was chargeable to the charterers' agents, who alone could reasonably be supposed to be aware of this regulation. I do not think the cases cited by the appellants are in conflict with this view. The case of Postlethwaite et al. vs. Freeland, 27 W. R., is perhaps the strongest.

Lord Selborne says: "If an obligation indefinite as to time is qualified or practically defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that practice *which the charterers could not have overcome by the use of any reasonable diligence*, ought in my opinion to be taken into consideration."

The case of Kearson vs. Pearson, relied on by the owners, is more applicable. It was there held that usual despatch meant the despatch of persons who have a cargo in readiness for the purpose of loading, and in the case of Aschroft vs. Crow Orchard Colliery Co., referring to the case of Kearson vs. Pearson, Mr. Justice Lush says: "That case establishes that the engagement to load with the usual despatch is absolute, and admits of no qualification so as to dispense with performance even where the performance was hindered by a casualty which the charterer could not prevent."

The judgment of the Court is as follows:—

"The Court, etc.

"Considering there is no sufficient evidence to establish that the appellants did not use prompt despatch in procuring cargo for and loading the steamship "Gresham";

"Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 21st day of May, 1880; doth reverse the said judgment, and proceeding to render the judgment which the said Court below ought to have rendered, doth dismiss the action of the plaintiffs now respondents in this cause with costs as well in the Court below as in appeal. (The Hon. Mr. Justice Cross dissenting.)"

Judgment reversed.*

Kerr, Carter & McGibbon, for appellants.
John Dunlop, for respondents.
(J. K.)

* The respondents appealed to the Privy Council from the above judgment, and on March 8 the judgment of the Q. B. was reversed.

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 22ND NOVEMBER, 1881.

Coram DORION, C. J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

No. 201.

LA BANQUE MOLSON,

(Plaintiff in the Court below),

APPELLANT;

AND

HARDOUIN LIONAIS ES QUAL.,

(Defendant in the Court below),

RESPONDENT.

HELD:—1. That a seizure by garnishment extends to a debt which did not exist in favor of the defendant at the time of the seizure, but which becomes due before the garnishee makes his declaration, owing to a liability which took its rise after the signification of the attachment.

2. That the defendant is not entitled to take advantage of an irregularity in the writ of *saisie-arrêt* affecting the validity of the summons of the garnishee, but of which the garnishee does not complain.

3. That an entry, by which a writ returnable on the 21th was entered as returned on the 26th, may be shown to be a clerical error, particularly when there is evidence from the record itself that the entry was the result of an error.

The appeal was from a judgment of the Court of Review, reported in 24 L. C. Jurist, page 176. The judgment in Review reversed a judgment of the Superior Court, rendered by RAINVILLE, J., 19th September, 1879, maintaining the validity of a *saisie-arrêt* in the hands of La Société de Construction Mutuelle des Artisans, T. S.

The case is fully explained in the judgment already reported, and in the observations of the honorable judges in the Court of Appeal:—

DORION, C. J. La contestation est à l'occasion d'une saisie-arrêt sur un jugement obtenu par l'appelante contre le défendeur, Joseph Galarneau. Cette saisie-arrêt a été signifiée à la Société de Construction des Artisans, tiers-saisie en cette cause, le 11 mars 1879, et au demandeur le 12 du même mois.

Le 21 mars, la tiers-saisie a déclaré que, lors de la signification du bref de saisie-arrêt, elle n'avait pas, n'a pas maintenant, et qu'il n'est pas à sa connaissance qu'elle aura par la suite aucune somme d'argent, créance, meubles ou effets, appartenant au défendeur, sous la réserve des faits suivants, qu'elle soumet et sur lesquels elle déclare s'en rapporter à justice:—Que par obligation du 12 mars 1879, Joseph Galarneau a vendu à la Société tiers-saisie un lot de terre à la charge de payer, le 7 décembre 1880, ou avant, si la chose était exigée, à l'acquit du vendeur, aux représentants de Henriette Moreau, de son vivant épouse de Hardouin Lionais, une somme de $200; que cette indication de paiement n'a pas été acceptée, mais qu'il est à la connaissance de la Société que cette somme de $200 a été transportée par le défendeur ès-qualité à Joseph O. Joseph, le 18 mars 1879, et que ce transport a été signifié à Joseph Galarneau le 22 mars 1879.

Sur cette déclaration la Cour Supérieure, par jugement du 17 octobre, a condamné la tiers-saisie à payer à l'appelante la somme de $200 et les intérêts.

La Cour de Révision a, le 25 octobre suivant (1879) infirmé ce jugement, en se fondant sur ce que, lors de la signification de la saisie-arrêt, le 11 mars 1879, la tiers-saisie ne devait rien au défendeur, et qu'elle n'était devenue sa débitrice que le 12 de mars, en sorte que "*la saisie devait être considérée comme prématurée et frappant dans le vide.*"

L'appelante appelle de ce jugement, et à part quelqu'irrégularité de procédure, toute la question consiste à savoir si la saisie-arrêt n'a eu l'effet d'arrêter entre les mains de la tiers-saisie que les sommes qu'elle devait lorsque la saisie-arrêt lui a été signifiée, ou si elle a eu l'effet d'arrêter toutes celles qui sont devenues dues par elle jusqu'au moment où elle a fait sa déclaration.

L'art. 613 C. de P. dit que "la saisie-arrêt est faite au moyen d'un bref "émanant du tribunal qui a rendu jugement, enjoignant au tiers de ne point "se dessaisir des effets mobiliers qu'ils ont en leur possession, appartenant au "débiteur, ni des deniers ou autres choses qu'ils peuvent lui devoir ou auront à "lui payer, avant qu'il en ait été ordonné par le tribunal," etc.

L'art. 616 C. de P. dit : "L'effet de la saisie-arrêt est de mettre les effets et "créances dont le tiers-saisi est débiteur, sous la main de la justice," etc.

L'art. 619 C. de P. : "Le tiers-saisi doit déclarer les choses dont il était "débiteur à l'époque où la saisie lui a été signifiée, celles dont il est devenu "débiteur depuis, la cause de la dette et les autres saisies faites entre ses "mains."

La Cour de Révision s'est fondée sur les termes de l'art. 613 du C. P. C. et sur l'autorité de Roger, de la saisie-arrêt, No. 171 *bis*, qui dit : "Mais lorsque "le tiers-saisi ne doit rien encore au débiteur, *et qu'il ne vient à lui devoir "que postérieurement à la saisie-arrêt formée en ses mains, il faut considérer "cette saisie comme prématurée, et frappant dans le vide.*"

Il est bon de remarquer que ce passage ne se trouve pas dans la première édition du traité de Roger, et qu'il a été ajouté dans l'édition publiée après sa mort, par son fils, ce qui en diminue l'autorité.

D'ailleurs, c'est en faisant le même raisonnement, que plusieurs auteurs recommandables avaient enseigné que l'on ne pouvait saisir des salaires ou appointements non échus, parce que lors de la saisie-arrêt il n'était rien dû, mais la jurisprudence a repoussé cette prétention et il est maintenant parfaitement établi, tant en France qu'ici, que des salaires non échus peuvent être saisis-arrêtés. Il y a même un Statut de la Province de Québec qui, par une disposition expresse, permet de saisir-arrêter une proportion des salaires non échus des employés publics ; (38 Vict. ch. 12, s. 1).

Quelle que soit l'autorité de Roger fils, elle ne peut prévaloir contre les décisions de la Cour de Cassation.

Or, ce tribunal a jugé, le 3 février 1820, en infirmant un jugement de la Cour Royale de Riom, qu'une saisie-arrêt de ce qui pourrait revenir à Philippe Courby dans la succession de sa mère, qui était encore vivante lors de la saisie, était valable, à l'encontre d'un cessionnaire à qui Courby avait cédé ses droits

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après la mort de sa mère. La Cour de Cassation a donné pour motifs de son jugement, que Courby n'avait pas, après le décès de sa mère, le droit de céder ses droits au préjudice de la saisie faite par l'un de ses créanciers, et que la Cour Royale de Riom qui avait décidé que la créance cédée n'avait pas pu être arrêtée parce qu'elle n'était pas due, et qu'elle aurait pu n'être jamais due, *avait méconnu les principes des saisies-arrêts.*

L'art. 619 du Code de Procédure Civile veut que le tiers-saisi déclare les choses dont il était débiteur à l'époque où la saisie lui a été signifiée, et celles dont il est devenu débiteur depuis. La saisie-arrêt met donc sous la main de la justice non seulement ce qui était dû lors de la signification du bref de saisie-arrêt, mais encore ce qui est devenu dû depuis et jusqu'à la déclaration faite par le tiers-saisi, et dès lors les sommes arrêtées cessent d'être à la disposition du débiteur insolvable, car tout débiteur dont les biens sont sous saisie est réputé insolvable, et il ne peut plus les céder au préjudice des créanciers saisissants.

C'est ce qu'a jugé la Cour de Cassation dans l'arrêt cité, et nous croyons que les principes sur lesquels elle s'est appuyée doivent être suivis dans cette cause-ci.

Deux questions de procédure ont été soulevées par l'intimé. La première, c'est que le bref de saisie-arrêt qui était rapportable le 24 mars, n'avait été rapporté que le 26. La seconde que l'on avait omis dans le bref d'assigner la tiers-saisie à venir déclarer ce qu'elle devait au défendeur.

Quant à la première objection, elle n'est nullement fondée, puisque la Cour Inférieure, dans le rapport des procédés fait par son greffier, déclare que le bref a été rapporté le 24 mars.

Quant à la seconde objection, il est vrai qu'il y a une omission dans le bref de saisie-arrêt, mais cette omission ne regarde que l'assignation de la tiers-saisie qui n'a pas voulu s'en prévaloir, et qui a fait sa déclaration, comme si elle avait été régulièrement assignée.

Quel intérêt le débiteur saisi peut-il avoir à contester l'assignation donnée au tiers-saisi ?

L'on a cité Carré et Chauveau, sur l'art. 557 du Code de Procédure, mais ces auteurs sont obligés d'admettre, à l'endroit cité, que la jurisprudence est contraire à leur opinion.

Nous croyons que le jugement de la Cour de Révision doit être infirmé et que celui de la Cour Supérieure doit être confirmé avec dépens.

RAMSAY, J.—The appellant took out a seizure in the hands of "La Société de Construction des Artisans," to attach the goods, moneys, credits and effects the said Society may have in its hands belonging, or due, or to become due to the said defendant, H. Lionais *ès qual.* The writ then goes on to summon the said H. Lionais *ès qual.* to be and appear to hear the said attachment declared good and valid. There was no summons to the *tiers-saisie.* The writ was served on the *tiers-saisie* on the 11th March, 1879, and on the defendant on the 12th March. It was returnable on the 24th. By the return it seems as though the writ was only returned on the 26th.

It seems although not summoned, that the *tiers-saisie* appeared and made a declaration to the effect that nothing was due by the *tiers-saisie* at the time of summons; but on the day following (22nd March) one Galarneau sold to the *tiers-saisie* a certain property, to be paid for on the 7th December, 1880, "*ou avant, si la chose était exigée pour et à l'acquit du vendeur,*" to the heirs and representatives of the late Mrs. Lionais, a sum of $200 and interest. That there was no acceptance of this *indication de paiement*, but that the respondent *es qual.* had, by notarial deed of the 18th, transferred the debt to Mr. Joseph, and that this transfer had been signified to Galarneau on the 22nd.

The defendant did not appear nor plead to the sufficiency of the proceedings, nor in any way contest them; default was entered, and judgment taken condemning the *tiers-saisie* to pay the $200 to the appellant. This judgment was of the 17th October, 1879.

On the 25th the appellant appeared and inscribed the case in review and raised three questions of form, and one substantial reason for setting aside the judgment.

The formal grounds are:—

(1) That he had no notice of inscription for hearing in the court of first instance.

(2) That there was no summons to the *tiers-saisie*.

(3) That the writ was returnable on the 24th, and it was not returned until the 26th.

The first ground is readily answered. The case being by default he was not entitled to any notice. The second is scarcely more difficult. Defendant was summoned, and he should have objected at once to the error in the writ if he had really any interest in raising the question; but now the writ having answered its purpose, he is too late in raising a question which does not affect him directly. The third ground is more difficult. If the writ was only returned on the 26th, he has not had an opportunity to be heard, and he was entitled to that. No one can be deprived of his legal right to be heard, without introducing a most dangerous laxity. A fair opportunity to be heard is a fundamental principle of justice, and Courts cannot assume the responsibility of saying when it is important or not. In practice the right to be heard does not depend on whether one has anything to say that is worth hearing. If there is no opportunity to a defendant to be heard, and no unmistakable waiver, there is no *chose jugée* (C. C. P. 16). The question, then, we have here to decide is whether as a fact the writ was not returned till the 26th. The articles of the C. C. P. referred to by appellant have no application to this case. The non-return of the writ till the 26th renders the whole proceeding absolutely null, and there is no more need of a preliminary plea than if there had been no service. But the appellant adds that the certificate shows that it was returned on that day, but that this was a clerical error, and that in fact it was duly returned on the 24th. I think this error may be shown, at all events, when there is evidence from the record itself that there is error, and so we held in a recent case where the judge's entry of the *jurat* showed that the date was

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a clerical error, and that the affidavit was sworn to on the Saturday and not on the Sunday. Besides, it is not properly matter of record contradictorily entered, but mere matter of docket. At most it is but the act of the Court and not of the party. In England such matters could be corrected *during the same term.* This admits the possibility of amending errors even in their rigid system. Under our law, I think error may always be shown, and particularly when the error is of a third party. How does the proof stand here? On this last question I think we must suppose that the Court knew of its own entry, and the Superior Court not having determined that the return day was the 26th and not the 24th, it would be hazardous for us to decide that it was.

The question on the merits on which the decision turned in the Court below is as to whether a seizure in the hands of a *tiers saisi* could be validly made so as to attach what is not due at the time of the seizure, but which became due owing to a liability which took its rise since the attachment was signified. The judges in the Court of Review held, on the authority of a writer on the modern French law, that the attachment could only affect what was due on a debt already contracted when the attachment was signified. I think we must look to the terms of our Code, read by the light of the old law, rather than to the somewhat speculative views of writers on texts of law differing materially from our own. In the French Code of Civil Procedure there is no article similar to our Art. 856. In that article the form of the writ implies that the attachment strikes all moneys, things or effects the *tiers saisi* has or may have belonging or due to the defendant. Now the respondent wishes this to be restrained to the time of the service or issue (it matters not which) of the writ. In other words, the *tiers saisi* is not to say what is true at the time he answers, but what might have been true at the time the question was asked him. The object of this limited interpretation is to defeat the recourse of the creditor. I cannot concur in this mode of dealing with the law, more particularly when it is clear that under the old law the *tiers saisi* had to speak in the present tense. Again, if we turn to our Art. 619, the thing becomes still more clear, for the *tiers saisi* has to declare: "in what he was indebted at the time of the service of the writ upon him, in what he has become indebted since that time," &c. There is no distinction here as to the period of the origin of the debt, and I cannot see on general principles why there should be any such distinction. It is a very striking form of expression to say "*il a frappé dans le vide,*" but I don't think it is a very convincing one. It is an exclamation rather than an argument. I am of opinion that the judgment of the Court of Review must be reversed, and the judgment of the first Court must be sustained.

The judgment of the Court is recorded as follows:

"La Cour, etc.

"Considérant que le bref de saisie-arrêt en cette cause qui était rapportable le 24 mars 1879, a été signifié à la Société de Construction des Artisans, tiers-saisie, le 11 mars 1879, et au défendeur le 12 du même mois;

"Et considérant qu'avant le rapport du dit bref de saisie-arrêt, et, avant que la tiers-saisie eût fait sa déclaration de ce qu'elle avait entre ses mains, apparte-

sant au défendeur, elle s'est obligée par acte de vente que lui a consenti le nommé Joseph Galarneau, le dit jour, 12 mars 1879, de payer au défendeur, à l'acquit du dit Galarneau, une somme de $200 avec intérêt ;

"Et considérant qu'aux termes des articles 613 et 619 du Code de Procédure Civile, la dite tiers-saisie ne pouvait se déposséder de la dite somme de $200 sans un ordre de la Cour, et qu'il n'était pas loisible au défendeur de céder la dite somme de $200, sans égard à la saisie-arrêt dont elle était frappée ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, siégeant en Révision à Montréal le 31e jour de mars 1880 ;

"Cette Cour casse et annule le dit jugement du 31e jour de mars 1880 ;

"Et rendant le jugement que la dite Cour de Révision aurait dû rendre, confirme le jugement rendu par la Cour Supérieure, siégeant en première instance, en cette cause, le 17 octobre 1879, et condamne le dit défendeur intimé à payer à l'appelante les frais encourus, tant en cour de première instance, et en révision, que sur le présent appel."

Judgment reversed.

Barnard & Beauchamp, for appellant.
Doutre & Joseph, for respondent.
(J. K.)

COURT OF REVIEW, 1882.

MONTREAL, 31st MARCH, 1882.

Coram TORRANCE, J., RAINVILLE, J., PAPINEAU, J.

No. 109.

Normandin vs. *Normandin et al.*, & *Les Religieuses Carmelites d'Hochelaga et al., mis en cause.*

HELD:—That the revocation of the title deed of a mortgagor, on the ground of fraud and simulation, cannot affect the rights of a *bonâ fide* mortgagee for value.

This was a review of a judgment of the S. C. at Montreal, rendered on the 17th of December, 1881, which maintained the action of the plaintiff and dismissed the pleas of the said *mis en cause*.

The *mis en cause* were the *cessionnaires* of one Dupré, who had loaned money to the defendant, Joseph Charles Arnois, on the security of certain real property hypothecated by him, and of which he was the apparent owner.

And the action was brought to set aside the title deed of Arnois to said property on the ground of fraud and simulation.

The judgment of the S. C. maintained the action and dismissed the pleas of the *mis en cause*, who contended that their rights, as third parties acting in good faith, could not be affected by the revocation by the Court of the title deed of the borrower.

The Court of Review (PAPINEAU, J., *dissenting*) reversed the judgment so rendered, so far as the *mis en cause* were concerned.

TORRANCE, J.:—The question of the validity or invalidity of the *hypothèque*

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in the circumstances is settled by authority. There is a host of authors under the French Code who opine for the validity of the *hypothèque*, and only Duvergier and Laurent *contrà*. M. David for the appellant has referred to the case of Devillard v. Guittet & al, J. Palais, p. 111, 112, A.D. 1879. I would also refer to the case of Sejourné Delisle, J. Palais, p. 1240, A.D. 1876, and to the very full and learned note of the editor appended to that case. Mr. Justice Rainville and myself are agreed that the conclusions taken by the Carmelites and the Abbé Valois should be granted.

The judgment of the Court is in the following words :—

" La Cour Supérieure siégeant présentement à Montréal comme Cour de Révision, ayant entendu le demandeur et les *mis en cause* par reprise d'instance par leurs avocats sur le jugement prononcé en cette cause le 17 décembre dernier par la Cour Supérieure du district de Montréal ; examiné le dossier et la procédure, et délibéré ;

Considérant que l'immeuble sur lequel Réné Dupré a pris une hypothèque pour garantie et sûreté de la somme de $500.00 qu'il avait prêtée à Joseph Charles Arnois, avait été donné à ce dernier par acte authentique duement enregistré ; que d'autre part, il n'est pas établi que le dit Réné Dupré, ait eu connaissance de la fraude ou simulation de la dite donation ; qu'il y a eu dès lors au moment où l'hypothèque a été consentie, titre apparent de propriété au nom de l'emprunteur, et bonne foi de la part du prêteur ; qu'en de telles circonstances les règles du droit ancien protégeaient les intérêts des tiers, et ne permettaient pas que la nullité de la donation leur fût opposée ; que notre Code sans faire textuellement revivre ces règles, ne contient cependant aucune disposition contraire ; que si l'article 1032 du Code Civil confère à tout créancier la faculté d'attaquer en son nom personnel les actes faits par son débiteur en fraude de ses droits, il n'est pas dit que ce soit, sans égard aux intérêts des tiers étrangers à la fraude ; que loin de là il ressort de l'esprit général de nos lois que la fraude ou simulation des actes n'est imputable qu'à ses auteurs ou à leurs complices, et ne sauraient réagir contre les tiers qui l'ont ignorée, ni porter atteinte aux contrats qu'elle a pu favoriser ou faire naître à leur profit.

Pour ces motifs, déclare les Religieuses Carmélites d'Hochelaga et l'Abbé Valois, comme représentant feu Réné Dupré, recevables en leur défense ; et statuant à l'égard de toutes les parties en cette cause sur les conclusions tendant à l'annulation de la vente du 26 mai 1880, et de la donation du 28 mai 1870, confirme le jugement dont est appel, et sur les conclusions des dites Religieuses Carmélites et de Messire Avila Valois, mis en cause par reprise d'instance, dit que l'annulation de la vente et de la donation précitées ne porte aucune atteinte à la validité de l'hypothèque consentie par Joseph Charles Arnois au profit de Réné Dupré ; et attendu qu'il y a erreur dans cette partie du dit jugement qui déboute les défenses des dites Carmélites et du dit Abbé Valois avec dépens, réforme et annule le dit jugement quant à eux, et procédant à rendre le jugement qu'aurait dû rendre sur ce point la Cour de première instance, maintient les dites défenses et déboute le demandeur de ses conclusions contre le dit Réné Dupré et ses représentants, avec dépens de la Cour Supérieure et de cette Cour

de Révision contre le demandeur, distraits à Messieurs Longpré et David, avocats des dits mis en cause par reprise d'instance.

L'honorable Juge Papineau ne concourt pas dans ce jugement."

Judgment of S. C. reversed.

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Béique & Co., for plaintiff.
Longpré & David, for *mis en cause*.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH JUNE, 1879.

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

No. 85.

PIERRE A. A. DORION,

(*Defendant in the Court below*),

APPELLANT;

AND

JOHN BROWN,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—That an agreement between advocate and client, by which the former, in his capacity of advocate and attorney, stipulates for a proportion of the amount which may be recovered in the suit, in addition to taxed costs, in consideration of his services in conducting such suit, is null and void, and cannot be invoked against the client as a valid consideration for a deed of transfer by which the client subsequently transfers to the advocate a portion of the amount recovered.

The appeal was from a judgment of the Superior Court, district of Montreal, (PAPINEAU, J.) 31st January, 1878, maintaining an action brought by the respondent against the appellant.

The judgment of the Court below was in the following terms:—

"La Cour, etc.:—

"Considérant que le demandeur a prouvé les principaux allégués de sa demande et spécialement que le défendeur, comme son avocat et procureur *ad litem*, a obtenu par voie d'action *in forma pauperis*, sous No. 880, en faveur du demandeur, contre le nommé Robert Brown devant cette Cour, jugement pour une pension alimentaire, dont les arrérages depuis le commencement de l'action jusqu'au jugement en date du trente de novembre 1875, s'élevaient à la somme de $566.78 outre les frais;

"Considérant que le défendeur a reçu presque toute cette somme du dit Robert Brown, le ou vers le quinze de décembre 1875, et qu'il en a reçu le surplus le ou vers le huit de janvier 1876, et que sous prétexte de s'indemniser de la perte de son temps et du trouble qu'il s'est donné de poursuivre cette cause jusqu'à jugement pour le demandeur, ainsi que pour s'indemniser du risque

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qu'il avait couru de ne pas recevoir d'honoraires dans le cas où il n'aurait pas réussi dans la dite action, il s'est fait signer par le dit demandeur le transport en question dans cette cause, étant un transport en date du seize décembre 1875, par le demandeur John Brown en faveur du dit défendeur Pierre A. A. Dorion, devant Mtre. L. O. Hétu, notaire, de tous les arrérages de rente viagère dûs au demandeur par le dit Robert Brown jusqu'au trente de novembre 1875, en vertu du dit jugement, dans la dite cause No. 880;

"Considérant qu'il n'est pas prouvé que le défendeur eût fait connaître au demandeur avant de lui faire signer le dit transport que les dits arrérages étaient de $566.78.

"Considérant qu'il n'est pas prouvé que le demandeur, étant alors dans l'indigence à la connaissance personnelle du défendeur, ait jamais consenti à donner à ce dernier tout le montant des arrérages lui appartenant en vertu du dit jugement pour l'indemniser du trouble et des risques susdits encourus par lui durant le dit procès;

"Considérant qu'en l'absence de preuve d'un don ou d'une promesse expresse par écrit à cet effet, un si pauvre homme n'est pas présumé avoir consenti librement à donner une si forte somme à son avocat en sus des frais ordinaires réglés par le tarif pour avoir gagné son procès;

"Considérant que le défendeur a reconnu n'avoir pas donné au demandeur pour considération du dit transport autre chose que la somme de $100 et peut-être une avance de $25 à $50 en différents temps durant le procès sous forme d'aumône;

"Considérant que le défendeur n'a jamais rendu compte au demandeur de la dite somme de $566.78, avant le dit transport et qu'il aurait dû lui en rendre compte;

"Considérant que le dit acte désigné sous le nom de transport comporte réellement un don par un indigent à son avocat d'une somme de $466.78, plutôt qu'un transport réel pour bonne et valable considération, tel qu'exprimé au dit acte et qu'il n'y a pas de preuves que ce don ait été véritablement et librement fait ou promis par le demandeur au défendeur;

"Considérant que le défendeur n'a pas prouvé les allégués de sa défense, la cour renvoie la dite défense et procédant à rendre le jugement sur la demande, la cour annulle et met à néant le dit transport, et condamne le dit défendeur à payer au demandeur la dite somme de $466.78, étant la balance lui revenant sur les deniers reçus par le dit défendeur pour le dit demandeur du dit Robert Brown, partie le ou vers le quinze de décembre 1875, et partie le ou vers le huit janvier 1876, en vertu du dit jugement du trente de novembre 1875, sous No. 880, des causes de la Cour Supérieure, dans le district de Montréal, en faveur du dit demandeur contre le dit Robert Brown, avec intérêt sur cette dernière somme, à compter du 26 mai 1877, jour de l'assignation, et les dépens distraits à Messieurs Archibald et McCormick, avocats du demandeur."

The appellant submitted the following argument:—

The present appeal turns entirely upon the validity of a notarial transfer made on the 16th December, 1875, by the respondent to the appellant, for good

and valid consideration of "all and every arrears of life rent, *rente viagère*, up "to the 30th of November last, due to the said assignor by Robert Brown, "Esq., merchant of Montreal, his son, under and by virtue of a certain judg- "ment obtained by the said assignor against the said Robert Brown, on the "30th of November last, in a certain cause bearing No. 880, instituted before "the Superior Court, in and for the district of Montreal, and wherein the said "assignor was plaintiff, and the said Robert Brown, defendant."

The transfer really covered a sum of $566.78, which was the amount of arrears due on the 30th November, 1875, in virtue of the judgment in question, and this amount was received from Robert Brown by the appellant subsequently to the date of the transfer.

The consideration was, besides $125 or $150 paid cash, a previous promise by the respondent that the appellant, who had been acting as respondent's attorney *ad litem* in the suit against Robert Brown for alimentary allowance in favor of the respondent, his father, should retain the whole of the arrears for which the defendant should be condemned, as remuneration for his services in the case which was brought *in forma pauperis*, and seems to have been considered somewhat hopeless. The taxed costs seem to have gone to the firm of Curran & Coyle, who took charge of the enquête and the argument before the court, and Mr. Curran moreover received from the appellant the sum of $100 as special fee, so that, in reality, the appellant seems to have received for himself a trifle over $300. The respondent, by the judgment in question, obtained a condemnation against his son for the sum of $200 a year, payable by monthly instalments.

The sole question is whether the transfer in question should be annulled as having been fraudulently obtained. If any fraud has been committed, that fraud must be held to result from the above circumstances, for there is no other evidence. The appellant is the only material witness examined, and he admits no fraudulent intent or misrepresentation. On the contrary, the appellant swears positively that everything was perfectly understood and deliberately carried out by respondent. We have moreover the very emphatic evidence of Mr. Curran and Mr. Coyle, which leaves no doubt as to the entire good faith of the appellant in the matter.

The judgment appealed from proceeds upon the theory:

1. That the respondent did not know at the time that he was transferring $566.78. Not only is there no proof of this, but against it is the admitted fact that the respondent knew the amount of his monthly allowance. Moreover the judgment is fully referred to in the transfer, and the legal presumption is that the respondent knew the contents of a document to which he specially refers.

2. That it is improbable that a poor man could have consented to have given such a large sum of money. That he did make the transfer, however, is beyond doubt; and fraud certainly cannot be presumed simply because one of the contracting parties was a poor man over 65 years of age, and the contract may or may not be considered advantageous to the other party.

3. Because the appellant should have proved a written promise from the

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respondent to give him the arrears in question, for his remuneration. The answer is that the transfer is quite sufficient to prove that respondent transferred the amount in question for a valid consideration. Because a previous written promise would make the case still stronger for the appellant, it does not follow that the respondent can, without good cause shown, be relieved from the consequences of a deed which is conclusive on its face.

The respondent submitted his case as follows:—

The facts of this case are exceedingly simple, and upon the most of them there is no divergence between the appellant and the respondent. In the month of January, 1873, the present respondent instituted an action against Robert Brown and others, his sons, for an alimentary pension.

This action was instituted by Messrs. Carter & Keller as attorneys for plaintiff, and conducted by them until about one half the plaintiff's evidence was produced. On the 17th day of February, 1874, Messrs. Kelly & Dorion were substituted to Messrs. Carter & Keller as plaintiff's attorneys, but proceedings do not seem to have progressed until late in 1875, when they were pressed, and judgment obtained on the 30th November, 1875, granting plaintiff an alimentary pension of $16.67 per month from the date of the institution of the action nearly three years before. The amount of such pension due at the date of the judgment was the sum of $566.66, and the costs of the action, all which, except a trifle of about $11.00, were paid to the appellant on the 15th December, 1875. On the 16th December, 1875, the appellant caused the respondent to sign a deed of transfer of the judgment above mentioned, which deed contains also a power of attorney in favor of appellant to draw the monthly payments awarded by the Court to the respondent.

This deed of transfer mentions neither the amount transferred nor the consideration given. It is proved, however, that the amount transferred was $566.67, and the consideration given was $100. So that the appellant in this case obtained for examining four witnesses and cross-examining four more, and for arguing the case in Court $466.67, beside full taxed costs of the action, as if the same had been completely managed by him, in all about $570.00.

The judgment in this case is so fully *motivé* that there is little necessity for an extended argument. Respondent contends that the appellant being his confidential agent, induced him to sign the transfer above mentioned without having rendered him an account, and without informing him of the amount he was transferring, or even of the nature of the act he was passing at all. The appellant attempts to excuse his conduct by alleging that there was a contract between him and respondent, by which respondent was to surrender to him all the arrears which should be due at the date of the judgment. There is no legal proof of any such agreement, nor did appellant attempt to prove anything of the kind out of the mouth of respondent, though respondent was present in Court, as appears in evidence, and even if there were such a contract, it seems extremely doubtful if this Court could sanction transactions of such a nature, which if not illegal, are certainly dishonorable. Respondent says that appellant was bound to put him (respondent) upon an equality with him (appellant) with regard to infor-

mation in relation to the subject and circumstances of the transfer above mentioned, and if by reason of any concealment or want of information respondent might be misled, the deed ought to be considered void. Can it be for a moment believed that a poor *vieillard* like respondent intended to donate to a rich man like the appellant $466.00 ?

TESSIER, J., *dissentiens :* L'action de Brown réclame la nullité d'un transport devant notaire du 16 décembre 1875, fait à un avocat P. A. A. Dorion pour valeur reçue, étant des arrérages de rente viagère alimentaire alors dûs à Brown. Le montant n'y est pas mentionné, mais le jugement qui l'a constaté y est indiqué comme jugement rendu.

Ce montant était de $566.78.

Il est admis par le témoignage de M. Dorion, que la considération de ce transport était qu'il conduirait à jugement une action alors pendante *in forma pauperis* depuis deux ans, commencée par d'autres procureurs. C'est ce que M. Dorion a fait à l'aide de ses associés nominaux MM. Curran & Coyle. Brown a ainsi obtenu jugement non-seulement pour les arrérages, mais pour une rente annuelle de $200 à l'avenir.

Ce transport doit-il être déclaré nul ? La considération est prouvée, il n'y a aucune fraude ou dol établi. A quel titre serait-il nul ? Un avocat ne doit pas faire une telle convention ; cela peut être vrai à raison de la dignité de la profession ; mais est-il annulle-t-il le transport d'après nos lois ? où est cette loi ? Les nullités ne se présument pas, et à l'égard des procureurs et avocats l'article 769 C. C. a fait disparaître les présomptions de suggestion. L'article 1732 du Code Civil soumet les avocats et procureurs aux règles générales du mandat, et ajoute : " La profession d'avocat et procureur est réglée par l'acte concernant le Barreau."

Il s'en suit donc que le présent litige n'est pas pour ce tribunal une question de discipline, mais une simple question de contrat civil. Or, il n'a été prouvé aucune fraude quelconque, et si *après le jugement* rendu, comme c'est le cas ici, il a plu au client de payer son avocat à même la somme qui lui a été adjugée, je n'y vois pas une chose défendue par aucune loi.

Les motifs du jugement imputent fraude à l'appelant, il n'y a pas de preuve de cela. Au contraire il est prouvé que Brown à plusieurs reprises après le transport s'est déclaré satisfait et content de l'avoir exécuté.

M. Dorion a déboursé et payé certaines sommes pour M. Brown, et on les lui fait perdre ; il faudrait au moins retrancher sur le jugement prononcé contre M. Dorion $120 payés à M. Curran pour avoir plaidé la cause, $30 payés en différents temps à Brown, à part $100 déjà déduits dans le jugement ; mais en confirmant le présent jugement c'est Brown qui fait payer les frais de son procès à son avocat, au lieu de les payer lui-même. Cela me paraît injuste. Réserver un recours à M. Dorion contre Brown qui a procédé *in forma pauperis* est un recours absolument illusoire. Je ne puis donc, quant à moi, concourir à confirmer le présent jugement tel qu'il est ; ce jugement eût dû au moins être réformé pour allouer à M. Dorion ce qu'il a légitimement déboursé.

MONK, J. (also *dis.*) I entirely concur in the observations which have

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been made by Mr. Justice Tessier. There is no disguising the fact that the transaction bears rather an unusual appearance, but the agreement was made in good faith; no fraud is proved. There can be no doubt that a lawyer under such circumstances might have taken a retainer for any amount. The question, then, resolves itself into this, whether a lawyer, as the consideration of his services, may take a transfer of part of the amount which may be recovered by the suit. I am not aware that there is any law against an agreement of that nature, and I would, therefore, be disposed to reverse the present judgment, and to maintain the pretensions of the appellant.

DORION, C. J. This case is undoubtedly of very great importance to the profession. The question is not whether an advocate practising before the Courts may stipulate for a fee, however exorbitant, to be paid by his client; but whether he can enter into an agreement with his client to share the proceeds of the suit which he undertakes to conduct. It is admitted that the fee in this case was enormous. A pauper, seventy years of age, was suing his son for an alimentary allowance. The final judgment awarded him about $16 per month, and his lawyer under the agreement would receive $566 for his services. The amount is no doubt excessive; but it is not a question of amount. The question is this: Did the appellant, when he undertook this suit, make a bargain with his client, by which, if he succeeded, he was to get a portion or the whole of the arrears? The majority of the Court are of opinion that this is what the appellant stipulated, and they hold that such a bargain cannot be sanctioned. The appellant states that the promise was made to him by Brown before he consented to take up the case. His position, therefore, is that of a person stipulating for a share of what was recovered. Are lawyers to be permitted to bargain for a share of the proceeds of the suits which they carry on? Such a practice is not tolerated elsewhere. If such agreements are lawful the law would become a matter of contract, and the profession would have to abandon its privileges. The Court does not decide that a lawyer may not stipulate for a fee; but it must be for a specific amount; it cannot be for a share contingent on the success of the suit. As to the $100 which was paid to Brown at the time of the transfer, the Court below has deducted it. But the Court refused to deduct certain small sums which it is said were given to Brown at various times. This Court will reserve the appellant's recourse for these sums, if he can establish them. As to the $100 said to have been paid by the appellant to his partner, Mr. Curran, to argue the case, that is a charge which the Court cannot sanction.

RAMSAY, J. The principle involved in this case is extremely simple, yet of great importance to the bar. The appellant, examined as a witness, admitted that the consideration of the contract was the maintenance of the suit which he was conducting in his capacity as a lawyer. Such a bargain has never been maintained in England, and cannot be here. I do not mean to imply that the appellant was guilty of fraud, but only that this contract, the consideration for which was maintenance, is against public policy, and incompatible with the existence of a respectable bar.

The judgment in Appeal is as follows:

"The Court, etc. :—

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"Considérant que l'appelant a admis que la cause du transport que l'intimé lui a fait le 16me jour de décembre 1875, était une convention antérieure intervenue entre l'appelant et l'intimé par laquelle le dit appelant, en sa qualité d'avocat et de procureur, se serait chargé de la cause de l'intimé qui réclamait de son fils une pension alimentaire, qu'à la condition et sur la promesse de l'intimé de lui abandonner pour honoraires additionnels, outre les frais taxés, tous les arrérages de pension qui lui seraient alloués par le jugement de la Cour ;

"Et considérant qu'une semblable convention entre avocat et client est illégale et ne peut être invoquée comme une cause valable d'un transport fait par le client à son avocat ;

"Et considérant que les arrérages de pension alimentaire que l'appelant a perçus en vertu du dit transport se montent à la somme de $566.78 courant ;

"Mais considérant que l'appelant a remis à l'intimé lors du dit transport une somme de $100 courant, en sorte que l'appelant n'a réellement reçu que la somme de $466.78, et qu'il n'est tenu de rembourser à l'intimé que cette dernière somme ;

"Et considérant qu'il n'y a pas d'erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal, le 31e jour de janvier 1878 ;

"Cette Cour confirme le dit jugement du 31e jour de janvier 1878, et condamne en outre l'appelant à payer à l'intimé les frais encourus tant en Cour Inférieure que sur le présent appel.

"La cour réservant à l'appelant son recours pour toute réclamation qu'il peut avoir contre l'intimé excepté quant à la dite somme de $100 courant déduite de la dite somme de $566.78 comme susdit. (Dissentientibus les honorables juges Monk et Tessier.)

Grenier, and Barnard & Monk, for Appellant.
Archibald & McCormick, for Respondent.
(J. K.)

Judgment confirmed.

COURT OF REVIEW, 1882.

MONTREAL, 31st JANUARY, 1882.

Coram MACKAY, J., RAINVILLE, J., BUCHANAN, J.

No. 1887.

Brunet vs. *Leroux*.

HELD:—That on proof of the communication of venereal disease by the husband to the wife, and that their common life has become impracticable, it is the duty of the Court to pronounce judgment of *séparation de corps*.

MACKAY, J.:—This is a review of a judgment of the Superior Court at Montreal, rendered on the 9th of September last, and which dismissed the plaintiff's action for want of proof.

The plaintiff sued *en séparation de corps*, and although some of the allegations of the declaration were not proved, we think the evidence on the whole is

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of such a character as to make it our duty to pronounce the judgment of separation, and we must, therefore, reverse the judgment.

The reasons of our judgment are fully shown in the written judgment, which is as follows:—

"The Superior Court of Lower Canada, now here sitting as a Court of Review, having heard the parties by their respective counsel on the judgment rendered in this cause on the 9th day of September last (1881) by the Superior Court sitting in and for the district of Montreal, examined the proceedings and the record and deliberated;

Considering that although some of the plaintiff's allegations of declaration are not proved, others and material ones are proved;

Considering, for instance, that it is well proved that the defendant did communicate to plaintiff "*une maladie vénérienne*" as is charged;

Considering from what has passed between the parties and what is proved, that it is plain that *la vie commune* between the parties is now impracticable, and that "*les plus hautes considérations de morale et d'intérêt public commandent de prononcer la séparation*" (4 Demolombe);

Considering that in the judgment complained against by the plaintiff to the contrary, there is error;

Doth reverse the said judgment, and proceeding to render the judgment that ought to have been rendered by the Court below, doth order that the plaintiff be from this day separated as to bed and board from the defendant, her husband; that the said defendant be prohibited, as he is hereby, from cohabiting with the said plaintiff, or troubling or visiting her in any way whatsoever, under all penalties of law;

And the Court doth further order that the said plaintiff be from this day separated as to property from her husband, the said defendant, to the end that she, the said plaintiff, may enjoy the same separate and apart and distinct from her said husband, as well that which she now holds as that which she may hereafter acquire;

With costs in the Court below in favor of plaintiff against defendant, and with costs in Review against the said defendant distraits to R. & L. Laflamme, attorneys for plaintiff.

Saving to plaintiff any rights under the reserves she has made in her conclusions of declaration."

Judgment of S. C. reversed.

R. & L. Laflamme, for plaintiff.
St. Pierre & Scallon, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 15TH FEBRUARY, 1881.

Coram DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 131.

BASILE BOISCLAIR,

(Defendant in the Court below),

APPELLANT;

AND

LOUIS LALANCETTE, PÈRE,

(Plaintiff in the Court below),

RESPONDENT.

HELD:—Where A had obtained a judgment in the Commissioners' Court against B in his quality of tutor to minors, and B, making affidavit that he was not tutor, procured the setting aside of this judgment on *certiorari*,—that even if it appeared (which was not the case) that the affidavit in question was the sole ground for setting aside the judgment of the Commissioners' Court, nevertheless A had no right to bring an action of damages against B (alleging that B had gained his case by swearing falsely that he was not tutor), to recover the costs and other damages incurred by A through the setting aside of the judgment of the Commissioners' Court. The judgment on the *certiorari* was a final determination of the issue between the parties, and the conclusion could not be renewed indirectly by means of an action of damages.

The appeal was from a judgment of the Circuit Court, District of Richelieu (GILL, J.), 2[illegible] October, 1879, maintaining the respondent's action.

The circumstances under which this action was brought are set out by the respondent in his factum as follows:—

Le 7 janvier 1878, l'intimé Lalancette assigne l'appelant Boisclair devant la Cour des Commissaires de la paroisse de St. Aimé, district de Richelieu.

Lalancette réclamait, par son action, de Boisclair, *en sa qualité de tuteur* aux mineurs de feu Maxime Proulx, une somme de £1-17-9.

Boisclair comparait *ès-qualité*. Il ne nie pas être tuteur tel qu'assigné, mais il nié le compte, une somme comparativement insignifiante.

Les témoins sont entendus, le délibéré a lieu et Boisclair, l'appelant *ès-qualité de tuteur* aux mineurs de feu Maxime Proulx, est condamné à payer à Lalancette, l'intimé, la somme de £1-9-5, étant partie de celle réclamée par l'action de Lalancette.

Les copies authentiques des pièces de la dite Cour des Commissaires, qui sont à l'appendice, établissent clairement les faits ci-dessus.

Le Greffier de la Cour des Commissaires, qui occupe cette charge depuis vingt-neuf ans, dit-il, entendu comme témoin, jure positivement que Boisclair a nié le compte, mais non sa qualité de tuteur, d'ailleurs indéniable, ainsi qu'on le verra plus loin.

L'appelant Boisclair, condamné prend un *certiorari* et, dans son affidavit de circonstance, il allègue deux choses: la première, qu'il avait été mal assigné, à cause d'une erreur dans la copie du bref, défaut que, du reste, il a couvert par sa

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comparution et sa contestation au mérite devant les commissaires. La deuxième allégation de l'affidavit de circonstance, c'est que Boisclair *jure* positivement *qu'il n'est pas le tuteur* des dits mineurs de feu Maxime Proulx, bien qu'il ait été condamné comme tel, par la dite Cour des Commissaires.

Et c'est là le point de la cause.

Devant cette affirmation solennelle de Boisclair et en l'absence de l'acte de tutelle, la Cour Supérieure de Richelieu, *bien qu'avec répugnance*, a dit le savant juge Papineau en rendant son jugement (car il était difficile de comprendre que des commissaires eussent condamné un défendeur comme tuteur en l'absence de toute preuve qu'il fût tuteur, et même malgré la dénégation au contraire), casse le jugement de la Cour des Commissaires avec dépens contre l'intimé Lalancette.

Nous soumettons que le considérant fondamental du jugement de la Cour Supérieure est l'absence de preuve que Boisclair fût tuteur et, surtout, *l'affirmation solennelle de ce dernier, dans son affidavit de circonstance, qu'il n'était pas tel tuteur.*

Or, Boisclair était bien le tuteur des mineurs de feu Maxime Proulx. L'acte de tutelle existait. Il n'a pas été produit devant les commissaires, car, évidemment, Boisclair admit le fait, mais il fait partie du présent dossier, et Boisclair, interrogé comme témoin, reconnaît que *c'est bien lui qui est mentionné au dit acte de tutelle !*

Ainsi, non seulement l'intimé perdait sa réclamation contre les héritiers Proulx, mais encore il était condamné à payer des frais s'élevant à au-delà de $100, par suite du délit commis à son préjudice par l'appelant, *qui avait juré qu'il n'était pas tel tuteur pendant que de fait il l'était.*

Evidemment, Boisclair avait juré faux dans son affidavit de circonstance. L'acte de tutelle, qu'il reconnaît lui-même, l'établit clairement. C'était donc un délit commis par l'appelant au préjudice de l'intimé.

De là, l'action en dommages par l'intimé contre l'appelant *personnellement.*

Les dommages consistent en frais payés par Lalancette, que le tribunal inférieur réduit à $74.77 au lieu des $110 réclamées par l'action, la différence étant pour consultations *extra*, voyages, etc.

The following were the reasons of the judgment appealed from :—

"La Cour, etc. ;

Considérant que pour obtenir un bref de *certiorari* à l'effet de faire casser un jugement rendu contre lui en sa qualité de tuteur aux mineurs Maxime Proulx en faveur de Louis Lalancette, le présent demandeur, par la Cour des Commissaires de la Paroisse de St. Aimé, le sept janvier 1878, le défendeur actuel Basile Boisclair, dans son affidavit de circonstances, donné devant un commissaire de la Cour Supérieure, à Sorel, dans le District de Richelieu, le 1er juin 1878, jura entr'autres choses qu'il n'était pas le tuteur des mineurs Proulx ainsi qu'allégué dans le dit jugement, et que la dite Cour des Commissaires n'était autorisée et n'avait aucune juridiction pour rendre jugement de cette manière.

"Considérant que dans le jugement rendu par la Cour Supérieure pour ce

District, le 14 février 1879, sur le dit bref de *certiorari*, maintenant ce bref, et cassant et annulant le dit jugement de la Cour des Commissaires pour la Paroisse de St. Aimé, il apparaît que le dit serment du défendeur qu'il n'était pas le tuteur des mineurs Proulx, a été le motif déterminant pour faire réussir le défendeur, ce qui est exprimé en ces termes:

"Considérant que le requérant jure dans son affidavit de circonstances, qu'il n'est pas tuteur comme il est mentionné dans le jugement de la dite Cour des Commissaires de la Paroisse de St. Aimé, et que les dits commissaires n'avaient pas jurisdiction pour condamner le requérant comme tel tuteur lorsqu'il ne l'était pas de fait;

"Considérant que de fait le défendeur était tuteur aux enfants mineurs de feu Maxime Proulx, et ce selon acte de tutelle homologué en justice le 15 octobre 1877; qu'il avait accepté la dite tutelle et que c'est même à sa requisition que le conseil de famille le nommant tuteur avait été convoqué, et que par conséquent en jurant comme il l'a fait dans son dit affidavit de circonstances qu'il n'était pas le tuteur des dit mineurs Proulx le dit défendeur a sciemment juré faux;

"Considérant que son dit mensonge et faux serment ne doit pas profiter au défendeur.

"Considérant que le demandeur, par sa présente action, recherche le défendeur en dommages-intérêts pour recouvrer de lui les frais qui lui ont été occasionnés dans les dites instances, et les pertes qu'il a subies en icelles, par suite du dit faux serment du défendeur, sur lequel serment repose surtout le jugement rendu contre le demandeur accordant le dit bref de *certiorari* et condamnant le dit Louis Lalancette aux dépens, et que le dit délit et dol, personnel du défendeur a réellement fait tort au demandeur et lui a causé un dommage que le demandeur a établi s'élever à $62.77, frais payés du procureur du défendeur sur le dit jugement, et $12 frais payés à son propre procureur.

"Considérant que bien qu'aux termes de l'article 505 du Code de Procédure Civile du Bas-Canada, il paraîtrait y avoir eu sur les faits de cette cause, ouverture à la requête civile, au moyen de laquelle le demandeur aurait pu obtenir la rétraction ou rescision du dit jugement obtenu par le dol du défendeur et une réparation contre le dit défendeur en sa qualité de tuteur aux mineurs Proulx, mais non personnellement, ceci n'enlève pas au demandeur son recours en réparation, par la voie de l'action de dommages-intérêts contre le défendeur personnellement, pour le fait de son dol et de son délit;

"Considérant que par la requête civile, le demandeur n'aurait pu atteindre le défendeur qu'en sa qualité de tuteur aux mineurs Proulx, tandis que c'est personnellement qu'il est responsable du tort et dommage causé au demandeur par le délit qu'il a commis en jurant faux, et que d'ailleurs le défendeur n'a pas opposé ce moyen à l'action du demandeur ni par sa plaidoierie écrite, ni par sa plaidoierie à l'audience;

"Et faisant droit à la défense du défendeur.

"Considérant qu'il n'y a pas chose jugée entre les parties, en autant que le défendeur qui n'était en cause qu'en sa qualité de tuteur aux mineurs Proulx

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dans la première instance, est poursuivi personnellement dans celle-ci et que, n'y ayant pas identité dans la qualité du défendeur, il ne peut y avoir chose jugée.

"Considérant qu'admettre avec le défendeur qu'avant de pouvoir le rechercher au civil pour le fait de son crime ou délit, il fallait au préalable obtenir un verdict ou une condamnation d'une Cour ayant juridiction criminelle contre lui, serait admettre la maxime que le criminel tient le civil en état, maxime non universellement admise en France et qui paraît partout inadmissible pour nos modes différents de procédure;

"A rejetté et rejette les dites défenses comme mal fondées, et a condamné et condamne le défendeur à payer au demandeur par forme de dommages-intérêts lui résultant du dit délit du défendeur, la somme de $74.77 avec les dépens."

The appellant submitted the following grounds for reversing the judgment:—

1o. C'est la faute de l'intimé s'il a payé les frais du *certiorari;* c'est par suite d'une contestation qu'il a faite mal à propos, lorsqu'il aurait dû se désister. Il doit s'attribuer à lui seul le tort qu'il en a souffert.

2o. Le jugement sur le *certiorari* n'a pas été rendu pour l'unique raison que l'appelant a juré qu'il n'était pas *tuteur des mineurs Proulx*, tel qu'allégué au jugement de la Cour des Commissaires; il y a plusieurs considérants, d'une nature différente, pour chacun desquels le *certiorari* a été maintenu.

3o. Par son affidavit en loi sur sa demande de *certiorari*, l'appelant n'a pas juré le fait absolu qu'il n'était pas tuteur de certains enfants mineurs, mais a juré le fait que le dossier de la Cour des Commissaires ne constatait pas légalement la qualité sous laquelle il avait été poursuivi, ajoutant que le jugement rendu contre lui de cette manière-là était illégal.

4o. C'est à tort que le jugement dont est appel, affirme que l'intimé a souffert des dommages causés uniquement par le serment faux de l'appelant, puisque dans tous les cas, l'on peut assigner à cela quatre à cinq causes et que l'intimé lui-même y a contribué pour la plus large part.

5o. Une partie ne peut par une action directe portée devant une Cour de justice réclamer les frais d'un procès auxquels elle a été condamnée par une autre Cour de Justice, et qu'elle a payés sur cette condamnation.

6o. Une partie qui se croit lésée par un serment qu'elle prétend faux doit faire constater le parjure par une autorité compétente, et ne peut poursuivre en réparation que sur un verdict de parjure.

The respondent relied upon the grounds invoked by his answers to pleas, which were as follows:—

"Qu'il n'y a pas chose jugée entre les parties sur les faits qui font la base de la présente action ainsi qu'allégué dans la défense, puisque le demandeur se plaint d'un délit clairement établi, révélé après la reddition du jugement relaté en la déclaration et résultant du fait que le défendeur a juré positivement qu'il n'était pas tuteur aux dits mineurs pendant qu'il l'était, lequel délit a été commis par le dit défendeur en pleine connaissance de cause, au préjudice du dit demandeur, et lui a causé et lui cause les dommages dont il demande et a le droit de demander réparation par sa présente action;

"Qu'il n'y a pas chose jugée parce que le nommé Basile Boisclair, poursuivi comme tuteur et requérant *certiorari* ès-qualité, et le défendeur en cette cause, poursuivi personnellement en dommages, sont deux *personnalités* différentes;

"Qu'il n'est pas nécessaire pour la cause du demandeur, qu'un verdict ait été rendu par une autorité compétente tel que prétendu par la défense, afin de rendre le dit défendeur responsable envers le dit demandeur des dommages qu'il a soufferts et qu'il réclame, puisque le délit est apparent et établi par l'acte de tutelle produit, lequel est antérieur à l'affidavit du défendeur, qui a juré *qu'il n'était pas tel tuteur*, et que tel est de fait le motivé fondamental du jugement rendu contre le dit demandeur par suite du délit du dit défendeur, commis au préjudice du dit demandeur;

"Qu'il n'est pas plus besoin d'un verdict pour demander réparation dans le cas actuel que dans tous les cas où des dommages résultent des paroles ou des actes d'une personne, et que l'homme qui est lésé par le délit d'une autre personne a, contre cette dernière personne, le recours civil ou criminel, ou les deux."

DORION, C. J. Cette cause nous offre la singulière anomalie d'un jugement rendu par la Cour des Commissaires, qui est mis de côté par la Cour de Circuit sur un bref de *certiorari*, parce que la preuve n'était pas suffisante, comme si le défaut de preuve devant une Cour de Commissaire, qui n'est pas ce que l'on appelle une Cour de record, et où, par conséquent, les commissaires ne sont pas obligés de prendre des notes de la preuve faite dans les causes plaidées devant eux, pouvait ôter la juridiction des commissaires et donner lieu à un bref de *certiorari*; puis un second jugement de la même Cour de Circuit vient en quelque sorte mettre de côté le jugement rendu sur le *certiorari*, et condamner l'appelant à payer les frais que l'intimé avait été lui-même condamné à lui payer par le premier jugement. Un défaut de preuve ne constitue pas un défaut de juridiction. Il y a une foule de jugements qui sont rendus sans preuve, ou du moins sans une preuve suffisante, et ces jugements ne peuvent être attaqués par voie de *certiorari*, le *certiorari* n'étant que pour faire examiner si la Cour Inférieure avait droit de prendre connaissance de la cause soumise à sa juridiction. Or les commissaires avaient le droit de prendre connaissance d'une demande de £1-9-9, courant, et de condamner l'appelant à payer cette somme et les dépens encourus. Ce jugement sur le *certiorari* est donc un mauvais jugement, mais il n'y avait point d'appel de ce jugement qui était devenu chose jugée entre les parties, et l'intimé ne pouvait, par un moyen détourné et sous le prétexte que l'appelant avait juré faux dans la première cause et lors de sa demande de *certiorari*, répéter les frais qu'il avait été condamné à payer. C'était là remettre en question la décision rendu sur le *certiorari* par la Cour de Circuit. (Aubry et Rau, t. 8, p. 364, Demolombe, t. 30, Nos. 717 et 718.)

L'intimé a invoqué le principe que quiconque cause du dommage à un autre par son délit est tenu de le réparer. (C. C. 1053). Il a cité en outre une cause de Kellond et Reed (18 L. C. J., 309), dans laquelle il a été jugé que l'on pouvait se pourvoir par action pour faire mettre de côté un jugement rendu contre une partie qui n'avait pas été assignée. Cette décision ne s'applique aucunement à

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la présente cause. Il ne s'agit pas de faire mettre de côté un jugement nul, mais de faire mettre de côté un jugement rendu contradictoirement et qui est sans appel. Ce jugement, non susceptible d'appel, aurait tout au plus pu être attaqué par la voie de la requête civile dans les cas prévus par l'article 505 C. P. C. Ce procédé n'a pas été adopté et dans les circonstances n'aurait pas pu l'être.

Ainsi la Cour, se fondant sur le fait que le jugement de la Cour de Circuit, qui avait annulé le jugement de la Cour des Commissaires, avait acquis force de chose jugée, et que la même Cour de Circuit ne pouvait détruire l'effet de ce jugement par une voie indirecte en condamnant l'appelant à payer à l'intimé des dommages au montant des frais qu'il avait été lui-même condamné à payer à l'appelant sur le *certiorari*, est d'opinion que le second jugement rendu par la Cour Inférieure doit être infirmé.

RAMSAY, J. This is a peculiar action. The appellant sued in the Commissioners' Court as tutor to the minors "Maxime Proulx," and condemned in this quality, sued out a writ of *certiorari*, and in the affidavit of circumstances he declared: "qu'il n'était pas le tuteur des mineurs Proulx ainsi qu'allégué dans le dit jugement, et que la dite Cour des Commissaires n'était autorisée et n'avait aucune juridiction pour rendre jugement de cette manière." The judge in the Superior Court, it would seem, set aside the judgment of the Commissioners' Court owing to this allegation of the affidavit of circumstances. The plaintiff before the Commissioners' Court, now respondent, sued appellant in damages for this false statement, as he calls it, and proved as the measure of damages what he had lost by the setting aside of the judgment in the Commissioners' Court. The question now arises whether such an action will lie. Had it not been for the decision in the case of *Gugy & Brown*, I should have had no hesitation in saying that there could be no suit on a suit, except to set aside judgments in specified cases, and this on the general principle that otherwise a legal difficulty might be made perpetual. In that case the parties, who had neighboring properties near Quebec, had been in litigation for many years. At last all causes of quarrel seemed to be about exhausted, when one of them sued the other for having sued him so often, in suits in which he had been unsuccessful, and without probable cause. The Court of Appeals held that such an action would lie. This decision seems to me to be open to the objection I have just mentioned; but it would not warrant, even if sustainable in principle, what is sought in this case. If such an action as the present could be maintained it would be a mode of evading the rule of *res judicata*. It is therefore open to the general objection to the decision in *Gugy & Brown*, with this one added.

But it is contended that Boisclair was not a party to the proceedings on the *certiorari* in the same quality as he is sued in this action, and that identity of quality is requisite to make good the defence of *res judicata*. I think this answer to the objection is put forward without due reflection. It is perfectly true that there is no *res judicata* where A as heir of C has sued B to recover a certain thing, and again sues him as heir of D., for a man may have two titles to a thing. In the first suit against B the title adjudicated upon is the

succession of C, in the second suit it is the succession of D. The question then is different. But to hold the plaintiff *ès-qualité* liable personally for his conduct in a suit would be virtually to try the issue over again. It is even much to be doubted whether a civil action will lie against a witness who has sworn falsely to a material fact, for his evidence was there to be contradicted.

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The decision of the matter before us has nothing to do with the question of the concurrent proceedings, civil and criminal. There never was any doubt that as a general rule the criminal prosecution did not prevent the civil remedy, and I fancy it is quite as clear that the civil suit would be no bar to a prosecution.

The judgment in appeal is as follows :—

" La Cour, etc.

" Considérant qu'il n'appert pas par la preuve faite en cette cause que l'affidavit donné par l'appelant au soutien de [illegible] pour *certiorari* à l'effet de faire annuler le jugement rendu par [illegible] Commissaires de St. Aimé, du 7 janvier 1878, ait été la seule [illegible] pour laquelle le jugement aurait été annulé et mis de côté par la Cour Supérieure le [illegible] février 1879 ;

" Considérant, en outre, que l'intimé [illegible] au moyen d'une action en dommages, et en produisant de nouvelles preuves, renouveler une contestation sur une question définitivement jugée entre les parties par le jugement rendu en dernier ressort par la Cour Supérieure ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour de Circuit pour le district de Richelieu siégeant à Sorel, le 25 octobre 1879 ;

" Cette cour casse et annule le dit jugement du 25 octobre 1879, et prononçant le jugement que la dite Cour aurait dû rendre, déboute l'action de l'intimé, et condamne l'intimé à payer à l'appelant les frais encourus, tant en cour de première instance, que sur le présent appel."

A. Germain, for appellant. Judgment reversed.
Geoffrion, counsel.
G. I. Barthe and *Longpré & David*, for respondent.
(J. K.)

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MONTREAL, 30TH NOVEMBER, 1880.

Coram RAINVILLE, J., PAPINEAU, J., LAFRAMBOISE, J.

No. 854.

Dupuy es qual. vs. *McClanaghan.*

HELD :—1. Where a tenant in good faith had paid ten months' rent in advance, and his landlord became an insolvent under the Insolvent Act of 1875 before the expiration of the term so paid in advance, and the tenant remained in occupation of the premises, that the payment was valid, and might be invoked by the tenant when sued in the name of the assignee, for rent from the date of the assignment.

2. Hypothecary creditors have no privilege on the rent of the property subject to their hypothec, received by the assignee of the mortgagor or *détenteur*, for the period between the date of the assignment and the sale of the property.

The judgment inscribed in review was rendered by the Superior Court,

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Montreal (JETTÉ, J.), 30th June, 1880. See 24 L. C. Jurist, pp. 243-247, where a full report will be found.

Doherty & Doherty, for the defendant inscribing in Review:—

Defendant inscribes in review from the judgment of the Hon. Mr. Justice Jetté in this cause rendered, on the 30th day of June last. This judgment condemns defendant to pay plaintiff in his quality of assignee to the estate of one Noel Jubinville the sum of $135.

By his declaration plaintiff alleges the execution by the aforesaid Jubinville, on the 19th of February, 1876, of three certain deeds of obligation and mortgage in favor of James Clyde, Duncan Thomas Mackinnon and wife, and Miss Elizabeth Hutton respectively, for sums amounting in the aggregate to £2,450 sterling, by which deeds said Jubinville hypothecated in favor of the creditors above-named the lot of land, official No. 877, St. Antoine ward of the city of Montreal, as security for the repayment of the sum above-mentioned; the intervening in said deeds of the Canada Investment and Agency Company as warrantors of said Jubinville, the registration of said deeds, and the failure of Jubinville to make payment of principal or interest under said deeds for a certain period.

The declaration then goes on to allege that while said Jubinville was in the possession of the property so hypothecated he leased a building erected on a portion thereof to defendant, at a rental of $27 per month, which is alleged to be the value of the use and occupation of the premises so leased; that Jubinville afterwards became insolvent, and that a writ of attachment issued against him addressed to plaintiff, on the 10th of August, 1878, which said writ was duly executed, and plaintiff subsequently duly appointed assignee to the estate, becoming, in consequence, vested with the estate and effects of said Jubinville; that thereupon the mortgagees above-named duly filed their claims for the sums due them respectively, and that there was then due them for interest the sum of $608.94; that the property hypothecated was afterwards, to wit, on the 17th January, 1879, brought to sale, and purchased by the Canada Investment and Agency Company for $11,100, which proceeds of the sale of said property were, it is alleged, insufficient to pay the claims of the mortgagees above-mentioned, the deficiency being stated to be at least $3,000; that defendant used and occupied during the five months that said property was vested in plaintiff in his said quality the premises above referred to as having been leased to him, which use and occupation was worth $27, or, for the five months immediately preceding the 31st of January, 1879, the sum of $135; that the mortgagees above-mentioned called upon plaintiff to take action for the recovery of said amount, and that he having refused, they have been authorized by a judge of the Superior Court to take such action in his name; that the use and occupation of said leased premises had by defendant was well worth the sum of $135 for said five months, and that said sum was due and owing by defendant to plaintiff, who was entitled in his capacity of assignee to said estate to have and receive the same. Plaintiff concluded in consequence.

Defendant meets the action denying all the allegations of the declaration

save such as are expressly admitted, and alleging that he leased the premises in question from Jubinville above-mentioned by authentic lease passed before Decary, N.P., on the seventh June, 1878; and that under and in accordance with the terms of said lease he paid said Jubinville the rent for the first ten months of the term thereof, to wit, from the first of July, 1878, to the first of May, 1879, in advance, which payment is acknowledged in and by said lease, authentic copy of which is produced with the plea, and that in said ten months are included the five months for which plaintiff, in his quality, is seeking to have him condemned to pay, and that plaintiff as assignee to said Jubinville was unfounded in demanding from defendant payment of said sum a second time.

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To this plea plaintiff filed two answers, the first alleging that the effect of the lease above refered to was merely a covenant to allow defendant to use the premises leased, in which respect plaintiff had complied with the requirements thereof; but the ownership of said property became vested in plaintiff by virtue of his appointment, and as an accessory of such ownership, the right to enjoy the said property and the revenues thereof for the benefit of the estate, of which right plaintiff alleged he could not be deprived by the payment alleged by defendant, which was made, he alleges, at defendant's sole risk and peril, and subject to the condition of said Jubinville's continuing to be the owner of said property and having the right to allow the defendant to use the same, and said payment was of no effect as regards plaintiff in his quality and the creditors of Jubinville, and could not affect plaintiff's right to recover the rent for the period said premises were occupied subsequent to Jubinville's insolvency. The second answer denies generally the allegations of the plea, and specially the payment of said rent.

In his replies defendant re-asserts the truth of the allegations of his plea, specially alleging the payment of said rent in perfect good faith and in accordance with the terms of his lease, and the registration of an extract from said lease acknowledging said payment, as shown by certificate of such registration annexed to the copy of lease produced with the plea.

Plaintiff filed an answer, and the case was inscribed for proof and hearing, and heard on the 3rd December last, and judgment rendered on the 30th June last. The only evidence taken was that of defendant, who admitted the fact of his having used and occupied the premises during the five months in question under his lease, and having agreed to pay $27 per month therefor to Jubinville. The only other proof is documentary.

On reading the judgment *à quo* the first question that suggests itself to the reader is, who is the plaintiff in this cause? Is it Louis Dupuy as assignee to the estate of Noel Jubinville, or is it possibly Mr. James Clyde, Mr. Duncan McKinnon and Sarah McKinnon, and Miss Elizabeth Hutton, hypothecary creditors of Jubinville? Reading the *considérants* of the judgment, one would fancy the latter were the plaintiffs—the judgment apparently condemning defendant, not by reason of anything which the plaintiff as assignee can claim to have, but by reason of the rights of the parties above named as hypothecary creditors.

The questions to be examined in the case may be said to be three, namely:—

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1st. What are the rights of the assignee, as assignee, under the circumstances of the case as above stated? 2nd. The action being in the assignee's name, and to all intents and purposes the action of the assignee, does the fact of the same being taken in his name by the hypothecary creditors above named, entitle such creditors to enforce, by means of such action, any other or greater rights than those belonging to the assignee as assignee? 3rd. Supposing the answer to the preceding question to be affirmative, what are the rights of such hypothecary creditors under the circumstances?

To the first question, the answer, defendant respectfully submits, must be, the rights of the assignee in this case consist of exactly all the rights which the insolvent himself, had he never become insolvent, and had no writ issued against him, could have exercised in the premises—neither more nor less. The assignee's rights are derived entirely and solely from the provisions of section 16 of the Insolvent Act of 1875. By his action he tells us he became vested with all the assets of the insolvent, and in consequence became proprietor of the premises in question in this cause. This allegation rests on the section above referred to, and, subject to the limitations in that section contained, defendant has no hesitation in admitting it. Let us see what the section tells us the assignee becomes vested with. It reads: Whenever an insolvent shall have made an assignment, or a writ or writs shall have been issued, such assignment or such writ or writs of attachment, as the case may be, shall vest in the official assignee of the county or district wherein the same shall have issued all right, power, title and interest which the insolvent has in and to any real or personal property, including his books of account, all vouchers, etc., etc., and generally all assets of any kind or description whatsoever which he *may be possessed of or entitled to* up to the time of his obtaining a discharge from his liabilities, *under the same charges and obligations as he was liable to with regard to the same.*

The assignee by his action tells us he is entitled to be paid for the use and occupation of the premises in question for the five months from August, 1878, to January, 1879. The Act tells us the assignee is entitled to exercise all the rights which the insolvent was entitled to exercise, and no more. Was the insolvent entitled to be paid for said use and occupation a second time? He had been paid for it once. The assignee tells us by his action that by virtue of the writ of attachment and his appointment he became proprietor of the property in question, and as such entitled to be paid for the use and occupation thereof. The Act tells us the assignee became vested with all the property and rights which *the insolvent was possessed of or entitled to under the same charges and obligations as he was liable to with regard to the same.* Was the insolvent proprietor, and as such entitled to be paid for the use and occupation of the premises in question? Assuredly not. He was proprietor, and because he was proprietor the assignee became proprietor, but he was a proprietor who had no right to be paid for the use of his property, inasmuch as he had already been paid, and because he was proprietor without that right, so the assignee became proprietor without that right. He was proprietor subject to the obligation of

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giving the use of his premises for the next five months, the assignee became proprietor subject to the same obligation. In short, the writ of attachment and appointment could not vest in the assignee what the insolvent had not. The insolvent when he became insolvent had no right to be paid for the use of the premises in question for the period in question,—his right had been extinguished; it follows of course necessarily that the assignee acquired no such right.

Upon this point defendant would also refer to Civil Code, Articles 1663, 2128 and 2129. Under these articles it is evident that any person acquiring the property from the insolvent by purchase, or other particular title, would be bound by the lease and payment in question in this cause, even though such purchaser should have bought without any knowledge thereof, and the lessee should have taken no pains to make him so aware by registration. If this be so with regard to a third person acquiring from the lessor by particular title, can we suppose for a moment that the universal successor of such lessor, he whom the law has placed in possession of the universality of his assets, specially subjecting him at the same time to all his liabilities, to wit, the assignee to his estate, is to be put in a more favorable position? If such lease and such payment would be binding on the person acquiring from the lessor by particular and onerous title, surely *a fortiori* it must be binding on his universal successor, his legal representative, as is the assignee, plaintiff in this cause.

Again, if the assignee be not bound by the payment in question, then it must be because the contract of lease in question was a nullity. But of this he makes no pretension; on the contrary, in his pleadings he specially admits its binding effect upon him, as obliging him to give defendant possession of the premises in question. He does not pray to have it set aside or declared null. He allows the same to stand, alleges he has complied with its requirements (see answer to plea), and if it stand at all, defendant respectfully submits it must stand in its entirety, and he must have the benefit of the payment thereby acknowledged. If he be not allowed that benefit, if the assignee, as having become proprietor, has become entitled to be paid the rental over again, then defendant submits that such assignee as assignee to the estate of said Jubinville, and as his universal successor and legal representative, is bound to warrant defendant in his possession under said lease, and against his being obliged to pay a second rent therefor. If on the one hand he be the creditor of defendant for this amount, on the other he is his warrantor against its being claimed.

But the judgment *à quo* would seem not to have condemned us by reason of any rights which the plaintiff as assignee might claim to exercise; its *considérants* appear to be based upon the rights of the three mortgage creditors of Jubinville above named. This brings us to the consideration of the question whether these mortgage creditors, having been authorized to bring an action in the assignee's name to enforce a right which they claim to belong to the assignee as assignee, but which he declines to exercise, can in the prosecution of that action, in which the assignee is the plaintiff, enforce any rights other and greater than those belonging to the assignee as such, and which they may claim to have in their capacity of mortgage creditors? For the answer to this question we

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must look to the section of the Insolvent Act under which actions such as the present are authorized to be brought. It is section 68 of the Insolvent Act of 1875. It need not be repeated here at length; the Court is perfectly familiar with it. Its provisions, and the authorization granted in virtue of such provision, cannot, defendant respectfully submits, alter the position of the defendant in any action taken under that section. In so far as the latter is concerned the assignee is the plaintiff, it is with him that the defendant has to deal. It is the claims and rights or pretended rights of the assignee as such that the defendant has to resist, and whether such assignee be enforcing those rights of his own motion and for the benefit of the estate generally, or at the request and risk and for the benefit of certain creditors only, can make no difference to the defendant.

In this case the mortgage creditors of the insolvent are seeking to enforce for their own benefit in the name of the assignee the rights of the assignee as assignee to be paid the rent sued for in this cause. If the assignee as such have the right (and defendant submits that he has clearly shown that he has not), then defendant may be condemned. But if the assignee have not that right, then defendant submits that he cannot be condemned by reason of any rights which the mortgage creditors as mortgage creditors may claim to have against him. If Messrs. Clyde & McKinnon and Miss Hutton have any rights peculiar to themselves as hypothecary creditors of Jubinville to exercise against this defendant, let them do so by an action taken by them as such. So long as they content themselves with endeavoring to enforce the rights of the assignee, let defendant not be condemned by reason of any other rights than those of the assignee. Defendant then respectfully submits that from the judgment *à quo* should be struck out all those *considérants* which are based upon the alleged rights of the mortgage creditors as such. If they be struck out, the Court will find that all the grounds upon which the Court below appears to have based itself to condemn defendant are gone.

We have been sued by the assignee because he alleged the assignee had a right to be paid the sum claimed; we have been condemned to pay the assignee, not because he has a right to have the sum claimed, but because certain other persons are adjudged to be entitled to it. This, defendant respectfully submits, is the result of the pleadings on both sides and the judgment in this cause. It is true that these persons are those who would in any event derive the benefit of the action, if benefit there should be, but that is the result not of any rights of their own, but because they had at their own risk enforced the rights of another.

Defendant then submits that he has made good the two propositions, firstly, that the assignee, as such, has no right to have the sum claimed by this action, and secondly, that the fact that Messrs. Clyde & MacKinnon and Miss Hutton have been authorized to enforce his rights, does not make those rights any greater. This being established should be sufficient to justify defendant in asking the dismissal of the action.

However, let us go a step further. Let us suppose that defendant has to deal with the mortgage creditors as plaintiffs in this cause, a position which

plaintiff himself by his pleadings did not seem to take, but which seems to have been adopted by the Court below in the *considérants* of its judgment. Have they as such the right to demand from him payment of his rent a second time? The judgment of the Court below says they have, inasmuch as no contract made by the insolvent subsequent to the execution and registration of the mortgage given said mortgagees can in any manner prejudice their rights as such. This brings us to the question of what are the rights of hypothecary creditors as such. Defendant submits that this right is limited to the right to be paid by privilege out of the *proceeds of the sale* of the property affected by their hypothec, and not out of the revenues of the property previous to its sale. This results from the definition of a hypothec as given by our Code, Art. 2016, as likewise from the definition of a hypothec given by Pothier, Traité de l'Hypothèque, article préliminaire, and by the authors generally. In fact plaintiff himself in his declaration tells us this was the effect of the hypothecs in question in this cause. In effect, to realize this, we have only to glance at the means which our common law gives the hypothecary creditor of enforcing payment of his claim. He may seize the property of his debtor and bring it to sale, but up to the moment of adjudication the possession of the property and the right to receive the revenues remain vested in the debtor. (C. C. P. art. 645.) If we leave aside, then, for the moment, the fact of the insolvency of Jubinville, and consider what rights the mortgagees in question would have had to exercise as mortgagees without the intervention of the assignee, we see at once that those rights have been in no manner affected, and their position in no manner altered, by means of the payment in advance made by defendant. They would have been entitled to seize the property in question and bring it to sale, through the intervention of the sheriff, a proceeding which would take fully as long a period of time as that which elapsed between the issue of the writ of attachment and the sale by the assignee in this matter. Up to the time that the latter official would bring the property to sale Jubinville would have remained in possession, and would have received the rents thereof, and whether the same were paid at the expiry of each month, or in a lump sum five months in advance, could not make any difference to the hypothecary creditors.

In this respect defendant submits there is an essential difference between our law and the French law, as it was, and he believes still is. In France, it is true, the hypothecary creditors rank by privilege upon the revenues of the property from the time of seizure until sale, which are supposed to have become immoveables from the moment of the seizure. But there the whole system is different from ours: when the property is seized, a *commissaire* is appointed, charged with making new leases of the property, not leaving the tenants in possession under their old leases, and enforcing conditions upon them opposed to the stipulations of such former leases; and then, under these new leases, receiving the revenues and rents of the property, which are added to the price of sale previous to distribution. Here we have nothing of the kind. Except in the case of oppositions, and the appointment of a sequestrator upon special application to the court, the property seized remains in possession of the debtor,

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and the revenues are drawn by him up to the time of sale. It is clear, then, that the rights of the particular hypothecary creditors in this cause, such as they would have been entitled to exercise under our Common Law, have not been in any manner affected by the fact of defendant's having paid his rent in advance. In any case that rent, whether paid in advance or paid at the end of each month, would not have come to them in the exercise of their rights as hypothecary creditors.

It can hardly be said that the effect of the Insolvent Act has been to increase the rights of hypothecary creditors. Nothing either in the letter or the spirit of the Act indicates any intent or desire so to do. On the contrary, the whole tendency of the Act is to keep within strict limits the rights of all privileged and hypothecary creditors, giving them their rights under the common law, and nothing more, and realizing as much as possible for the ordinary creditors.

Again, we are told that defendant in making the payment in question to Jubinville did so at his own risk and peril; that the latter would be able to maintain him as against [illegible] that, knowing of the existence of hypothecary claims registered [illegible] creditors could not oppose that payment to the holders of those claims. Admitting, for argument sake, that such payment was so made at his own peril, defendant made it, knowing that Jubinville would, under the common law, be entitled to the possession, and consequently to give him possession of the property in question, as against such hypothecary creditors, until the adjudication of the property. And it is about the rent up to that adjudication only that the whole discussion in this cause is; for though plaintiff claims rent for fourteen days after such adjudication, to wit, from the seventeenth of January, 1878, to the thirty-first, he evidently cannot have that, for on the former date all his own rights to said property, or the use thereof, terminated by the adjudication he then made thereof.

On the whole, then, defendant submits respectfully that even were the hypothecary creditors the plaintiffs in this cause, and exercising their own rights as such, they would not be entitled to have the condemnation against him which the assignee seeks in the present cause; that their rights as hypothecary creditors have been unaffected by the payment made by him in advance; that, had it not been so made in advance, it should have gone to the assignee as assignee for the mass of the creditors, and not to them as *hypothecary creditors* in any event; and further, as hereinabove fully explained, that whatever their rights may be as hypothecary creditors, that is not the question before the court; that the plaintiff in this cause is the assignee as assignee; that under the circumstances he, as such assignee, is not entitled to be paid the amount claimed, and that, in consequence, the judgment now inscribed for Review should be reversed with costs, of which costs the undersigned pray distraction.

Before closing defendant begs to draw the attention of the Co[illegible] the fact that by the deed of sale of the property in question from plaintiff [illegible] Canada Investment Co., copy of which is produced by plaintiff, it [illegible] that two of the mortgage creditors [illegible] ned if the declaration ha[illegible]ld, or the purchaser has agreed to p[illegible] them, in full, and would mentio[illegible] fact that an

authorization to said mortgage creditors to take action against this defendant is not produced, the parties mentioned in the authorization produced not including defendant.

Abbott, Tait, Wotherspoon & Abbott, for plaintiff:—

The question involved in this cause is as to the validity of a payment of rent made in advance by a tenant to the proprietor of certain immoveable property, such proprietor having some time previous to such payment hypothecated the same property to certain other parties as security for a loan made by them to him, and having become insolvent shortly after such payment.

The pretension of the hypothecary creditor is that such payment was illegal, and the object of this action was to recover the amount so paid; and, although brought in the name of the assignee of the Estate of Noel Jubinville, was really brought in the interests and on the behalf of these hypothecary creditors, whose names are James Clyde, of Edinburgh, in Scotland, Doctor of Medicine, Duncan Thomas McKinnon and his wife, of London, in England, and Miss Elizabeth Hutton, of Edinburgh, spinster, and who obtained leave under provisions of the Insolvent Act to bring the action in the name of the assignee, but at their own risk and for their own benefit.

The declaration sets forth that on the 19th of February, 1876, by three deeds of obligation and mortgage of even date, and ranking concurrently, the insolvent, Noel Jubinville, acknowledged himself indebted to Dr. Clyde in £1150, to Mr. and Mrs. McKinnon in £1000, and Miss Hutton in £300, all sterling sums which the insolvent promised to pay these parties respectively, with interest, as set forth in said deeds; and as security for such payment mortgaged in their favor, with concurrent ranking, Lot No. 877 of St. Antoine Ward, Montreal; and that these obligations were forthwith duly registered, and thereby these parties obtained a first hypothec and mortgage upon the property and a special privilege upon the proceeds of any sale made thereof.

That the Canada Investment and Agency Company (limited), a corporate body, became a party to these deeds, and became sureties of the insolvent towards these hypothecary creditors for the payment of the mortgage.

That the insolvent made default to pay the interest and also the principal sums due under the mortgages.

That while the property was in the hands of the insolvent as proprietor he leased a part thereof, to wit, certain premises, being numbers 87 and 89 St. Joseph street, to the defendant, the rental of which was twenty-seven dollars per month, and which was the true value of the use and occupation thereof.

That Jubinville became insolvent on the 10th August, 1878, and his estate was placed in liquidation under the Insolvent Act; that the present plaintiff was duly appointed assignee; that the above-mentioned hypothecary creditors duly proved and filed their claims on the estate, and that there was due to them $608.94 interest, in addition to the capital sums.

That on the 17th January, 1879, the property was brought to sale by the assignee under the provisions of the Act, and the Canada Investment and Agency Company became the purchasers, at a sum of eleven thousand dollars,

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and that the proceeds of the sale were insufficient to pay the amount of the claim of the said hypothecary creditors; that such deficiency will amount to at least $3,000.

That during the period in which the said assignee was vested with the property, to wit, for the period of five months from the 30th of August, 1878, up to the 31st of January, 1879, the defendant used and occupied the leased premises as lessee, but during said period failed to pay the assignee the sum of $27 per month for the value of the use and occupation thereof.

That the assignee had been required by the said hypothecary creditors to institute proceedings to recover from the defendant for the benefit of the estate the said amount so due by defendant, but refused to do so; and that said creditors, were by order of the Judge, authorized to take the said proceedings in the name of the assignee for their own benefit and at their own risk and expense.

That the use and occupation of the premises so leased to the defendant during the five months were worth fully $27 per month, which sum defendant had been frequently requested to pay to the plaintiff in his said capacity, but he failed to do so. The plaintiff, therefore, in his capacity, concluded that the defendant may be adjudged to pay the said sum of $135, being five months' rent at said sum of $27 per month, and interest and costs of suit, including all exhibits.

With the return of the action the plaintiff filed authentic copies of the three mortgages in question, of the writ of attachment against the insolvent Jubinville, certificate of appointment of plaintiff as assignee, and an authentic copy of the deed of sale from Dupuy as such assignee to the Canada Investment and Agency Company.

The defendant pleaded that on the 27th day of June, 1878, Jubinville leased to him by authentic lease, for a period of two years and ten months from the 1st of July then next, the premises for which the plaintiff claims rent, and that at the same time the defendant paid in advance to the insolvent, Noel Jubinville, the sum of $271, being the rent for the same for the first ten months of the said lease up to the first of May, 1879, which includes the period for which rent is claimed by the present action, and the defendant therefore concludes that the action should be dismissed.

With this plea the defendant filed an authentic copy of the lease from Jubinville to defendant which contains this clause: "The present lease is thus made "for and in consideration of the sum of $271 for the first ten months of the "present lease, which said sum has been paid in cash at the execution hereof, "whereof quit for so much."

Upon this lease there is a certificate that it was registered on the 25th July, 1878. This, it is to be observed, was within thirty days of the issue of the writ of attachment in insolvency against Jubinville.

The plaintiff filed a special answer to this first plea in which he alleged that the effect of the lease in said plea referred to, so far as said insolvent was concerned, was merely a covenant to allow the defendant to use and occupy the premises in question, in which respect the said assignee has carried out the con-

tract; that the ownership of the property became vested in the plaintiff in his said capacity on his appointment as assignee, and as an accessory of such ownership the right to enjoy the property and the revenues thereof for the benefit of the creditors of the estate, of which right the plaintiff could not be and was not deprived by the alleged payment by defendant of rent in advance, which payment, if even it was made, which plaintiff denies, was made at defendant's sole risk and subject to Jubinville continuing to be owner of the property and having the right to allow defendant to use the same, and said alleged payment in advance became of no force and effect as regards the said plaintiff and the creditors of said estate, and cannot affect the right of plaintiff to recover said rent for the period during which they were occupied by defendant after said insolvency.

By a second answer, the plaintiffs denied that the rent was ever paid in advance.

The defendant filed a special replication to the first answer, to the effect that the payment in advance was made in good faith and in fulfilment of one of the conditions of the lease, which lease was duly registered.

And a further replication, stating that it was true that he made the payment in advance as alleged in his plea and as alleged in the deed of lease.

The only evidence adduced in the case was the examination of the defendant, McClanaghan, who proves the value of the premises in question to be $27 per month.

Judgment was rendered on the 30th of June, 1880, by Judge Jetté maintaining the action of the plaintiff.

The plaintiff submits that this judgment is well founded and should be maintained for the following among other reasons:

1st. Because the effect of the lease, so far as the said insolvent was concerned, was merely a covenant to allow the defendant to use and occupy the premises in question, in which respect the said assignee has carried out the said contract, but the ownership of said property became vested in said plaintiff in his said quality on his appointment as assignee to the estate of said Noel Jubinville, and as an accessory of such ownership the right to enjoy the said property and the revenues thereof for the benefit of the creditors.

2nd. Because the plaintiff could not be deprived of such right by the lease of the property by the insolvent on the eve of his insolvency, and the alienation of the revenues thereof from him, the plaintiff, by a payment of rent made in advance under such circumstances.

3rd. Because the payment of rent by the defendant was made at his own risk, and plaintiff should not be deprived of the same while defendant occupied the premises after insolvency.

4th. Because the hypothecary creditor has a preferential right upon the immovable hypothecated to him to be paid his debt, which cannot be affected by any subsequent agreement by his debtor.

5th. Because the [illegible] of an immovable with payment of rent in advance would, if such payments could be opposed to an hypothecary creditor, have the effect of diminishing the security of the latter without his consent.

6th. Because the lessee who pays the rent of an immovable in advance obtains

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only a chirographic claim upon the immovable as security that he will have the enjoyment of it for the period for which he has paid in advance unless he stipulates for an hypothec, and even in the latter case he only obtains an hypothec of inferior [illegible] already registered.

7th. Because the [illegible] the hypothecary creditors in question in this case date from the [illegible] February, 1876.

8th. Because defendant's lease was only registered on the twenty-fifth of July, 1878, within thirty days of the issue of the writ, and such registration conferred no privilege, right on the immovable, and that the fact of possession without paying rent would constitute a privilege to the [illegible] of the hypothecary creditors of the insolvent.

9th. Because Article 2129 Civil Code only applies to third persons who are purchasers and not hypothecary creditors.

10th. Because the payment by anticipation of ten months' rent by the defendant to insolvent cannot prejudice the right of the hypothecary creditors, whose rights were duly registered upon the immovable in question.

For these and other reasons the plaintiff contends that the judgment of the Court below should be confirmed.

The Court of Review unanimously reversed the decision complained of, the judgment of the Court being as follows:—

"La Cour, etc.

"Considérant que le loyer réclamé par le demandeur pour le bénéfice des dits créanciers appartenait aux créanciers chirographaires et à la masse de la faillite;

"Considérant que le failli avait le droit de se faire payer le dit loyer d'avance au moins jusqu'à la date de la vente de l'immeuble par le syndic, et que tel paiement fait les créanciers du dit failli, à moins qu'il n'y eût fraude;

"Considérant que les créanciers hypothécaires n'ont aucun privilége sur les loyers perçus par le syndic jusqu'à la vente;

"Considérant qu'il y a erreur dans le dit jugement du 30 juin 1880, infirme et annule le dit jugement, et procédant à rendre celui qu'aurait dû rendre la dite Cour en première instance, maintient l'exception du défendeur, et déboute le demandeur ès-qualité de son action, avec dépens," etc.

Judgment of S. C. reversed.*

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

Doherty & Doherty, for the defendant.

(J. K.)

* No appeal was taken from the judgment in Review.

SUPERIOR COURT, 1883.

MONTREAL, 16TH FEBRUARY, 1883.

Coram RAINVILLE, J.

No. 2136.

McDonell et al. vs. *Buntin.*

HELD:—That it is not competent to hypothecary creditors, who have not been collocated in a report of distribution duly homologated, of the monies arising from a sheriff's sale of the real property hypothecated in their favor, to sue to recover from a party alleged to have been illegally collocated in such report, on the ground that, according to the Registrar's certificate attached to the sheriff's return, such party ought not to have been so collocated, and that plaintiffs should have been collocated for the amount of their demand preferentially to him.

The legal question raised by the pleadings, and the facts which gave rise thereto, are fully explained in the judgment of the Court, which was worded as follows:

"La Cour * * * Attendu que les demanderesses allèguent qu'elles avaient une hypothèque sur une partie d'une propriété connue et désignée comme étant le No. 642 des plan et livre de renvoi officiels du quartier Saint Antoine de la cité de Montréal, que le dit lot No. 642, était possédé par Joseph Dier, qui l'avait acquis des auteurs des demanderesses en différents temps, et lequel lot comprenait des lopins de terre désignés comme lots Nos. 7, 8, 9, et 10; que le dit lot No. 642 aurait été vendu par le shérif de ce district, et que sur le produit de la vente le défendeur Buntin aurait été colloqué par le rapport de distribution pour une somme de $2312.80, et pour $18.60, frais d'opposition, la dite collocation étant basée sur une obligation consentie au dit Buntin par le dit Dier, le 18 mai 1869, laquelle somme lui aurait été payée; que les demanderesses auraient fait renouveler leur hypothèque sur le dit lot No. 642 suivant la loi, et que cependant elles n'auraient pas été colloquées; que par son obligation le dit Buntin n'aurait eu hypothèque que sur le lot No. 10 et non sur les lots Nos. 7, 8 et 9, et que d'ailleurs il n'a jamais renouvelé son hypothèque, laquelle n'apparaissait pas au certificat du régistrateur, et qu'il n'aurait pas dû être colloqué au préjudice des demanderesses dont l'hypothèque apparaissait au dit certificat; que la collocation du dit Buntin a été contestée et homologuée par jugement de la Cour Supérieure, rendu le 17 de mai 1881;

Attendu que les demanderesses concluent à ce que le dit lot No. 642 soit déclaré avoir été à l'époque de la dite vente par le shérif, hypothéqué en faveur des demanderesses au paiement d'une somme de $330 avec intérêt comme balance du prix de vente; et à ce qu'il soit déclaré que le dit défendeur Buntin a été illégalement colloqué de tel montant, et à ce qu'il soit condamné à en rembourser les demanderesses;

Attendu que le défendeur Buntin a plaidé par une défense en droit, alléguant que le jugement homologuant le dit rapport de distribution ne pouvait être attaqué et révoqué que par un jugement de la Cour d'Appel, ou par voie de requête civile, pour des raisons donnant lieu à la requête civile, ce qui n'a pas été fait, et que même dans le cas où le jugement serait révoqué, le défendeur Buntin ne pourrait être condamné qu'à remettre au shérif tel montant que la Cour jugerait à propos;

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Considérant qu'en vertu de l'article 761 du Code de Procédure Civile, les dites demanderesses ne pouvaient se pourvoir contre le dit jugement que par opposition, dans les quinze jours, ou par appel, ou par requête civile ; qu'elles n'ont pas produit telle opposition ni interjeté appel, et que leur présente demande n'allègue aucune des raisons donnant lieu à la requête civile ;

Considérant que la défense en droit du dit défendeur Buntin est bien fondée, la maintient, et déboute les demanderesses de leur action quant au dit Buntin, avec dépens distraits à Messieurs Bethune et Bethune, avocats du défendeur Buntin."

Action dismissed.

J. Cahler, for plaintiffs.
Bethune & Bethune, for defendant.
(S. B.)

COURT OF REVIEW, 1882.

MONTREAL, 31st MARCH, 1882.

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

No. 1170.

Pérodeau vs. *Quintal*, and *Parent*, creditor collocated, and *Préfontaine*, contestant.

HELD:—That where a hypothecary creditor, who is first in rank, cedes his right of preference on the monies arising from the sale of a portion of the property hypothecated, in favor of a hypothecary creditor, who is only third in rank, such creditor having first rank cannot afterwards claim to rank for his full claim (without deduction of the monies received under said sale), to the prejudice of a hypothecary creditor, who is second in rank, in the distribution of monies arising from the sale of the balance of said property.

MACKAY, J., in pronouncing judgment, remarked that the Court had adopted the reasons assigned in the *factum* of the creditor collocated. These reasons were as follows:—

Tous les faits invoqués par la créancière colloquée et qui ont donné lieu au présent litige ont été admis par le contestant.

Voir la contestation du contestant et la déposition de ce dernier.

Ces faits peuvent se résumer comme suit:

En 1878 l'immeuble connu et désigné aux plan et livre de renvoi officiel du Quartier Ste. Marie, en la cité de Montréal, était grevé d'un privilége en faveur des Ecclésiastiques du Séminaire de St. Sulpice, pour droits seigneuriaux.

Les héritiers Jacques Poitras prennent ensuite rang sur le même immeuble comme bailleurs de fonds, mais une partie du prix de vente leur revenant avait été déléguée en faveur de la créancière colloquée.

Messieurs Prévost et Préfontaine, aux droits desquels est maintenant le contestant, venaient en dernier rang sur une moitié indivise du dit immeuble.

Cette moitié indivise sur laquelle les dits Prévost et Préfontaine avaient une hypothèque, ayant été vendue, par autorité de Justice, en 1878, un rapport de distribution du produit de la vente fut préparé en février de la même année (1878) dans une cause No. 86, où Catherine Rawley était demanderesse et André Monarque était défendeur.

Précédent vs. Quintal.

La créance des Ecclésiastiques du Séminaire de St. Sulpice pour droits seigneuriaux sur le dit immeuble No. 89 s'élevait alors en capital et intérêts, à une somme de $269.50 seulement, et le prix de vente de la moitié indivise du dit immeuble était suffisant pour qu'ils fussent payés de cette somme.

Au lieu cependant d'user de leurs droits de préférence ou de priorité sur la créancière colloquée et sur les dits Prévost et Préfontaine, les dits Ecclésiastiques du Séminaire de St. Sulpice de Montréal, donnèrent un consentement pour que les dits Prévost et Préfontaine fussent colloqués en leur lieu et place jusqu'à concurrence de la dite somme de $269.50, et la collocation fut faite en conséquence comme suit :—

"Io. A Messrs Prévost et Préfontaine, en vertu d'un consentement exprès "des Ecclésiastiques du Séminaire de Montréal que les dits Prévost et Préfon- "taine soient colloqués de préférence à leur propre créance pour commutation "et intérêts accrus sur le montant d'icelle, et ce jusqu'à concurrence de leur dite "créance la somme de $269.50 pour laquelle les dits opposants, les Ecclésiasti- "ques du Séminaire de Montréal, auraient été colloqués en satisfaction de leur "créance en capital et intérêts s'ils n'eussent donné la préférence aux dits Pré- "vost et Préfontaine en déduction de leur créance s'élevant en principal, intérêts "et frais à $316.29, et fondé sur un jugement rendu par la Cour Supérieure à "Montréal, le 13 juin 1877, dans la cause sous No. 2196, W. Prévost et al. vs. "André Monarque, et enregistré le 13 juillet 1877, $269.50."

Plus tard l'autre moitié indivise du même immeuble fût vendue en la présente cause, et sur le produit le contestant fut colloqué en la manière suivante ;

"IIo. A l'opposant Raymond Préfontaine, cessionnaire de Wilfred Prévost, "par acte de transport du 20 novembre 1880 (Marion, notaire), le dit Wilfred "Prévost cessionaire du Séminaire de St. Sulpice de Montréal par acte de trans- "port du 27 février 1878, (Lafleur, notaire), montant de sa réclamation étant "pour droits de commutation sur le dit lot No. 89 du Quartier Ste Marie de "Montréal, et intérêts accrus et frais encourus, savoir la somme de $479.62, "moins celle de $239.50, montant pour lequel les Ecclésiastiques du Séminaire de "St. Sulpice de Montréal auraient été colloqués par jugement de distribution "homologué le 11 mars 1878, sur le produit d'une moitié indivise du dit lot "No. 89, vendu par le Shérif de ce district au dit Luc Quintal, le défendeur "en la présente cause, à la poursuite de Catherine Rawley dans une cause No. "89, dans laquelle cette dernière était demanderesse et André Monarque, défen- "deur, s'ils n'eussent donné la préférence à Messrs. Prévost et Préfontaine qui "furent colloqués en leur lieu et place en vertu d'un consentement exprès des "dits Ecclésiastiques du Séminaire de St. Sulpice de Montréal, $210.12."

Et la créancière colloquée fut ensuite portée à l'ordre de distribution comme créancière délégataire des héritiers Jacques Poitras pour la balance restant à distribuer, savoir $197.87½.

Le contestant dénie maintenant le droit de la créancière colloquée à cette collocation faite en sa faveur, et le jugement soumis à révision a maintenu sa prétention en déterminant qu'il avait droit d'être colloqué, même pour la dite somme de $269.50, comme étant aux droits des Ecclésiastiques du Séminaire de

Pérodeau vs. Quintal.

St. Sulpice de Montréal, de préférence à la dite créancière colloquée, et sans égard à la cession de rang faite par les dits Ecclésiastiques en faveur des dits Prévost et Préfontaine, créanciers postérieurs à la dite créancière colloquée lors de la distribution du prix de vente de la première moitié indivise, du dit immeuble.

C'est-à-dire qu'il a été maintenu par ce jugement que lorsqu'un immeuble est hypothéqué en faveur de A (Les Ecclésiastiques) en premier rang, de B (la créancière colloquée) en deuxième rang, et de C (le contestant) en troisième rang, A peut céder son droit de préférence en faveur de C sur une moitié indivise de cet immeuble, et réclamer ensuite son droit de préférence contre B sur l'autre moitié du même immeuble.

En d'autre termes, que lorsque B a acquis une hypothèque sur tout l'immeuble en question, qui n'était alors grevé que d'une somme de $269.50, il s'est exposé à ce que ce montant fût pris ou payé deux fois avant sa créance sur le produit du prix de vente de cet immeuble par autorité de justice, ou encore que contrairement à l'article 2048 du Code Civil, l'interversion de rang peut être fait entre A et C au préjudice de B créancier intermédiaire, et sans son consentement.

Et cette nouvelle doctrine serait, paraît-il, le résultat des principes qui régissent les hypothèques générales venant en concours avec les hypothèques spéciales.

Nous comprenons que si la créance de B n'eût pas frappé la moitié indivise dont le prix a été distribué en 1878, A aurait sans aucun doute pu sur le produit de cette moitié céder son droit de priorité à C et prendre ensuite toute sa créance sur le produit de l'autre moitié vendue plus tard; car alors c'eût été réellement un cas d'hypothèque générale et d'hypothèque spéciale, et il n'y aurait pas eu d'interversion de rang au préjudice de créanciers intermédiaires.

Mais ce que nous ne comprenons pas, c'est qu'on puisse prétendre appliquer à l'espèce actuelle les règles des hypothèques générales venant en concours avec des hypothèques spéciales, lorsque l'hypothèque de la créancière colloquée était aussi générale que celle des dits Ecclésiastiques. C. C. B. C., art. 2048, Pont, Priv. et hypothèque, No. 334.

Lors de la distribution du produit de la première moitié indivise de l'immeuble en question, les héritiers Poitras, ou plutôt la dite M. L. Parent a été colloquée d'une partie de sa créance sur les deniers restant après la collocation faite en faveur des dits Prévost et Préfontaine en vertu de la cession de rang, qu'ils avaient obtenue des dits ecclésiastiques, cependant si la doctrine maintenue par le jugement soumis à révision était fondée en loi, rien n'aurait empêché les dits ecclésiastiques d'écarter encore la dite M. L. Parent et de renouveler l'opération à volonté, même sur le produit de cette première moitié indivise; car la cession de rang ne pouvait avoir ni plus ni moins d'effet sur la première moitié indivise qu'elle ne devait en avoir sur la seconde.

Nous soumettons qu'en autant que l'hypothèque de la créancière colloquée est concernée, celle des dits ecclésiastiques est censée payée depuis qu'ils ont con-

senti à ce que la somme qui leur était attribuée à même le produit du gage commun fût payée à un autre créancier. Voir Pont, Priv. et hypothèques, No. 1238.

The following was the written judgment of the Court in Review:—

"The Superior Court now here sitting as a Court of Review, having heard the collocated creditor, Marie Louise Parent, and the contestant by their respective counsel upon the judgment rendered on the 24th December, 1881, by the Superior Court of the district of Montreal, maintaining the contestation of said contestant and setting aside the collocation made in favour of the said Marie Louise Parent, examined the Record and the proceedings had in this cause and deliberated;

Considering that the judgment of the Superior Court of the 24th December, 1881, complained of by said Marie Louise Parent, and which has set aside the Prothonotary's collocation of her in the judgment of distribution prepared by that officer, works against her, to her prejudice, contrarily to Article 2048 of the Civil Code, and is erroneous;

Considering that whereas, say on the 1st of June, 1877, the Ecclesiastics of the Seminary of St. Sulpice of Montreal had first claim against the lot of land of which the half has been sold *super* Quintal, the defendant in this cause, and the said Marie Louise Parent, the second claim, and the claim of Prévost and Préfontaine did not exist against the said land; and whereas afterwards Prévost & Préfontaine's mortgage claim, now held by the contestant, arose founded upon a judgment of the 13th of that month of June, which struck with mortgage one undivided half of the said lot of land in possession of André Monarque, the said mortgage third in order, or following after Marie Louise Parent; and whereas in the case of Catherine Rawley vs. Monarque the claim of the Ecclesiastics of the Seminary of St. Sulpice has been once wielded to the extent of its full nominal money sum, and the said sum has been [illegible] once by their consent, to wit, by Prévost & Préfontaine, out of the proceeds of sale of portion of the same lot of land upon which the said Ecclesiastics had as beforesaid the first claim, and the said Marie Louise Parent the second, and Prévost & Préfontaine only the third; and whereas directly or indirectly the said Ecclesiastics' claim could not and cannot be worked to diminish the claim of said Marie Louise Parent against the said land, the whole or any part of it but once, and to the extent, once, of the sum or money amount of the said Ecclesiastics' claim, as shown by the Registry Office books; and whereas by the judgment complained of the contrary is ruled, and the collocation in favor of Marie Louise Parent is set aside, that its amount may be taken by the contestant as in the rights of the Ecclesiastics to the extent of the same sum of money as taken already by Prévost & Préfontaine in Rawley vs. Monarque case; and whereas, under this system, Marie Louise Parent would be prejudiced unduly, against the provisions of our registry law and its system, and against our Code Civil enactment in such matter;

Considering that the said contestation fyled by the said Raymond Préfontaine is unfounded;

Pérodeau vs. Quintal.

Doth reverse the said judgment of the 24th December last, maintaining the said contestation and declaring illegal the collocation in favor of Marie Louise Parent, and proceeding to render the judgment that should have been rendered by the Court below, doth dismiss the said contestation and maintain and re-affirm the said collocation, with costs in the said Superior Court against the contestant in favor of the said Marie Louise Parent distraits to Messrs. Beique & McGoun, attorneys for said collocated creditor, and with costs in Review in favor of the said M. L. Parent against the said contestant distraits to Messrs. Beique, McGoun & Emard, attorneys for said collocated creditor."

Judgment of Superior Court reversed.

Beique & Co., for creditor collocated.

Préfontaine & Major, for contestant.

(S.B.)

SUPERIOR COURT, 1883.

MONTREAL, 31ST JANUARY, 1883.

Coram RAINVILLE, J.

No. 2424.

Nixon vs. *Darling*.

HELD:—1. That when a commercial traveller, engaged by the year, quits the service of his employer without legal cause and against the will of his employer, and without previous legal notice, he forfeits all claim to wages accrued to the time of his quitting said service.

2o. That in the present instance said claim to wages was moreover compensated by the defendant's claim for damages (estimated by the court at at least $500), and for goods sold and advances in money.

The facts and circumstances of the case are fully set forth in the judgment of the Court which was worded as follows:

"La Cour * * * attendu que le demandeur allègue que le trois de septembre 1877, il s'est engagé au défendeur comme commis voyageur à raison de $700 par année, sans aucune stipulation quant à la durée de l'engagement, qu'il a été à l'emploi du dit défendeur jusqu'au quatre septembre 1882; que toute fois le premier février 1881 le défendeur s'est engagé à lui payer son salaire à compter du premier janvier alors dernier à raison de $800 par année; que le quatre septembre 1882, il lui était dû une somme de $112.61 pour balance de salaire;

Attendu que le défendeur plaide, que l'engagement du premier février 1881, n'a été fait que sous la condition que le dit engagement compterait du premier janvier 1881, au premier janvier suivant, et que le dit engagement a été continué facilement du premier janvier 1882 au premier janvier 1883;

Attendu que le dit demandeur avant la fin de son engagement s'était engagé secrètement à une autre personne comme commis voyageur; qu'il a abandonnée le service du défendeur avant la fin de son engagement et est allé ensuite solliciter des ordres pour son nouveau bourgeois, des pratiques du défendeur; que par là il lui a causé des dommages, s'élevant à $2,000; qu'en outre il lui a fait des avances pour frais de voyages excédant de beaucoup ce que le dit demandeur

avait droit d'avoir; qu'en outre le dit demandeur lui est endetté pour marchandises à lui vendues et pour deniers par lui collectés; Nixon vs. Darling.

Considérant que le demandeur n'a que l'aveu du défendeur pour prouver l'engagement par lui allégué;

Considérant que par son plaidoyer et par ses aveux sous serment le dit défendeur n'admet le changement d'engagement au premier février 1881, que sous la condition que ce nouvel engagement devait compter du premier janvier 1881 pour l'espace d'une année, et que le dit engagement a été continué tacitement pour une autre année;

Considérant que le dit aveu est indivisible;

Considérant que le dit demandeur a laissé le service du défendeur avant la fin de son engagement, sans raison et contre la volonté du défendeur, et qu'à raison de ce fait le dit demandeur a forfait son salaire, et le défendeur a souffert des dommages considérables, que la cour évalue à au moins $500;

Considérant que le défendeur a aussi prouvé en partie les autres allégations de ses défenses;

Déclare la somme réclamée par le demandeur compensée par les dits dommages et marchandises vendues et livrées au demandeur et avances à lui faites;

Maintient les exceptions plaidées par le défendeur et déboute le demandeur de son action, avec dépens *distraits* à Messrs. Bethune & Bethune, avocats du défendeur."

Macmaster & Co., for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

Action dismissed.

COUR DU BANC DE LA REINE, 1882.

MONTREAL, 24 NOVEMBRE 1882.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 416.

FELTON,

APPELANT;

ET

BELANGER ET AL.,

INTIMES.

JUGE:—Qu'une opposition afin d'annuler d'un défendeur saisi peut être renvoyée sur *motion*, lorsque certaines irrégularités existent à la face de l'opposition et qu'elle paraît être frivole. Que dans l'espèce actuelle la Cour de Circuit a décidé un point de pratique qu'elle était justifiable de déterminer d'après l'article 135 du Code de P. C.

TESSIER, J.:—Le 30 juin 1879, les intimés Bélanger obtinrent jugement en la Cour de Circuit à Sherbrooke contre l'appelant Felton et une autre personne pour $174 avec intérêt et dépens. Il y eut des procédures prises pour prélever le montant de ce jugement, mais elles n'obtinrent pas ce but. A un *alias* bref d'exécution, il fut produit une opposition *afin d'annuler* le 18 mai 1881 de la part de l'appelant Felton.

Felton et Belanger et al.

Les intimés demandèrent par requête sommaire ou *motion* que cette opposition fût rejetée, parce qu'elle était frivole et vexatoire, à cause de différentes raisons apparentes à la face de cette opposition.

La Cour de Circuit siégeant à Sherbrooke a accordé cette motion et le 10 juin 1881 a débouté cette opposition avec dépens.

C'est de ce jugement qu'il y a maintenant appel à cette Cour.

Le principal grief de l'appelant, c'est que cette opposition n'aurait pas dû être rejetée sur simple *motion*, sans avoir été contestée d'une manière régulière par voie d'exceptions et défenses.

Il n'y a pas de doute que la règle générale est de contester une opposition par le moyen des plaidoyers préliminaires ou plaidoyers au fond. Il s'agit de savoir si lorsque dans une opposition afin d'annuler, la Cour de Circuit a trouvé des motifs frivoles et clairement mal fondés, accompagnés d'irrégularités apparentes à la face de la procédure, la Cour d'appel mettra de côté un jugement rendu dans la Cour de Circuit comme dans l'espèce actuelle.

L'article 135 du Code de Procédure Civile justifie suffisamment le tribunal inférieur d'avoir approuvé la voie de la requête sommaire ou *motion* au lieu d'un plaidoyer régulier.

Cet article dit: "Grounds of preliminary exception may in certain cases, be "urged by *motion*, according to the *practice* of the courts."

Le texte anglais est plus expressif que le texte français qui traduit assez mal le mot anglais *motion* par les mots "requête sommaire."

Ce mode de renvoyer une opposition en certains cas sur une simple "*motion*" existait en *pratique* avant le Code, et cet article n'a pu avoir d'autre but que de conserver cette pratique-là et dans les cas où elle existait.

Le jugement rendu adopte pour motifs, 1° Que cette opposition n'est pas accompagnée d'un ordre de sursis par un juge; sans décider que cela soit toujours nécessaire en Cour Supérieure, l'article 1084 du Code de P. C. l'indique en Cour de Circuit; 2o. Que cette opposition est autrement irrégulière. Ce motif est général, il peut s'appuyer sur l'omission de quelque mots essentiels dans le *jurat*, savoir; des mots "de bonne foi" qui se trouvent indiqués dans la formule de la Règle 38 de Pratique de la Cour de Circuit.

Il est vrai que l'opposition allègue des faits à l'encontre du jugement, savoir, qu'il aurait été obtenu par fraude, et sans preuve suffisante que des paiements ont été faits précédemment au jugement sur la demande. Ces allégations auraient pu peut-être justifier la production d'une requête civile, mais elles sont pas admissibles dans une opposition afin d'annuler produite deux ans après la reddition du jugement en première instance, sans alléguer au moins que l'opposant a été empêché de produire ces moyens de contestation plus tôt et en temps opportun.

Dans l'espèce actuelle, cette Cour agissant comme tribunal d'appel ne se croit pas justifiable de renverser un jugement rendu sur un point de pratique en Cour de Circuit.

En conséquence le jugement est confirmé avec dépens.

Jugement de la Cour de Circuit confirmé.

Felton & Blanchard, pour l'appelant.

L. C. Bélanger, pour l'intimé.

(S. B.)

COURT OF REVIEW, 1882.

MONTREAL, 31st MARCH, 1882.

Coram TORRANCE, J., PAPINEAU, J., JETTE, J.

No. 1514.

Aitken vs. *Bisaillon*, and *La Société de Construction Metropolitaine*, creditor collocated, and *plaintiff*, contesting.

HELD:—1. That a renewal of registration against cadastral lots, by the original owner of a *bailleur de fonds* claim, for the whole of such claim (of which he had previously transferred a portion, by deed of transfer duly registered) enures to the benefit of the transferee under said deed.

2. That in renewing registration against cadastral lots, an error as to the name of the possessor of the property will not invalidate the procedure.

3. That it is not necessary to re-register a transfer of a hypothecary claim against the cadastral number.

The following are the facts which gave rise to the present litigation:

1. On the 4th October, 1872, Lighthall, N.P., Wm. B. Johnson sold certain lots in the city (by official number), and certain in St. Jean Baptiste (where the cadastre was not then in force, without official numbers) for a balance of $36,000, payable to Thomas R. Johnson. Registered 19th November, 1872, 70,007.

2. On same date Thomas R. Johnson transferred to trustees Dr. Aitken various sums, and *inter alia* $2,300 of above $36,000, to be taken by preference out of it. This was registered same date as last, 70,008. It of course did not contain reference to registration date or number of the above sale, and probably on that ground the registrar did not enter it *en marge* at the time.

3. Bastien sold, 16 Dec., 1872, Lighthall, N. P., certain lots in the city to Giroux & Benard for a balance of $1,140, payable to T. R. Johnson in reduction of said $36,000, and Johnson intervened to restrict, making no mention of above transfer.

4. Exchange 30th May, 1874, between Bastien and Giroux & Benard, of above lots for certain in St. Jean Baptiste by official numbers (the plan then being in force), subject to payment of a like sum to Johnson, who again intervened, etc.

5. Renewal 13th October, 1874, by Thomas R. Johnson, stating that the lots in St. Jean Baptiste stated are affected in his favor for the whole $36,000, and among others the lots of Giroux and Benard by their numbers, but stated to be in *Bastien's possession*.

6. The period for renewal in St. Jean Baptiste expired 25th November, 1874, and the trustees Dr. Aitken made no renewal within that time of their transfer.

7. 23rd April, 1875, Lighthall, T. R. Johnson transferred above balance due by Giroux and Benard to H. Aitken, the plaintiff, the lots affected being mentioned by official number. No reference to transfer to trustees Aitken.

8. Only subsequently, 16th September, 1875, did trustees Dr. Aitken renew their claim.

9. After mutations one of the Giroux lots in St. Jean Baptiste became property of defendant, and on suit of plaintiff on his transfer was seized and sold by sheriff. La Société, which had obtained subrogation from trustees of Dr. Aitken, was collocated out of the proceeds preferentially to plaintiff who contested.

Aitken vs. Bissilion.

On these facts, the S. C. at Montreal (SICOTTE, J.) rendered the following judgment on the 29th of November, 1881.

"La Cour * * * considérant en fait, que la vente du 4 octobre 1872 constitutif de l'hypothèque qui est la base de la collocation au profit de la société de construction, savoir l'acte de vente par Wm. B. Johnson à Benoit Bastien, a été duement enregistré; et que renouvellement de l'enregistrement de cet acte a été fait à temps utile pour conserver tous les droits en découlant;

Considérant que par ce titre une délégation fut accordée en prise de tout le prix de vente, au profit de Thomas R. Johnson, et que l'acheteur Bastien s'engagea formellement de payer le prix au dit Johnson qui l'accepta comme son débiteur;

Considérant que l'enregistrement de ce titre et son renouvellement ont conservé au dit Thomas R. Johnson les droits et priviléges de bailleur de fonds;

Considérant en fait que le transport fait aux auteurs de la dite société de construction le 4 octobre 1872, a été accepté le même jour et par le même acte, par l'acquéreur Bastien qui s'obligea personnellement de payer aux dits auteurs de la société la somme transportée;

Considérant en fait que l'hypothèque susdite de bailleur de fonds était ainsi sur tout le terrain acheté par Bastien, et que le terrain vendu en cette cause par le shérif est portion du terrain vendu à Bastien;

Considérant en fait que le transport du 4 octobre 1872, a été enregistré le 19 novembre 1872, conformément à la loi;

Considérant que par les dispositions du Code Civil, les renouvellements d'enregistrement ne concernent que les enrégistrements des titres créant la dette, et qu'il n'est pas prescrit de renouveler l'enregistrement des transports de créances hypothécaires, il suit que ces transports conservent leur rang et priorité d'après les mentions faites par le registrateur à la marge de l'entrée du titre constituant la dette; déclare le contestant mal fondé dans sa contestation, et la collocation par le rapport de distribution au profit de la dite Société de Construction faite conformément à la loi et aux droits des parties, déboute la contestation avec dépens contre le contestant, distraits à F. O. Rinfret, avocat de la partie colloquée."

The Court of Review unanimously confirmed the judgment.

Judgment of Superior Court confirmed.

R. A. Ramsay, for plaintiff.

F. O. Rinfret, for creditor collocated.

(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 13TH FEBRUARY, 1883.

Coram RAINVILLE, J.

No. 133.

Penny et al. vs. *The Montreal Herald Printing & Publishing Co., & Cochenthaler, mis en cause, & Cochenthaler*, plaintiff *en gar.*, vs. *The Herald Co.*, defendant *en gar.*

HELD —1. That plaintiffs and defendant had agreed about the 30th June, 1882, to resiliate the lease between them, in consequence of a fire which had destroyed in great part the premises leased, but that defendants were liable for the full rent to the 1st August, 1882, as they had not completely vacated the premises until that date; there being no claim for, or proof of the value of, any diminution of rent.

2. That defendant had done all in its power to give plaintiffs possession of the portion of the premises sub-let to Cochenthaler.

3. That although Cochenthaler was quite willing to remain in possession, notwithstanding the fire, to the end of his lease, the plaintiffs had a right to claim the resiliation of the lease and sub-lease, as it was established in evidence that the premises leased formed one establishment extending from St. James street to Fortification lane; that the retention of said portion by Cochenthaler would cause grave inconvenience to plaintiffs, and that the exigencies of commerce and of tenants required that the property should be entirely rebuilt, and that the new building should extend from St. James street to Fortification lane. And that, under the circumstances, Cochenthaler's right to any damage he may suffer by the resiliation should be reserved to him.

4. That the default of defendant to pay rent was owing to the uncertainty existing as to its amount and to the retention of part of the premises by Cochenthaler, and that the lease consequently should not be resiliated for non-payment of rent.

5. That the action *en garantie* was, under the circumstances, unfounded.

The facts and pleadings are fully disclosed in the judgment of the Court, which was as follows:—

"La Cour après avoir entendu les parties par leurs avocats respectivement, tant sur la contestation liée entre les demandeurs principaux et la défenderesse principale et sur celle liée entre les demandeurs principaux et *le mis en cause*, que sur celle liée entre le demandeur en garantie et la défenderesse *en garantie*, avoir examiné la procédure et les pièces produites, entendu les témoins cour tenante et délibéré;

Attendu que par l'inscription produite en cette cause les dites contestations sont du consentement des parties réunies, et qu'en conséquence les documents produits et la preuve faite sont communs;

Attendu que les demandeurs principaux allèguent qu'en 1879, eux et leur auteur ont loué à la défenderesse principale, pour le terme de quatre ans à compter du 1er mai 1880, une propriété avec bâtisses y érigées, située sur la rue Saint Jacques, en cette cité, et étant le numéro 199 des plan et livre de renvoi officiels du quartier ouest de la cité de Montréal; que le 13 juin dernier les bâtisses érigées sur la dite propriété ont été détruites par un incendie, à l'exception d'une petite partie occupée par le mis en cause et à lui louée par la défenderesse; que le 30 juin dernier la défenderesse, vû la destruction des dites bâtisses, serait convenue de résilier le dit bail; que les demandeurs auraient consenti à la dite résiliation et que la défenderesse aurait commencé à mettre

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en exécution son dit engagement en abandonnant les lieux par elle occupés, mais qu'elle n'aurait pas livré la possession entière des premisses à elle louées, en autant que le *mis en cause* serait resté en possession de la partie à lui louée; que la défenderesse doit $1,100 de loyer pour six mois écoulés depuis le 1er mai 1882, au 1er novembre dernier, que la portion occupée par le mis en cause n'aurait pas été endommagée considérablement par le feu, mais que la portion détruite par le feu ne peut être reconstruite sans qu'on démolisse toute la bâtisse, dont une partie est occupée par le mis en cause, et qu'en conséquence les demandeurs principaux ont droit à la résiliation du dit bail et du sous bail et à la dite somme de $1,100 de loyer;

Attendu que la défenderesse principale a plaidé, en admettant le droit des demandeurs principaux de faire résilier le dit bail, admettant aussi la convention alléguée par les demandeurs par laquelle le dit bail aurait été résilié, et alléguant qu'en conséquence de cette convention la dite défenderesse principale a pris une action contre le mis en cause pour faire résilier son sous bail, mais que la dite action a été renvoyée, sur le principe qu'elle aurait dû être intentée par les demandeurs principaux;

Attendu que par ses conclusions la défenderesse principale demande aussi que la dite résiliation de bail soit prononcée, mais que la dite demande pour loyer soit renvoyée;

Attendu que le mis en cause a plaidé que le bail à lui consenti par la défenderesse principale l'avait été à la connaissance des demandeurs principaux; que les lieux loués à la défenderesse principale consistaient en deux bâtisses distinctes, et que la partie occupée par le dit mis en cause n'a pas été endommagée par le feu, et qu'il a droit de continuer à occuper la dite partie, optant pour la continuation du dit bail pour la partie qu'il occupe; que par la convention intervenue entre les demandeurs principaux et la défenderesse principale il n'y a eu résiliation du bail que quant à la partie occupée par la défenderesse principale, et qu'il a toujours été prêt à payer le loyer de la partie qu'il occupe, qu'il l'a offert avant l'institution de l'action, et il réitère son offre;

Attendu que le dit mis en cause a pris une action en garantie contre la défenderesse principale et qu'il réclame d'elle des dommages à raison de la dite résiliation du bail, et qu'il conclut à ce que la défenderesse fasse cesser la dite action en résiliation, et à son défaut de ce faire, elle soit condamnée à indemniser le mis en cause du jugement qui pourra être prononcé contre lui, et que dans le cas où le dit bail serait résilié, elle soit condamnée à lui payer une somme de $4,000;

Attendu que la défenderesse en garantie plaide qu'elle n'est pas responsable des conséquences de l'action intentée par les demandeurs principaux;

Adjugeant sur la contestation liée entre les demandeurs principaux et la défenderesse principale;

Considérant qu'il est établi que les dites parties ont consenti, le ou vers le 30 juin dernier, à résilier le dit bail et que la défenderesse a exécuté autant qu'il était en son pouvoir, la dite convention, et qu'elle consent encore par son plaidoyer, à la résiliation demandée;

Considérant qu'il est établi qu'elle a même pris une action contre le mis en cause pour compléter la dite contestation en expulsant le dit mis en cause ;

Considérant que la dite action a été renvoyée sur le principe que telle action aurait dû être prise par les locateurs, les demandeurs principaux ;

Considérant que la dite défenderesse a exécuté autant qu'il était en son pouvoir la dite convention, et que si icelle n'est pas parfaitement exécutée cela est dû au fait du mis en cause ;

Considérant qu'il est prouvé que la dite défenderesse a continué d'occuper les lieux loués après le dit incendie jusqu'au 1er août dernier, et qu'il n'y a aucune preuve quant à la diminution de valeur de l'occupation des dits lieux résultant de leur destruction par le dit incendie, et que les demandeurs principaux ont droit à leur loyer entier pour les dits trois mois, mais considérant que la défenderesse s'est toujours déclarée prête à payer le montant du loyer qu'elle pouvait devoir, et que son défaut de payer doit être attribué à l'incertitude qui existait sur le montant réellement dû, vû la dite convention de résiliation de bail, et le défaut du dit mis en cause de livrer la partie par lui occupée ;

Considérant que la dite défenderesse a abandonné complètement les lieux par elle loués à compter du dit 1er jour d'août dernier, et que vû les circonstances elle ne peut être tenue responsable du loyer que quant à la partie occupée par le dit mis en cause, et qu'elle aurait droit de demander la diminution du loyer à proportion de la partie de la chose louée dont elle se trouve privée, et qu'en conséquence la demande des demandeurs pour loyer du 1er d'août au 1er novembre dernier est mal fondée, excepté quant à la partie occupée par le mis en cause ;

Et adjugeant sur la contestation liée entre les demandeurs principaux et le mis en cause ;

Considérant qu'il est en preuve que les lieux loués par la défenderesse principale ne formaient qu'un seul établissement, et que les dits lieux ne peuvent sans de graves inconvénients être conservés en partie ; que les besoins du commerce et les exigences des locataires demandent que la reconstruction des bâtisses à être érigées sur la dite propriété ait lieu à partir de la rue Saint Jacques jusqu'à la profondeur du terrain par une seule construction, et qu'il y a lieu, en conséquence, d'opérer la démolition complète des bâtisses actuelles ;

Considérant que cette reconstruction résulte d'un fait dont la responsabilité au moins pour partie, retombe sur les demandeurs principaux, et qu'elle peut donner lieu à une action en dommages au profit du dit mis en cause, réserve cette action au dit mis en cause ;

Considérant qu'il y a lieu à déclarer le dit bail résilié, tant entre les demandeurs principaux et la défenderesse qu'entre cette dernière et le mis en cause ;

Annule et résilie à toutes fins que de droit le dit bail par Edward G. Penny et autres, les auteurs des demandeurs principaux, à la défenderesse principale des lieux ci-dessus désignés, et le sous bail par la dite défenderesse principale au mis en cause passé le 2 de novembre 1881, devant Mtre. Cushing, Notaire, et condamne la dite défenderesse principale et le [illegible] en cause à livrer aux demandeurs principaux, sous trois jours de la signification des présentes, les lieux à eux loués respectivement, comme susdit, en y [illegible] propre nette, et à défaut

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par eux de ce faire, mettant la dite défenderesse et le dit mis en cause expulsés des dits lieux par main de justice, et les demandeurs principaux mis en possession et jouissance paisible des dits lieux ;

Et considérant que le dit mis en cause a déposé avec son plaidoyer une somme de $220.66, comme étant tout le loyer dû par lui à la défenderesse principale jusqu'au 1er de novembre dernier ;

Ordonne que sur et à même la dite somme de $220.66 ainsi déposée, un montant de $40.66 soit appliqué en déduction de la dite somme de $550 que devra payer la défenderesse en vertu du présent jugement ;

Et considérant que le mis en cause est responsable personnellement vis-à-vis des demandeurs principaux du montant de son loyer pour les trois mois écoulés depuis le dit 1er jour d'août au 1er novembre dernier, et de le payer à l'acquit de la défenderesse ;

Déclare bonne et valable l'offre par lui faite pour les dits trois mois de loyer, et permet aux demandeurs de percevoir et de retirer le montant ainsi déposé ;

Avec dépens de contestation contre la défenderesse principale et contre le mis en cause, sauf les frais d'enquête, lesquels seront à la charge du mis en cause seul en autant que la dite enquête n'a été rendue nécessaire que par sa contestation ;

Et adjugeant sur la demande en garantie :

Considérant que l'action en garantie est basée sur deux raisons, la première pour défaut de paiement, et la seconde pour cause de destruction des lieux loués, par le feu [illegible] accendie ;

Considérant que la défenderesse en garantie est garante du mis en cause quant à la première raison, mais qu'elle ne l'est pas quant à la seconde, en autant que ce dernier est indépendante de sa volonté ;

Considérant que la dite défenderesse en garantie aurait dû quant à la première raison, se déclarer garante du mis en cause et prendre son fait et cause, et qu'en ce sa défense est mal fondée, mais considérant que l'action en garantie du mis en cause est mal fondée sur la seconde, en autant que les demandeurs principaux exercent par leur action principale une action qui leur était propre, et ce indépendamment de la volonté du dit fait de la défenderesse principale en garantie ;

Mais considérant que l'action principale est renvoyée quant à la première raison, et que la contestation liée entre les parties n'a été engagée que sur le deuxième point, et vû l'adjudication déjà faite sur ce point,

Renvoie l'action en garantie, chaque partie payant ses frais."

Judgment resiliating lease and sub-lease.

Judah & Branchaud, for plaintiffs.

Strachan Bethune, Q. C., counsel.

R. & L. Laflamme, for *Herald Co.*, defendant and defendant *en gar.*

Abbott, Tait & Abbotts, for *mis en cause* and plaintiff *en gar.*

(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 17TH NOVEMBER, 1880.

Coram DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 209.

WILLIAM DONAL[illegible]

APPELLANT;

AND

DAME MIRANDA R. CHAR[illegible]

RESPONDENT.

HELD:—1st. That under a lease wherein the rent is payable on the 1st day of May that day belongs entirely to the lessee, and an action taken for non-payment of the rent then to become due is premature.

2. The water tax payable under a lease is not due to the lessor but to the City.

3. Where a lessor prematurely institutes an action in ejectment for non-payment of rent upon the day previous to the rent becoming eligible, and pending the suit files an incidental demand for damages owing to not having got possession of the leased premises, the incidental demand is held to be a complement of the principal action, and the allegations of the incidental demand will avail to justify the conclusions of the principal demand for ejectment.

The facts of this case will sufficiently appear from the judgment of the Superior Court, the Judge's reasons and the factum of the appellant.

JETTÉ, J.:—Action accompagnée de saisie-gagerie, et de demande en expulsion, intentée le premier mai 1880 par la demanderesse contre le défendeur en vertu d'un bail expirant ce jour-là même, 1er mai 1880; cette action est basée sur les moyens suivants.

1o. Défaut de paiement du loyer dû pour le mois d'avril 1880.....	$50 00
2o. Défaut de paiement de la taxe imposée pour approvisionnement d'eau.....	29 70
3o. Coût d'une vitre de l'étalage du magasin, brisée pendant l'occupation du défendeur.....	50 00
	$129 70

Le défendeur plaide:

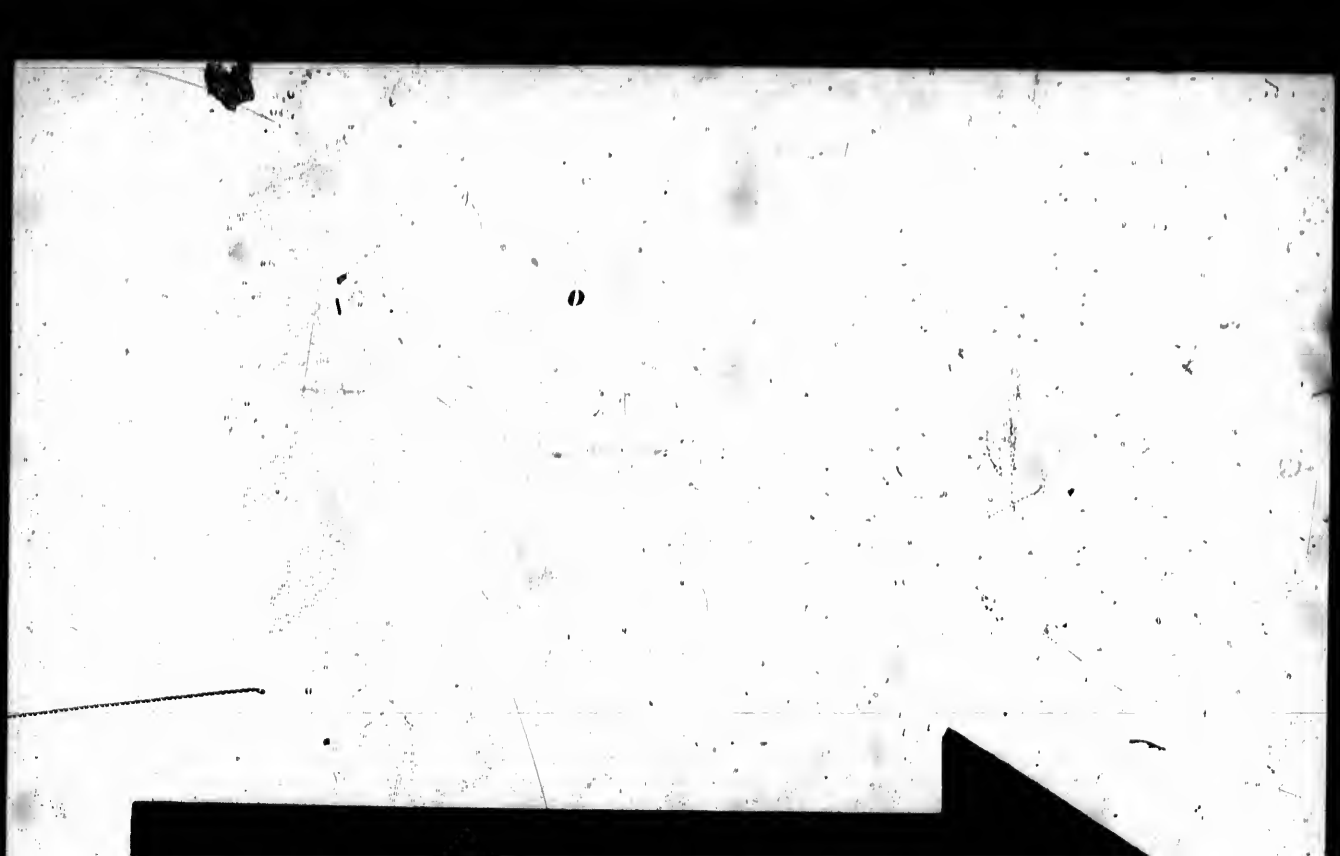
Que le loyer n'était payable que le 1er mai, et que par suite l'action intentée ce jour-là est prématurée.

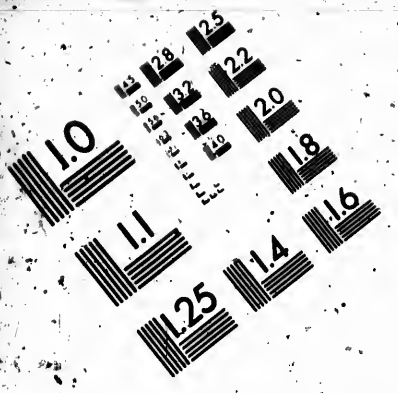
2o. Que la taxe d'eau n'est pas due à la demanderesse, mais à la municipalité, et que le défendeur l'a payée.

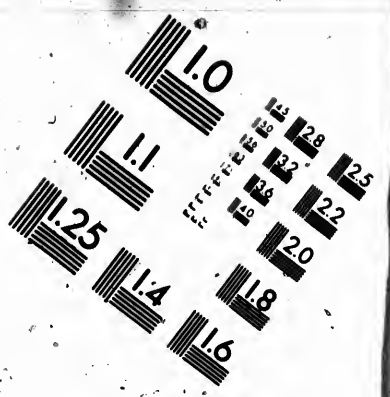
3o. Quant à la vitre brisée, qu'elle ne l'a pas été par la faute du défendeur, mais bien par défectuosité de l'assise de la maison louée.

En même temps le défendeur produit le reçu du comptable de l'aqueduc pour la taxe d'eau; et il consigne la somme réclamée pour son loyer.

La demanderesse voyant la contestation ainsi engagée demande et obtient, le 12 mai, la permission de produire une demande incidente alléguant que depuis l'institution de l'action le défendeur a illégalement gardé possession de la maison louée et refuse de la livrer à la demanderesse; qu'en conséquence cette dernière







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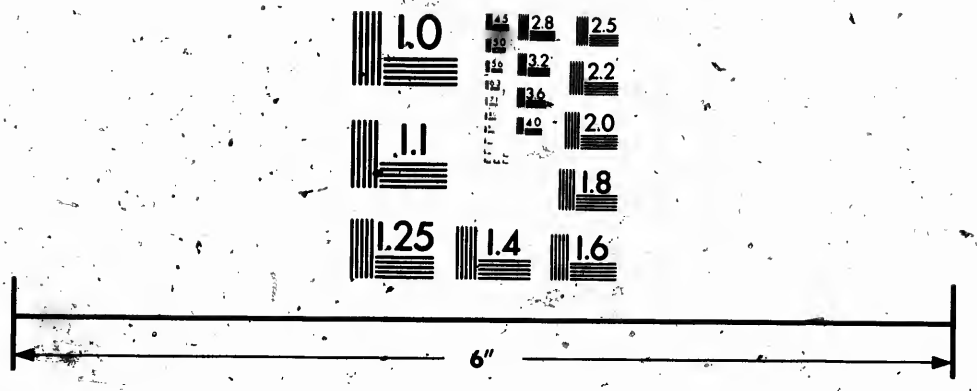

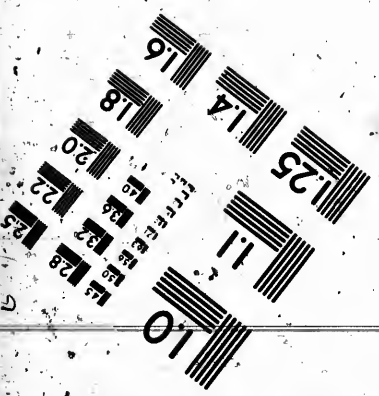

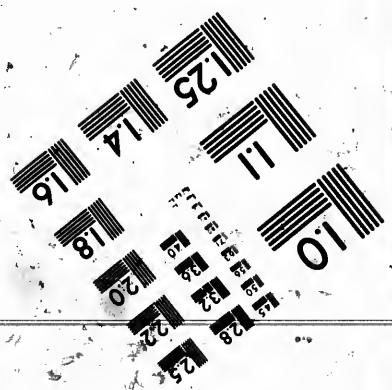

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a souffert des dommages considérables par l'impossibilité où elle s'est trouvée de livrer possession de cette maison à un autre locataire à qui elle avait passé bail. En conséquence elle conclut, en outre de sa première demande, à $300 de dommages.

Le défendeur plaide à cette nouvelle demande disant qu'il avait droit de garder possession de cette maison, l'agent de la demanderesse la lui ayant louée pour une autre année à compter 1er mai 1880 ; que si la demanderesse l'a louée à un autre locataire, c'est sans droit, et que lui le défendeur n'est par conséquent pas responsable des dommages dont la demanderesse se plaint, et qu'il a droit d'être maintenu dans la possession de la dite maison.

L'exception du défendeur à la demande principale et son exception à la demande incidente définissent donc on ne peut plus clairement la situation des parties ; le défendeur accepte la lutte franchement sur tous les points.

Appréciant maintenant et la demande principale et la demande incidente, je n'hésite pas à dire que les trois moyens invoqués par la demanderesse au soutien de sa demande principale sont mal fondés.

1o. Quant au loyer, c'est un principe incontesté que le jour de l'échéance appartient en entier au débiteur. Or, dans l'espèce le loyer était payable le 1er de mai, par conséquent l'action prise ce jour-là même est prématurée. Le défendeur ayant consigné la somme due, cette consignation est valable et le défendeur doit en avoir le bénéfice.

2o. Quant à la taxe pour approvisionnement d'eau, il est évident aussi que la demanderesse n'avait pas droit d'action pour ce, contre le défendeur, surtout ne l'ayant pas payée elle-même. Le défendeur a produit le reçu du comptable de l'aqueduc pour cette taxe, ce qui enlève même l'ombre d'un prétexte à ce chef de la demande.

3o. Quant au prix de la vitre brisée, la stipulation insérée au bail à cet égard n'y a été mise évidemment que pour éviter tout malentendu quant à la valeur exceptionnelle des vitres que le défendeur entreprenait de remplacer, mais non pour obliger le défendeur à supporter la perte arrivée par cas fortuit. L'obligation du défendeur doit donc être interprétée comme dans les cas ordinaires, c'est-à-dire que le défendeur ne peut être tenu de la perte ou dommage, si ce dommage est le résultat de quelqu'accident inévitable.

Or, il me paraît prouvé que c'est par suite d'une vice de construction à raison de l'instabilité de la bâtisse sur ses fondations, que cette vitre s'est brisée. L'agent de la demanderesse avoue lui-même que, lorsque le défendeur a pris possession de la maison, une vitre brisée au même endroit avait été remplacée, et l'ouvrier qui a posé la nouvelle lui a alors dit qu'en coupant quelque peu cette vitre, il pensait pouvoir la soustraire à l'effet de ce travail de déplacement que subissait alors la charpente de la maison. Les autres témoins me paraissent établir cette prétention au-delà de tout doute.

Ce dernier chef de la demande principale n'est donc pas fondé non plus.

Reste la demande incidente. Mais d'abord quel peut être l'effet, la portée de cette demande ? Est-elle valablement produite ; est-elle régulièrement formée, et enfin contient-elle assez pour justifier une condamnation contre le défendeur ?

La question n'est pas sans difficulté. L'article 149 du C. de P. C. dit : " La demande peut dans le cours de l'instance, former demande incidente ;

1o. Pour ajouter à la demande principale quelque chose qu'il a omise en la formant.

2o. Pour demander *un droit échu depuis l'assignation, et lié avec celui qui est exercé par la demande principale.*

3o.....

L'art. 26 du titre II de l'ordonnance de 1667, dans le but de simplifier la procédure sur les incidents qui prolongeaient indéfiniment la durée des procès, avait dispensé de la formalité de recourir à des Lettres du Prince pour être admis à articuler des faits nouveaux dans une instance, et avait permis de les invoquer par simple requête signifiée et jointe au procès, et Jousse, indiquant le sens que l'on devait donner à ces mots de l'ordonnance, *pour articuler faits nouveaux*, disait : e.g. : *quelque fait nouveau qui change l'état de la cause.*

Il n'était certes guère possible de donner une portée plus considérable à cette disposition de l'Ordonnance, mais Pigeau (Tome 1er page 347) semble avoir ensuite mieux rendu l'intention du législateur et exprimé plus exactement le sens de la loi en restreignant cette faculté d'articuler des faits nouveaux aux cas où ces faits ont une connexité nécessaire et évidente avec la demande principale. Notre article 149 rend sur ce point assez exactement la doctrine de Pigeau.

Bien que l'organisation judiciaire soit aujourd'hui bien différente, en France, de ce qu'elle était sous l'ancien régime, il est facile de constater cependant que la règle de l'ancien droit, sur ce point particulier de procédure, est encore suivie et fait la base du système nouveau. La citation suivante de Carré & Chauveau (vol. 3, page 192) détermine bien clairement l'étendue et la portée de la règle dont nous avons à faire ici l'application.

" Nous avons dit (tome 2, page 150) ce que l'on entendait en général par le mot *incident* ; et d'après la définition que nous avons donnée, nous avons considéré comme formant autant d'incidents particuliers, les différentes exceptions, contestations ou événements quelconques qui surviennent dans le cours d'une instance.

La plupart d'entre eux ne tiennent qu'à l'instruction d'un procès et ne changent rien à son état, quant au fond. Les autres, au contraire, ajoutent d'autres contestations à la contestation primitive, et prorogent ainsi la juridiction du Juge pour statuer à leur égard, en même temps que sur la première, et par un seul et même jugement, comme s'il n'y avait qu'un seul procès.

Ce sont ces contestations, élevées à la suite ou à l'occasion d'une autre dont le tribunal est déjà saisi, que le titre 16 de notre Code appelle incidents....

Il suit de ce qui précède que la demande incidente proprement dite n'est qu'une demande nouvelle formée pendant le cours d'une instance principale soit pour l'une soit pour l'autre des parties.....

C'est une règle depuis longtemps consacrée par notre jurisprudence que les tribunaux ne peuvent admettre comme demandes incidentes, celles qui doivent être l'objet d'une demande principale.

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On ne peut donc faire de toutes sortes de prétentions l'objet d'une demande incidente. Il n'y a que celles qui servent de réponse contre la demande principale, ou qui ont avec elle une connexité, ou *qui ne sont nées que depuis l'action* qui puissent être jugées et instruites incidemment, telles sont les demandes en compensation, en provision, en paiement de loyers échus ou de dommages causés depuis l'action principale.

Il faut en général, pour qu'une demande puisse être opposée contre une action principale, que toutes les deux proviennent de la même source, de la même affaire ou de la même convention: "*Ex eodem fonte, sive ex eodem negotio, vel ex eodem contractu.*"

Dans l'espèce actuelle, la demanderesse par sa demande principale conclut à l'expulsion du défendeur. Par sa demande incidente, elle ajoute aux motifs par elle invoqués, le *fait nouveau*: que depuis le 1er de mai le défendeur garde possession de la maison louée et qu'à raison de cela la demanderesse souffre des dommages pour lesquels elle demande à ajouter à ses conclusions.

Ces deux demandes doivent-elles être considérées comme parfaitement distinctes et séparées de manière à ne faire découler la conclusion de chacune que des faits qui y sont invoqués, ou peuvent-elles être réunies de manière à ne présenter qu'une seule demande principale, greffée d'un moyen additionnel motivant une condamnation plus considérable?

J'avoue que la procédure de la demanderesse laisse fort à désirer. Cependant le défendeur a interprété lui-même la demande incidente comme constituant le complément véritable de la demande principale. A la demande de dommages basée sur le fait de sa détention illégale de la maison louée, après l'expiration de son bail, il répond qu'il avait droit de continuer son occupation en vertu d'un nouveau bail et il conclut à être maintenu en possession. Les prétentions des parties sont donc exposées devant ce tribunal aussi complètement [illegible] pouvaient l'être. Les renvoyer à se pourvoir de nouveau ne serait-ce pas les obliger à recourir à un circuit d'actions que l'esprit de notre législation réprouve et que Pothier recommande si souvent d'éviter? C'est la conclusion à laquelle j'arrive, non sans hésitation cependant.

Appréciant maintenant la demande incidente à ce point de vue, il ne reste à décider que deux questions de fait:

1o. Le défendeur a-t-il prouvé le nouveau bail qu'il invoque pour être maintenu en possession de la maison louée?

2o. La demanderesse a-t-elle prouvé les dommages qu'elle réclame à raison de la détention de cette maison par le défendeur après l'expiration du bail?

La preuve du défendeur sur ce premier point, me paraît tout à fait insuffisante et il m'est impossible d'y trouver la continuation de bail quelconque.

Quant aux dommages je ne puis non plus admettre que la demanderesse ait droit d'en réclamer dans l'état actuel de la procédure.

Les dommages-intérêts que le créancier peut avoir droit de réclamer à raison d'inexécution de la convention ne peuvent consister que dans la perte réellement soufferte et le gain réellement perdu par le créancier (C. C. 1073). Or ici il n'y a aucune preuve de tels dommages. Le second locataire Tighe prouve bien

que lui a souffert des dommages, mais la Cour ne peut accepter la probabilité de sa réclamation contre la demanderesse, comme base d'un jugement en indemnité contre le défendeur. Cette question des dommages ne pourra donc se présenter que plus tard, et dans l'état actuel de la procédure elle est prématurée.

Sur le tout l'action de la demanderesse doit donc être renvoyée, et quant au loyer, vû la consignation, et quant à la taxe d'eau, et quant au coût de la vitre brisée, et enfin (pour le présent) quant aux dommages, mais elle est maintenue quant à cette partie d'icelle qui demande l'expulsion du défendeur de la maison louée.

Quant aux frais, comme la demanderesse a fait faire des frais inutiles au défendeur, sur sa demande principale, et comme celui-ci de son côté a eu tort de contester la demande d'expulsion après l'expiration de son bail, chaque partie paiera ses frais, la demanderesse supportant les frais d'enquête des témoins par elle examinés, Houghton MacDonald, Tighe & Chester, et des suivants examinés par le défendeur Philbin, McArthur, Haycroft, Lee, Baldwin et Ste. Marie; et le défendeur, les frais des témoins suivants: le défendeur lui-même, McDonald, Cushing et la demanderesse.

The judgment was *motivé* as follows:

La Cour après avoir entendu les parties par leurs avocats respectivement sur le mérite de cette cause, examiné la procédure, les pièces produites et la preuve, et délibéré:

Considérant que la demanderesse par sa demande principale requiert l'expulsion du défendeur son locataire, de la maison à lui louée par bail en date du 19 septembre 1878, et continué pour une année de plus à compter du 1er mai 1879 au 1er mai 1880, la dite maison décrite comme suit: "That certain "three story stone store situate and being on Notre Dame street, in the said "City and latterly in the occupation of one David Rae, auctioneer; bounded in "front by Notre Dame street aforesaid, in rear by James Johnson & Co., on "one side by the representatives Cadieux and on the other side by the property "of the Honorable J. Ferrier," et ce pour les raisons suivantes, savoir: 1o. défaut de paiement du loyer du mois d'avril, $50; 2o. défaut de paiement de la taxe d'eau, $29.70; 3o. coût d'une vitre de l'étalage ou de la vitrine du magasin loué, brisée par le défendeur, $50, et que par sa demande incidente la demanderesse invoque en outre la détention illégale par le défendeur de la dite maison, après l'expiration du bail à lui consenti, et réclame en conséquence en addition aux conclusions de sa première demande des dommages s'élevant à $300, à raison du tort souffert par son nouveau locataire, vû l'impossibilité où il a été de prendre possession de la dite maison depuis le 1er de mai par le fait du défendeur;

Considérant que le défendeur a plaidé à ces deux demandes disant: quant au loyer, que la demanderesse était sans droit pour le lui demander, le 1er mai, le terme qu'il avait pour le payer n'étant pas échu; quant à la taxe d'eau, qu'elle n'est pas due à la demanderesse mais à la ville, et que le défendeur l'a payée à qui de droit, quant à la vitre brisée, qu'elle l'a été par un défaut de construction de la maison louée et non par la faute du défendeur, qui par suite n'est pas responsable du dommage souffert par la demanderesse en conséquence,

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enfin que par un nouveau bail intervenu entre l'agent autorisé de la demanderesse et lui, il est en droit de garder la dite maison pour une autre année du premier mai courant au premier mai 1881, et que par suite il n'est pas responsable des dommages soufferts par le second locataire à qui la demanderesse a pu louer de nouveau le dit magasin ;

Considérant que la prétention du défendeur quant au loyer réclamé est bien fondée ; qu'aux termes du bail invoqué, le loyer n'était dû que le premier mai ; que le dernier jour du terme appartient en entier au débiteur, et que l'action de la demanderesse intentée ce jour-là était prématurée, et que la consignation que le défendeur a faite du dit loyer au greffe de cette Cour est valable et suffisante ;

Considérant que la taxe d'eau n'était pas due à la demanderesse, qu'elle n'avait aucun droit de la réclamer du défendeur, et que ce dernier justifie l'avoir payée à qui de droit ;

Considérant qu'il est établi en preuve que la vitre dont la demanderesse réclame le coût n'a pas été brisée par le fait et la faute du défendeur, mais bien par suite d'un vice de construction de la maison louée dont le défendeur ne peut être responsable ; Considérant que la demanderesse ne pourrait avoir droit à des dommages contre le défendeur pour la détention illégale par ce dernier de la maison en question qu'en autant que ces dommages seraient réalisés et constatés contradictoirement, et que dans l'espèce aucune telle réclamation n'est établie, renvoie les diverses prétentions de la demanderesse à raison de tout ce que dessus. Mais considérant que le défendeur n'a pas prouvé avoir obtenu de la demanderesse ou de son agent autorisé un nouveau bail de la dite maison pour une autre année à compter du 1er mai courant (1880), et que par suite il est resté en possession de la dite maison ou magasin sus décrit illégalement après le temps accordé par la loi pour déménager, depuis le 1er mai courant ;

Condamne le défendeur à délaisser et livrer à la demanderesse, sous trois jours de la signification du présent jugement les lieux sus-décrits, en faisant place nette : sinon, et le dit délai expiré, sera le dit défendeur expulsé des dits lieux par main de justice, les biens, meubles et effets qui s'y trouveront jetés sur le carreau, et la demanderesse mise en possession et jouissance paisible des dits lieux. Et la Cour, vû les prétentions erronées des deux parties, les condamne à payer chacune leurs frais, condamnant néanmoins spécialement la demanderesse à supporter les frais d'enquête occasionnés par l'examen des témoins Houghton, Macdonald, Tigh et Chester produits par elle, et Philbin, McArthur, Haycroft, Lee, Baldwin et Ste Marie produits par le défendeur ; et condamne le défendeur aux frais d'enquête occasionnés par l'examen des témoins suivants, savoir : le défendeur lui-même, MacDonald, Cushing et la demanderesse, et la Cour réserve à cette dernière tout recours en dommages que de droit, s'il y a lieu, à raison de la détention de la dite propriété sans droit après l'expiration de son bail."

Messrs. *Archambault & David* for appellant argued :—

Il nous semble qu'il y a erreur complète dans ce jugement sur la légalité de la demande incidente et surtout sur l'opportunité et la régularité de son intro-

duction dans la cause telle qu'intentée. Examinons d'abord cette question et voyons si les dispositions de l'Art. 149 de notre Code de Procédure Civile s'appliquent dans l'espèce.

Sommes-nous dans aucun des deux cas mentionnés dans les sections 1 et 2 du dit Article 149 ?

Cet article dit : "Le demandeur peut, dans le cours de l'instance, former demande incidente. 1o. Pour ajouter à la demande principale quelque chose qu'il a omise en la prenant."

Eh bien, ce n'est certainement pas le cas dans l'espèce ; car non-seulement les faits de la demande incidente n'ont pas pu être omis dans l'action principale, mais ils ne pouvaient pas alors être invoqués pour l'expulsion du défendeur qui avait trois jours pour déménager.

Section 2. "Pour demander un droit échu depuis l'assignation et lié avec celui qui est exercé par la demande principale."

Il semblerait que c'est sur le texte de cette section que l'Hon. Juge Jetté s'est appuyé pour rendre son jugement ; mais a-t-il eu raison ?

Pour faire l'application de ce principe dans l'espèce il fallait deux choses indispensables à l'intimée : 1. Qu'elle eût le droit d'exercer l'action principale ; 2. Que le droit qu'elle voulait exercer par sa demande incidente fût lié avec celui de sa demande principale.

La demanderesse réunissait-elle ces deux conditions ? Non, sa demande principale était mal fondée, la demanderesse était sans droit de l'exercer, comme le prouve le jugement qui l'a déboutée *in toto*. Or, si ce droit d'action n'existait pas, celui que voulait exercer la demanderesse incidemment ne pouvait donc pas lui être lié. On ne lie pas une chose à une autre qui n'existe pas. Mais l'incident n'est que l'accessoire du principal, et si celui-ci est nul, comment celui-là peut-il être valable ? Comment peut-on dire dans l'espèce : la demande incidente ne demande pas l'expulsion du défendeur, mais la demande principale le demande et c'est tout comme. La demande principale étant renvoyée, ses conclusions n'existent plus et on ne peut pas les prêter à la demande incidente. Les conclusions d'expulsion étaient prises à raison des faits allégués dans la demande principale, et non à raison des faits invoqués dans la demande incidente qui ne pouvait pas alors être formée.

Mais on dira peut-être avec l'Hon. Juge Jetté : Les deux demandes n'en font qu'une et on doit les traiter comme telle. Eh bien, si on envisage la question sous ce point de vue, la demande incidente qui est insuffisante par elle-même est donc nulle, puisque, ayant besoin d'un autre élément pour rendre son existence valable, elle ne saurait le trouver dans une sphère où il n'existe pas. Du reste, si ces deux demandes n'en font qu'une, elles sont censées avoir été formées en même temps et comme dans ce temps elles ne pouvaient l'être ni l'une ni l'autre, elles sont toutes deux nulles.

Si, au contraire, la demande incidente est censée avoir été instituée à la date qu'elle porte, elle n'est pas, comme la demande principale, prématurée, mais elle est tout de même illégale et intempestive, étant formée dans un temps où la tacite reconduction était acquise à l'appelant.

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Dans ce cas encore, la demande incidente pour être maintenue aurait dû, pour justifier le jugement qui ordonne l'expulsion, contenir des conclusions à cet effet, ce qui n'est pas, et en conséquence elle est mal fondée et devait être renvoyée. Elle n'a été formée et produite que pour demander des dommages non établis; la Cour les lui refuse, mais lui accorde ce qui n'est pas demandé: l'expulsion. C'est donc accorder *ultra petita* et c'est en conséquence irrégulier et illégal.

Nous ne croyons pas devoir insister davantage pour faire triompher des principes aussi logiques et aussi clairs, et nous espérons, de la part de l'appelant, la révocation et infirmation du dit jugement du 25 mai 1880, avec dépens tant de cette Cour que de la Cour Inférieure.

RAMSAY, J., stated that Mr. Justice Jetté, in the Court below, did not approve of the procedure adopted by the respondent; but he said that the appellant himself had taken the incidental demand as the complement of the principal action. The whole case was before the Court, and was as complete as if the whole were incorporated in one demand. He had therefore granted the conclusions, putting the appellant out of possession. The judgment certainly met the equities of the case, and the Court here did not see any cause for disturbing the decision.

Judgment confirmed.

Archambault & David, for appellant.
Ritchie & Ritchie, for respondent.
(J. L. M.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1874.

14TH NOVEMBER, 1874.

Present: SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER.

PIERRE GUYON DIT LEMOINE,

APPELLANT;

AND

HARDOIN LIONAIS,

RESPONDENT.

HELD:—1. That a Court of Justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appears that he has acquiesced in it for years, lying by, until by circumstances, and the expenditure of capital, the subject matter of the sale has greatly increased in value, and new interests have been created in it. He must sue promptly, or explain the delay.

2. That although their Lordships were of opinion that the deed of sale impeached in this cause was certainly suspicious, and that there is much in it which tends to throw doubt on the honesty and good faith of the respondent, yet the subsequent dealings with him on the part of the appellant or his *cédant* deprive him of his right of redress.

The facts and the judgment of the Judicial Committee of the Privy Council appear fully in the following notes of their Lordships:—

This is an appeal from a judgment of the Court of Queen's Bench in Lower Canada, affirming a former judgment of the Superior Court, which dismissed the

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appellant's suit. Their Lordships, on the hearing of the appeal, were placed in circumstances of unusual difficulty. The appellant, a French Canadian, and not a lawyer, pleaded his own cause in his own language. He was opposed by two counsel of eminence and ability, speaking a language which, possibly, he imperfectly understands. It is due to those gentlemen to say that they argued the case with remarkable fairness and candor, and gave their Lordships all the assistance in their power. It is obvious, however, that their Lordships, as well as the appellant, were nevertheless at considerable disadvantage. To remedy this, as far as might be, they, at the close of the argument, undertook to examine carefully this complicated and voluminous record; and, particularly, to read and consider the elaborate and able factum presented by the appellant's counsel to the Court of Queen's Bench, with that of the respondent. This they have now done, and will proceed to give judgment on the appeal.

The suit was brought by the appellant on the 29th of October, 1856, as the assignee of the rights of a lady, whom it will be convenient to designate throughout this judgment as Dame Marguérite Roy, to set aside a deed of sale executed by her on the 30th of October, 1846; and the broad questions raised before their Lordships were:—

1st. Whether, if Dame Marguérite Roy had herself been the plaintiff on the record, she would have been entitled to have this deed set aside, or to any other relief in this suit; and,

2ndly. Whether, if she would have been so entitled, the appellant is entitled to any relief at all in the suit; or at most to any relief except that which is obtainable under the "exception des droits litigieux," which forms part of the record.

Their Lordships in dealing with these questions propose to divide the first of them; and to consider separately, first, whether Dame Marguérite Roy could successfully have impeached this deed of sale immediately or shortly after its execution; and, secondly, how far her right to do so would have been affected by the subsequent transactions; and the lapse of time between the date of the deed and the commencement of the suit.

The history of the transactions which lead up to the sale is shortly as follows:—

Marguérite Roy was first married to one Jean Marie Cadieux, who died in 1863, leaving two sons, viz., Pantaléon and George, and two daughters, viz., Henrietta, the wife of the Chevalier de Lorimier, and Christine Rachel, the wife of Jean Baptiste Chamilly de Lorimier, a person who plays a considerable part in the history of this case.

On the death of her husband, Dame Marguérite Roy became entitled to one moiety of the property which they had held and enjoyed *en communauté*; the four children taking the other moiety in equal shares.

Part of that property consisted of about fifty acres of land, situate at Côteau Baron, in the parish of Montreal, and on the outskirts of the then city. This had been derived from the parents of Dame Marguérite Roy, and was charged with an annuity of 50*l.* in favor of Dame Josephta Roy, the mother of Marguérite, and the surviving donor of the land.

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On the 16th of April, 1834, Henrietta conveyed her share in this land to her brother-in-law, Chamilly de Lorimier, who will henceforth be called Lorimier.

On the 20th of October, 1834, a partition was made between the widow, her two sons, and Lorimier, as assignee of Henrietta's share and the representative of his wife, then a minor. The effect of the "Acte de Partage," which is at page 43 of the record, was to divide the land into lots, and to assign certain lots to the different sharers according to their respective interests in severalty.

On the 8th of April, 1835, the widow sold and conveyed her moiety of the land, as ascertained by the partition, to one Pinsonnault, a land-jobber or speculator, who, by conveyances, dated respectively the 26th of April, the 1st of May, and the 18th of May, 1835, also acquired the shares of George, Pantaléon, and the Lorimiers; and thus became the proprietor of the whole plot of land, subject to the liens or privileges of the different vendors in respect of the unpaid purchase-money of their respective shares.

On the 13th July, 1835, Dame Marguérite Roy had the misfortune to contract a second marriage, with one Regnier, who appears on the evidence of both sides to have been a person of slender means and indifferent character. The settlement made in anticipation of this marriage was dated the 6th of July, 1835 (page 37), and its effect was to make the future consorts separate in estate, excluding all community of property, except such as might be implied in the words, "Cependant les bénéfices et augmentations appartiendront de plein droit par moitié aux dits futurs époux et leur sortiront nature de propre, et aux leurs de leur côté et ligne respectivement." On the day before the execution of this contract, Madame Marguérite Roy had been induced to sign certain promissory notes in favor of Regnier, which he indorsed to Pinsonnault, who indorsed them over to one Thomas Storrow Brown.

On the 19th of April, 1837, Brown recovered judgment in two actions on these notes against Regnier and his wife, for sums amounting together to 452*l.* 8*s.* 4*d.* with subsequent interest and costs.

On the 17th April, 1838, one Francis, of Birmingham, recovered judgment against Brown, who had then become insolvent, and his partner in a hardware business, for the sum of 4,086*l.* 4*s.* 7*d.*

On the 4th of April, 1838, Pinsonnault, having also become insolvent, and failed to perform his part of the contract for the purchase of Dame Marguérite Roy's moiety of the land at Coteau Baron, she, suing with her husband, Regnier, obtained a decree for the resiliation of that sale, and recovered back her moiety of the land; and on the 18th of April, 1838, she compromised a suit with her children touching the succession of Jean Marie Cadieux, and under that compromise acquired all the rights of resiliation which George Cadieux and the Lorimiers possessed against Pinsonnault in respect of their shares in the same land.

She thus became again the proprietor of her own moiety of the Coteau Baron property, and acquired the rights of the unpaid vendors in $\frac{3}{8}$ths of the other moiety; and this state of things continued up to 1844.

In 1844 Marguérite Roy made a lottery of her moiety of this property, which she divided for that purpose into eighteen lots. In this way she disposed of

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some lots, but in every case the purchase money was not paid down, but was stipulated to be paid by instalments at future dates; the usual rights and privileges of an unpaid vendor being reserved to her. It would seem that, after these transactions, thirty-one of the lots originally defined by the "Acte de Partage" of 1834 remained in her possession.

In the meantime no steps had been taken by Brown, or any person representing him, to enforce the judgments which he recovered in 1837 against Dame Marguerite Roy and her husband. But, on the 17th of October, 1844, Régnier obtained from one Forster, the constituted attorney of Francis, an assignment of the judgment recovered by Francis against Brown for 4,086*l.* 4*s.* 6*d.* Armed with this judgment, Régnier, in the name of Francis, took out execution against Brown, attached thereunder the judgment debt due from himself and Dame Marguérite Roy to Brown, and on the 30th of September, 1845, obtained an order that he (Régnier) and Dame Marguerite Roy, as garnishees, should each of them, within fifteen days, pay the 452*l.* 8*s.* 4*d.*, with interest calculated from various dates in reduction of the judgment-debt nominally due to Francis.

Régnier having thus acquired the power of taking out execution against his wife's property in the name of Francis, did nothing further in that way himself. But on the 19th of November, 1845, being in prison, he assigned to the respondent, who then, for the first time, comes upon the scene, the benefit of this order against the garnishees. The consideration expressed in this assignment was 250*l.*, alleged to have been paid down, and an undertaking to pay the balance of the 452*l.* 8*s.* 4*d.* in goods. The act of assignment also bound the assignee to pursue the execution against certain persons indebted to Dame Marguérite Roy for the purchase-money of some of the lots sold by the lottery; and by two further assignments, dated respectively the 30th December, 1845, and the 14th of January, 1846, the rest of the judgment debt of Francis, and all rights under that judgment were transferred by Regnier to, and became vested in, the respondent.

The respondent having thus acquired the power of taking out execution against the property of Marguerite Roy in the name of Francis, exercised it in the following manner:—In December, 1845, he attached in the hands of Ovide Le Blanc, William Ermatinger, Joseph Beaudry, Prudent Beaudry, and Joseph Caspard Laviolette, the moneys due from them to Dame Marguerite Roy, or to Régnier; being in part the sums due for the purchase money of the lots sold to them respectively under the lottery; in August, 1846, he attached a similar debt due to Dame Marguerite Roy from MacPherson, Crane & Co.; but on the 24th of October, 1846, he withdrew this last execution; and, lastly, in September, 1846, he took out execution against some of the lots of land in Marguerite Roy's own possession. A. M. Beaudry acted as his advocate in the execution against MacPherson, Crane & Co.; it does not appear who was the advocate or attorney through whom the other seizures were made.

This was the position of the parties when the deed of sale of the 30th of October, 1846, which is now impeached, was executed.

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This deed (p. 38), which was in the notarial form, and was acknowledged before two notaries public, named Martin and Lappare, purported to be made by Dame Marguerite Roy, being separate in estate from her husband, under her marriage contract, but duly authorized by him, and to sell and convey to the respondent,—

1st. Twenty-seven of the thirty one lots forming part of the vendor's original moiety in the Côteau Baron property, which remained in her possession;

2ndly. All the claims and rights which, by virtue of the assignment made to her under the family compromise, she possessed, and could assert against the lots sold by George Cadieux and the Lorimiers to Pinsonnault;

3rdly. All the debts and claims enumerated in Schedule A to the deed, being the sums due from the several purchasers of lots under the lottery, except MacPherson, Crane & Co, with all her rights as unpaid vendor in respect of those lots. The gross amount of those debts and claims was 3,125*l.*

As the consideration for this purchase the respondent undertook,—

1st. To pay to Marguerite Roy on her separate receipt (her husband thereby authorizing her in that behalf) 2,000*l.* by the following instalments: viz., 250*l.* six months after the sentence of ratification, which the purchaser bound himself to obtain at his own cost, and without delay; 250*l.* one year after the date of such sentence of ratification; 500*l.* within eight years, calculated from the date of the deed; and 500*l.* in each subsequent year until the whole 2,000*l.* should be paid, with interest from the date of the deed, payable quarterly, on account of which interest the vendor admitted the receipt of 30*l.*

2ndly. To pay 100*l.* to Régnier, in consideration of whatever rights he might be conveying under the deed, he consenting to his wife's receipt of the 2,000*l.*, and admitting the receipt by himself of the 100*l.*

3rdly. To pay to Dame Josephta Roy in exoneration of the vendors, 68*l.* for the first, and 50*l.* for every subsequent year during her life; such annuity to be payable quarterly.

4thly. To pay and satisfy within two months after obtaining the judgment of ratification, and in discharge of the vendors, all the debts enumerated in Schedule B to the deed. The gross amount of these was 1,885*l.* 16*s.* 4*d.*, but they included 750*l.*, the alleged amount of Brown's judgment debts, with the interest due thereon, which was entered as then due to Francis; and M. Beaudry's bill of costs, amounting to 110*l.*

5thly. To pay for the vendor, and in discharge of the Lorimiers, certain claims which "MM. les Ecclésiastiques du Séminaire Seigneurs de l'Isle de Montréal" and the Sisters of the Hôtel Dieu de Montréal, had against the Lorimiers, under certain assignments made on or about the 6th of October, 1835, and the 2nd of November, 1835, to the amount of 100*l.*; it being provided that if these claims should exceed that sum, the purchaser should pay the excess on account of the interest coming from him to the vendor; and that if they should fall short of 100*l.*, he should pay the difference to Dame Marguerite Roy.

The deed contained a stipulation empowering the respondent to commute the tenure of the lots sold to him, which seem to have been subject to certain

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seigniorial rights, the vendor binding himself to ratify the commutation, and to repay to the purchaser what he should pay for such commutation, in the event of the resiliation of the sale. It also reserved power to the purchaser, in the event of the ratification being opposed by creditors, other than those mentioned in Schedule B, to cancel the sale on the terms of being repaid whatever he might have paid under the contract, with interest. It contained a ratification, by Dame Josephta Roy, of the arrangement touching her annuity, and an acknowledgment that she had received 17*l.* on account of it. And by a clause in favor of the vendor, the respondent declared that, to secure the execution of all and each of the obligations contracted by him, he had "spécialement et par privilège affectée et hypothéqué les biens susvendus."

By what is termed a *contre-lettre* of the same date (p. 114), the respondents also undertook, first, to cause certain proceedings of MacPherson, Crane & Co. to be discontinued; secondly, to hold Marguerite Roy harmless in respect of the claims of one Louis Marteau, as cessionnaire of Pantaléon Cadieux; Marguerite Roy ceding to the respondent all the counter-claims which she might have against Louis Marteau, but reserving to herself any surplus or balance that might be found due to her in respect of such claims and counter-claims; and, thirdly, to relieve Lorimier from two judgments, one for 60*l.* 13*s.* 0*d.* and the other for 61*l.*, which had been recovered against him by George Storrow Brown. It is to be remarked that, by another deed of the 30th October, 1846 (p. 53), there had been a settlement of accounts between Lorimier and his wife on one side, and Dame Marguerite Roy and Régnier on the other, under which the liability of Lorimier in respect of these judgments, and also in respect of the claims against him by the Seminarists and the Sisters of the Hôtel Dieu, had been assumed by Dame Marguerite Roy. Hence the stipulations both in the principal deed and in the contre-lettre, which appeared to be in favour of Lorimier, are, in fact, stipulations in favour of Dame Marguerite Roy, and go to swell the consideration payable by the respondent.

By another and more important contre-lettre (p. 41), which was made on the 3rd of November, 1846, between Régnier and the respondent alone, it was declared that Régnier had not, in fact, received the 100*l.* the receipt whereof was admitted by him in the principal deed; that the true consideration for which he had consented to the sale was not that sum, but the undertaking thereby admitted of the respondent to share with Régnier the ultimate profits of the transaction in equal moieties.

The transaction, therefore, which is impeached is, in fact, embodied in the three last-mentioned documents; and the question now to be considered is, upon what grounds, if any, Dame Marguerite Roy, immediately or shortly after the date of that transaction, could successfully have impeached it.

It is unnecessary to go at length into the voluminous pleadings in the case, or to consider the dilatory defences and other expedients by which the respondent is said for several years to have attempted to defeat the suit on which the appellant sought to set aside the deed. The grounds for resiliation may be broadly stated to be fraud, the nature of which will be more particularly stated hereafter, and "lésion au delà de la juste moitié du prix."

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Before going further, it will be well to consider how these points have been dealt with in the Courts below. Mr. Justice Monk in the Superior Court, and three of the judges in the Court of Queen's Bench, held that the appellant had failed to establish "lésion;" and that he had also failed to prove any fraud upon which Marguerite Roy or her heirs could have set aside the contract. The two dissentient Judges of the Court of Queen's Bench held that fraud vitiating the contract had been established, and that the appellant was entitled to take advantage of it, but declined to find that "lésion" had been established. There is, therefore, no finding in the appellant's favor on the question of "lésion;" and on the question of fraud he has four judges against him, and but two in his favor.

It is right, however, to observe, that the value of Mr. Justice Monk's judgment is considerably diminished by the error into which he seems to have fallen touching the legal relations of Régnier and his wife. His view (as appears more clearly from the "considerations" of his formal judgment at p. 30 of the Record, than from the reasons for that judgment at p. 646) was, that a partial community existed between the husband and wife; that some of the property sold, and, in particular, the rights against Pinsonnault which had been assigned to Dame Marguerite Roy by the Lorimiers, had fallen into and become part of that community; and that this consideration justified and supported the counter-letter of the 30th of November, 1846. But, upon this point, Mr. Justice Badgley, for the reasons fully stated in his judgment, and apparently with the concurrence of all the judges of the Court of Queen's Bench, came to the conclusion that the alleged partial community between Marguerite Roy and her husband had no existence in fact or in law. And that this is the true construction of the marriage contract was not disputed by the learned counsel for the respondent at the bar.

Their Lordships may at once dispose of the question of "lésion," as distinct from fraud, by saying, that they are not disposed to dissent from the finding of the Canadian Courts on that point. To ascertain the real value in 1846 of property, which it is admitted on all hands has since risen enormously in value, would obviously be very difficult, and Mr. Justice Monk was possibly right when he observed: "It may be said with confidence, that the property was worth more than the price agreed to be paid; but how much more, or whether it was worth twice as much, it is impossible to say. In fact, 'lésion,' as a distinct ground for setting aside the sale, was almost abandoned by the appellant's counsel in the Court of Queen's Bench." (See his Factum, at p. 645 of the Record.)

The question of fraud is more complicated and difficult of solution.

The case presented on the part of the appellant in the Court of Queen's Bench and before their Lordships is, perhaps, most succinctly and neatly expressed in the able Factum of Maître Barnard, at p. 598 of the record. It is there said—

The facts alleged by the appellant may be summed up, as follows:—

1st. The respondent in order to possess himself of the property of Madame Régnier, viz., the debts due to her, and the lands described in the bill of sale,

seduced Régnier, by promising him a moiety of the profits which might result from the operation.

2ndly. In order to compel Madame Régnier to consent to the sale, the respondent, amongst other means, seized the property in the name of John Francis, the debt thus turned against Madame Regnier, being a debt paid and extinguished, if it had ever been due by her.

3rdly. Not content with having thus obtained the property for a price much less than half its value, and payable at long dates, the respondent contrived by buying the debt for the commutation of tenure, and by means of a fraudulent decree, to cause the property of Madame Régnier to be transferred into the name of his wife, so that the former has never received a farthing of the purchase money, except the 30*l.* paid down; and all the facts of the cause indicate that it was the intention of the respondent from the beginning to obtain the property without paying the price.

The first of these heads turns chiefly on the effect of the agreement between the respondent and Régnier, which is proved beyond all question by the counter-letter of the 3rd of November, 1846.

According to the law of Lower Canada, founded on the Custom of Paris, Dame Marguerite Roy could not sell any part of her immoveable property without the special sanction of her husband, or, if that were improperly refused, without the sanction of a Court of Justice; and her husband was utterly incapable of purchasing any part of her separate property for himself. These propositions seem to be established by the authorities cited in the Factum of Maître Barnard (see pp. 622 and 623 of the Record). Nor do they seem to be impugned in the Court of Queen's Bench by the respondent, who chiefly rested his defence on this part of the case upon the partial community which the lower court had, erroneously, as now appears, found to exist between Régnier and his wife.

How, then, do the judges of the Court of Queen's Bench who decided in favor of the respondent meet this part of the case? Their reasons are to be found in Mr. Justice Badgley's judgment, at p. 32 of the Supplemental Record.

After setting out the substance of the counter-letter, the learned judge goes on to say:—

"Now it is manifest that the sole objects of the sale were the moveable and immoveable private property of Marguerite Roy, in which Régnier had neither share nor right, and that he was a consenting party to the deed for the sake of legal conformity only, to validate her alienation of her *immeuble*. His consent otherwise was of no moment, but given probably to avoid the expense of obtaining judicial sanction for her completion of her consensual contract, had he refused to become a party to the deed; because it will be remembered that Regnier and his wife were not in community as to property but absolutely disconnected for their material interests, except as to the requisite of his consent or authorization for her alienation of her *immeubles*. The property sold was hers, the consideration of the sale was for her personal benefit and use, and in discharge of her indebtedness, and for the receipt by herself of her money consideration of 2,000*l.* As between herself and Lionais the contract of sale was complete and perfect by their consensual agreements between them, and the

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alleged further consideration to Régnier of 100*l.* mentioned in the deed, or as afterwards referred to by the contre-lettre of 3rd November, was a consideration between Lionais and Régnier, in which she had neither part nor interest, whether the consideration was the 100*l.* of the deed, or the alleged consideration of the contre-lettre.

"The appreciation, therefore, by Lionais and Régnier, of the necessity for or of the precise value of Régnier's consent to the deed of sale, in which alone his consent figures, is not within this controversy between Lionais and Regnier's wife, which solely questions her consent to the sale, and cannot apply to or affect Régnier's consent in itself which he has not denied anywhere in the record, nor authorized Lemoine to deny or question for him. At the utmost, the stipulations of the contre-lettre of the 3rd of November only exhibit Régnier's astuteness for his own advantage, not against his wife or her property, which she had voluntarily passed from herself to Lionais, by the deed of sale for a satisfactory consideration to herself, but against Lionais, as the purchaser from her of that property, then no longer hers, but Lionais', and to have effect only after the full completion by Lionais of all the executory agreements of the deed of sale and contre-lettre of 30th October, 1846, and probably only after long years from that date, and certainly after heavy outlay and advance by Lionais. It is manifest, that the stipulations by Lionais and Régnier of their contre-lettre were apart from and independent of those of the deed of sale in her favour; that they expressly referred to Regnier's consent to the deed of sale alone, the words of the contre-lettre being 'the true consideration for his consent to the deed of sale;' that these words are restrictive and explicit, and manifestly neither caused nor contemplated any interference with the deed of sale, nor any loss or diminution to her of considerations or rights therefrom, but, on the contrary, confirmed both in their integrity, by only allowing operative effect to the agreement of the November contre-lettre, after her claims had been fully liquidated and discharged.

"Under these circumstances she had no interest in those stipulations between Lionais and Régnier, the more so as no stipulations made by them without her consent could possibly affect or jeopardize her rights under the deed. Moreover, Regnier was quite free and competent to contract for his own advantage with Lionais or with any one else, if he did not detriment his wife or her separate property, and as she could not control her husband's private bargains, she could have no resolutory rights over his agreement with Lionais, or over the property of the latter under the contre-lettre, any more than she could have had over the 100*l.* stipulated in the deed of sale, which she did not dispute."

To their Lordships this reasoning is eminently unsatisfactory. It treats the two transactions as separate and independent of each other; the deed of October as effecting a complete transfer of Dame Marguerite Roy's property to the respondent; the counter-letter of November as a subsequent and independent dealing by the respondent with the property which he had previously acquired. But this is inconsistent with the admissions of the parties themselves. The counter-letter, though executed a few days later than the deed, expressly

declares that the true consideration for Régnier's sanction of and joining in the deed was not the 100*l.*, but a then existing agreement between him and the respondent to share in the profits of the transaction; an agreement afterwards embodied in the counter-letter. The deed then ought to be read as if this, the true consideration for its execution by Régnier, had been expressed in it. And if this had been done, could any Court of Justice have said that the transaction did not sin against the two rules above referred to; that such a stipulation in favour of Régnier did not render it impossible for him to be the disinterested protector of his wife which the law required him to be; and did not, in fact, involve such a purchase of his wife's property as the law forbids?

That this was done not openly, but indirectly, and under cover of a false allegation in the deed, is a circumstance which only serves to impress upon the transaction an additional characteristic of fraud. Nor are these the only inferences to be drawn from the counter-letter. It shows that there was concert between the respondent and Regnier in order to effect a purchase that was designed to be for the benefit of both; and thus affords some evidence in support of the appellant's allegation that the transaction was the result of a conspiracy between these persons to obtain the property at a price below its value; and possibly without payment of the price stipulated.

The second *résumé* is chiefly founded on the use said to have been fraudulently made of the judgment in Francis *v.* Brown. It has been seen that that judgment-debt was originally purchased by Régnier in October, 1844. The expressed consideration for the assignment was the payment by Régnier of the amount of the principal due on the judgment, being upwards of 4,000*l.* That any such payment was made would be simply incredible, and is not asserted. It was suggested by the respondent in his evidence, that the real consideration was a charge of 200*l.* in favour of Francis upon part of the Cadieux property. In that case the consideration would be one moving from Dame Marguérite Roy. It might, indeed, be the case that this judgment was thus originally acquired by Régnier honestly, and in order to protect himself and his wife against any claim upon the judgment of Brown, in respect of which, whatever may have been their liability *inter se*, they were unquestionably jointly and severally liable to Brown's estate. And the same motive may have justified the application for the garnishee order of the 30th September, 1845. But if this was so, it is clear that Régnier was not in a condition in which he could use, either honestly or legally, this judgment against his wife. If he did acquire the judgment honestly, he held it for his wife's benefit as well as his own. No justification is shown for the transfer of it to the respondent in order that he might use it against Dame Marguerite Roy or her property. No consideration is satisfactorily shown to have passed between the appellant and Régnier on the several assignments of portions of this judgment debt. And it is abundantly demonstrated on the record that the considerations expressed in the different deeds executed in the course of the voluminous transactions embodied in it cannot safely be treated as paid, because they are thereby admitted to have been paid.

Another important consideration is under what advice Dame Marguerite Roy, evidently not receiving that protection from her husband which she ought to

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have received, acted in this transaction. Her advocate and attorney, it is admitted, on both sides and by himself, was M. Ubald Beaudry, who was examined as a witness in the cause. It cannot be said that his examination (Record, p. 274), taken, no doubt, many years after the transaction, throws much light upon it, or tends to establish its regularity or fairness. On the other hand, he admits that he is now, in some sort, a partisan of the respondent, and has aided him in his defence in this suit; that he was retained and instructed rather by Regnier than by his wife; that the proposal for the purchase came to him directly from the respondent, and was submitted through him to Dame Marguerite Roy; and that he acted in at least one of the seizures of his client's property under Francis's judgment, as the advocate of the seizor, a circumstance which he wholly fails to explain. Mr. Justice Monk, too, finds that he also drew the counter-letter (p. 646). His bill of costs (p. 158), of which the greater part was paid under the deed of the respondent, is entirely made out against Regnier; and every thing points to the conclusion that he was substantially instructed by, and acting for, Régnier in this business. Mr. Justice Monk suggests that Dame Marguerite Roy had also the independent advice of her son-in-law Lorimier; and lays stress upon his statement that two proposed drafts of the deed of sale were shown by him to Messrs. Pelletier and Bourret (Record p. 269.) But there is really nothing to show that those gentlemen ever gave Marguerite Roy any advice in the matter, or saw the drafts, except for the purpose suggested by Lorimier. Nor is it likely that they would have interfered between M. Beaudry (a person of position and consideration in his profession) and his ostensible client. As for Lorimier, he appears, at that time, to have been in difficulties, and hardly a free agent in the matter. His connection with the lady cannot be taken to supply the want of the independent aid and professional advice which M. Beaudry was bound, and failed, to give her.

On the whole their Lordships, without giving much weight to the oral testimony of Lorimier, which may be open to the objections taken to it in the courts below; but relying on the conduct of Régnier and the respondent, as proved by authentic acts; and to the unsatisfactory character of the testimony, both of the respondent and of M. Beaudry, in explanation of those acts; are constrained to say that the transaction of October, 1846, was one which, upon a suit brought in proper time, Dame Marguerite Roy might successfully have impeached, if no better evidence in support of it than that now forthcoming had been produced. They have hitherto excluded from consideration the third *résumé* of Mr. Barnard, because that is founded on matters subsequent to the execution of the deed; matters which, even if they afford some evidence of the imputed conspiracy between the respondent and Regnier to get the property without paying for it, also afford evidence of the acts of ratification relied upon by the respondent, and are, moreover, capable of being treated as separate transactions, to be inquired into on their own merits.

The following is the history of the subsequent dealings between the respondent and Dame Marguerite Roy.

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It may be assumed, without going into the details, that the respondent realised, either by payment, or by recovery of the lots upon which they were secured, all the credits comprised in Schedule (A) to the deed, and that he also paid, or otherwise indemnified, Dame Marguerite Roy against all the debts comprised in Schedule (B). The satisfaction of the annuity to Dame Josephta Roy, and the settlement of the matters which were the subject of the counter-letter of even date with the deed, were involved in the transactions now to be shortly stated.

It would appear that between 1846 and 1849, the respondent had commuted the tenure of the purchased lands, by paying or becoming liable to pay to the religious communities, who were the lords of it, the price of the seigniorial dues, and that the preferable lien which the law gave to him for the sums thus expended, passed by various mesne assignments, nominally at least, through his brother-in-law to his wife, who is separate in estate from him. A good deal is made of this in the Factum of the appellant, and in his case on this appeal. But the enfranchisement of the land was clearly contemplated and provided for by the deed. The law makes the sums paid for enfranchisement the first charge on the land, and the transfer of that charge to the respondent's wife, if material to the present question, and impeachable at all, can only be impeached in a suit to which she is a party.

On the 17th of March, 1849, the respondent, being then in embarrassed circumstances, brought a suit (p. 276) to be relieved from the purchase, on the ground that Dame Marguerite Roy, for default of appearing before a Judge, was not duly authorized to execute the deed of sale. Régnier and his wife are said (p. 343) to have appeared to this action. But nothing came of it. It seems to have been finally abandoned in consequence of the cure, by means of a retrospective statute, of the defect in the title, if that ever existed. It is suggested by Lorimier, in his evidence (p. 339), that this proceeding was brought by the respondent with a fraudulent intent, and in the belief that it would enable him to get the land without paying the price, by means of his first charge on it in respect of the enfranchisement. If the land was as valuable as is now pretended it was, such a contrivance could hardly have succeeded. But it is certain that Dame Marguérite Roy then showed no inclination to have the sale rescinded.

On the 26th of June, 1849 (p. 439), the two first payments of 250*l.* cash, on account of the 2,000*l.* being then due under the deed, Dame Marguerite Roy gave the respondent a prolongation of the term of four years from that date, viz. to the 26th of June, 1853. She also gave up her *hypothèque* and other rights on certain of the lots. Yet she might then, if she had desired to set aside the sale, have sued for its resiliation under her rights and privileges as an unpaid vendor. There is no explanation of this transaction; and it would certainly have been incumbent on her, if she had been the plaintiff in this suit, to explain this apparent confirmation of the original transaction.

On the 11th of June, 1850, she petitioned the Judges of the Circuit Court for authority to receive and give receipts for the purchase-money to come to her from the respondent. This proceeding seems to imply that she was not then acting under her husband's influence, but adversely to him, and is some further confirmation of the transaction.

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Before this, however, and on the 26th of June, 1849 (p. 434), a long deed was also executed between the Lorimiers and Dame Josephta Roy on the one side, and the respondent on the other. It is in the nature of a settlement in respect of the claims of the three former persons, under the deed of the 30th of October, 1846, and the counter-letter of the same date, though, like most of the settlements to be found in this record, not of a final character.

On the same day Dame Marguerite Roy executed another deed, by which she assigned certain other rents to the respondent, in consideration of what had been done by him in relieving her from some of the obligations she had incurred towards the Lorimiers; and by the last clause of the deed (p. 204) she especially ratified and confirmed the sale of the 30th of October, 1846.

There were also some distinct transactions between the respondent and Dame Marguérite Roy in respect of the claims of Louis Marteau as cessionnaire of the rights of Pantaléon Cadieux, and of some dealings with Ovide Blanc, in which fraud is imputed by the parties to the respondent. It is difficult to unravel them. It is sufficient to say that their merits cannot be tried in such a suit as this, and that they would at most go to the question whether the stipulations of the deed had been duly carried into effect; not to that whether it should be set aside on the ground of fraud.

There are occasional appearances of Régnier upon the scene. On the 12th of July, 1850, he transferred to Pierre Moreau (apparently the brother-in-law of the respondent) his rights under the contre-lettre of the 3rd November, 1846 (p. 170). On the 11th of November, 1850, he revoked (as far as he could) by notarial act the authority he had given to his wife to receive the purchase money of the lots sold (alleging it to belong to him); and on the 14th caused this revocation to be solemnly notified to her. And on the same 11th November he, by another deed, transferred 1,000*l.* and interest, being half the outstanding purchase money, to one Eugène Jouette, who is admitted by the respondent (see p. 543) to have been a *prête-nom*. These acts, however, except as general evidence of dishonesty, do not affect the case.

The most material of the subsequent transactions is that which relates to the alleged satisfaction of the 2,000*l.*, payable to Dame Marguerite Roy under the deed, of which it is admitted she has directly received only 30*l.*

On the 31st of March, 1853, Dame Marguérite Roy transferred all her rights against the respondent in respect of the 2,000*l.* (subject to a reservation as to a sum of 750*l.*, which was to abide the result of some legal proceedings) to Jean Baptiste Lionais, the respondent's brother, who afterwards transferred the benefit of this transfer to the respondent's wife, for whom he was probably a mere *prête-nom*.

It does not appear that any consideration was received by her for this; but, her son-in-law, Lorimier, in his evidence (p. 270), states that this cession was made at his instance, and in order to effect a transaction of even date whereby (see p. 514) he in his own right and that of his wife, and also as assignee with her of the rights of Josephta Roy, transferred to the same Jean Baptiste Lionais.

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all his rights under the deeds of the 30th of October, 1846, and the 26th of June, 1849, in consideration of a sum of 650*l.* to be paid by the respondent's wife.

The factum of the appellant connects these transfers with a complicated litigation arising out of a suit of Duplessis *v.* Lionais, alleged to have been collusive, and a maze of chicanery, of which it is difficult to find a clue.

But, if it be granted that this transaction, certainly suspicious, was really fraudulent; if it be true that this unfortunate old lady was thereby tricked out of the chief part of the price for which she sold her property, how is it possible that its merits can be tried in this suit in the absence of all the parties ostensibly concerned in it? Again, how can it be made a ground for setting aside the deed, unless it can be shown that it was part of a conspiracy entered into seven years before to obtain the property without paying for it—a most unreasonable presumption. There may be good ground for setting aside the transaction itself in a suit properly framed for the purpose, and thus recovering the credit transferred; and such a suit appears to have been once threatened by the appellant. But the transfer, if valid, or a suit to enforce the payment of the unpaid purchase money by setting it aside, would alike imply a recognition of the original sale as valid.

It need only be added that, after a great fire at Montreal, in 1852, the land became very valuable for building purposes, and that large sums have been expended by the respondent upon it; that, in August, 1854, Dame Marguerite Roy transferred all her rights and claims against the respondent to the appellant, Régnier (who seems to have been faithless to all parties) joining in the transfer; and that she and her husband both, as it would seem, died before the institution of this suit.

Reviewing these subsequent transactions, their Lordships are of opinion that though there is much in them which tends to throw additional suspicion on the honesty and good faith of the respondent; so far from strengthening the right of Dame Marguerite Roy to set aside the deed of sale by such suit as this, they are, if unexplained, absolutely inconsistent with the continuance of that right, involving, as they do, repeated ratifications of the deed. The action was no doubt commenced within, though only just within, the legal term of prescription. But that does not in such a suit relieve a party from the consequences of his own acts or laches. A Court of Justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appears that he has acquiesced in it for years, lying by, until by circumstances, and the expenditure of capital, the subject matter of the sale has greatly increased in value and new interests have been created in it. He must sue promptly, or explain the delay. Whether Dame Marguerite Roy, if alive and the plaintiff in the suit, could have made a better case it is needless to inquire. It cannot be presumed that she would have done so, and certainly no such intendment ought to be made in favor of a person in the position of the appellant. Upon the whole, the n, their Lordships, though dissenting from much of the reasoning of the Judges who concurred in the judgment under appeal, are of opinion that they were right in

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coming, upon the evidence before them, to the conclusion that Marguérite Roy could not when this action was brought, and in an action like this, have successfully sued to set aside the sale of 1846.

This being their Lordships' opinion, it is unnecessary for them to consider the objections raised on behalf of the appellant to the application to him of "l'exception des droits litigieux." They will only say that, in the absence of all insuperable objections, they should have thought that the plea afforded the measure of the relief to which in any view of the case the appellant could be entitled. The existence in the code of the provisions on which that plea is founded shows that if the law of Canada permits, it does not favor, such transactions as that by which the appellant became the purchaser of Dame Marguérite Roy's claims. Nor would their Lordships have been sorry to mark the view which they take of the respondent's conduct in these transactions by granting such relief. But they could not do so consistently with what is of far higher importance than the merits of the parties in this particular case, viz., the substantial principles by which Courts of Justice ought to be guided in determining suits of this kind.

They must therefore humbly advise Her Majesty to affirm the Judgment under Appeal, and to dismiss the Appeal. In an ordinary case the costs would follow the result; but their Lordships, considering the peculiar circumstances of this case, and the view they have taken of them, have, not without doubt, come to the conclusion that each party should bear his own costs of this Appeal.

(J. J. B.)

Appeal dismissed.

SUPERIOR COURT.

MONTREAL, 28TH MAY, 1883.

Coram TORRANCE, J.

No. 41.

Heyneman vs. *Davis*.

HELD:—That the plaintiff, who has made option of a jury trial by his declaration, cannot withdraw it without the consent of the adverse party.

The plaintiff had made option of a jury trial by his declaration, as his right was, and issue was joined accordingly. He now made motion that his option be cancelled, leaving to defendant the same option if he chose to avail himself of it.

PER CURIAM.—This option once made was binding on the other side, and should not be withdrawn or annulled without the consent of the other side.

The Court refuses the motion.

Atwater, for plaintiff.

W. H. Kerr, Q.C., for defendant.

(J.K.)

SUPERIOR COURT, 1883.

SWEETSBURGH, 2ND MAY, 1883.

Coram BUCHANAN, J.

The School Commissioners of Roxton Falls vs. *Beauchemin.*

HELD:—1. That the Superintendent of Education has no jurisdiction in the revision of the accounts of a Secretary-Treasurer of School Commissioners whose resignation has been accepted and a discharge granted him by his employers.

2. That the Superintendent of Education has no jurisdiction or authority in law to set aside a discharge granted to such Secretary-Treasurer, but such discharge must be set aside by a competent tribunal under the provisions of 40 Vic. ch. 22, sec. 30, as amended by 41 Vic. ch. 6, sec. 19.

3. That even supposing the Superintendent of Education has jurisdiction, the Statute 41 Vic. ch. 6, sec. 16 can have no retroactive effect to enable him to revise the accounts of a Secretary-Treasurer whose resignation has been accepted and a discharge granted him previous to the passing of said Statute.

4. That the action to have the sentence of the Superintendent of Education declared executory under sec. 17 of ch. 6 of 41 Vic. must show that the Superintendent had the power to render such sentence, and that his jurisdiction appears on the face of the proceedings.

PER CURIAM. In Nov., 1865, the defendant was appointed Secretary-Treasurer of the School Municipality of the Township of Roxton, and acted as such until the fourth day of February, 1877, when he resigned his office and a discharge was given him by the said Commissioners releasing him from all liabilities thereunder. Subsequently to such discharge, on the 30th June, 1877, a division of the territory of this Township School Municipality was made, and there was erected two distinct School Municipalities, that of the Township of Roxton and that of the Village of Roxton Falls; the latter represented by the plaintiffs here. There was no division made, apparently, of the assets of the original Municipality, but it is obvious that the plaintiffs made claim to some share therein, and one of these assets as claimed by the new Municipality, but not recognised by the old one, was a claim against the defendant, arising, as the plaintiffs aver, through the fraudulent misappropriation by defendant of monies belonging to the old Municipality, and which should have formed part of these assets of which plaintiff sought a share. These conflicting claims not being adjusted the matter was referred to the Superintendent, but in what manner it was done is not clearly stated, whether by the Commissioners or by five contributors to the local school fund as provided by sec. 16 of 41 Vic. chap. 6, replacing sec. 63 of chap. 15 of Con. Statutes L. C.—the plaintiffs in their declaration on that head contenting themselves with the allegation, that the intervention of the Superintendent was demanded as provided by law to have the accounts of the defendant audited. However that may have been, the Superintendent of Education under the powers conferred upon him of appointing a delegate, 41 Vic. ch. 6, sec. 16, for the purpose of revising the accounts of a Secretary-Treasurer, named one Mr. Stenson as his delegate to make the necessary revision of the accounts which defendant had rendered and upon which he had obtained his discharge, and of this all the parties concerned are alleged to have been notified, though defendant seems to have taken no notice of this meeting nor to have attended before the delegate.

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On the 15th June, 1881, the Superintendent rendered his final decision, based, of course, upon the facts reported to him by his delegate, and in this sentence, which criticises at length the defendant's account and contests and sets aside divers items placed therein in favor of defendant, concludes by setting aside or in terms ignoring the discharge obtained from the Commissioners of the Township, and declares him to be a defaulter and to be indebted in a sum of $617.07, composed of the amount of the balance of his account and $105 for the costs of that investigation, such amount being, according to the sentence, divisible between both Municipalities proportionately to the respective values of their properties—whatever that may have been, which does not appear. The next proceeding seems to have been the demand by the plaintiffs upon the Township Commissioners for a transfer to plaintiffs of their share of this claim, to which the Township Commissioners acceded, it would appear, with some reluctance, for they state, as recited in plaintiffs' declaration, that they had decided as regards their share not to enforce the sentence against the defendant, but as the plaintiffs had decided to sue for their share, which they could not do without the authorization of the Township Commissioners, they transferred to plaintiffs, without warranty, the share which plaintiffs could claim in the amount awarded, without defining such amount. It nowhere appears in what manner the respective shares were ascertained, nor has any law been shown to the Court to establish how such division was made or arrived at. Under these facts or statement of facts as taken from plaintiffs' declaration, suit is brought to have the sentence declared executory as to plaintiffs' share, and defendant condemned to pay $255.88 for such share.

The action is purely and simply to enforce that sentence, the conclusions ask that and nothing more, and on several occasions in the declaration it is said that that sentence is final as to the matters therein adjudicated upon, evidently with a view to prevent the defendant from opening up the questions or matters investigated by the delegate, and to make his action as formalized by the Superintendent conclusive. It is an action to enforce the judgment of a competent tribunal, or rather perhaps of an arbitration award, and a serious question to be examined is as to whether the tribunal which acted had the necessary authority to formally and conclusively adjudicate upon the liability of the defendant.

The defendant by a demurrer raises that question, and further urges that the proceedings taken by the Superintendent were taken under a law subsequent to the time the defendant had ceased to be an officer subject in any manner to his jurisdiction, and that in acting as he did he was giving a retroactive effect to a law to which the defendant was not liable; that the jurisdiction of the Superintendent in any event could not apply as between a then non-existent Corporation and a person who never was the officer of such Corporation after it came into being; that it was not competent to the Superintendent to annul a discharge regularly given by the Commissioners which could only be made by a competent tribunal, with the Township Commissioners *en cause*. He further contends that the transfer can have no effect inasmuch as the defendant could not be made liable to two or more suits for the same debt, and that as

between debtor and creditor the obligation should be executed as being indivisible. The final reason is that it does not appear that any division of the assets and liabilities of the two Municipalities was ever made, and nothing establishes that the plaintiffs have a right to any particular part or portion of this claim.

We have now to examine the points of the case submitted as to what law or under what authority the Superintendent acted in rendering the sentence which he has done. At the arguments defendant's counsel contended that he acted under the law of 1878, that is 41 Vic. ch. 6, sec. 16, a law enacted subsequently to defendant's discharge, and this contention as to the law was not denied by the plaintiffs at the argument, and I take it for granted that that was the law under which he assumed jurisdiction, for I can find no other, and I am strengthened in that presumption from the fact that the Superintendent by his sentence orders that the defendant in default of payment be proceeded against for the recovery of the amount awarded under the same statute 41 Vic. ch. 6, sec. 17.

On looking at sec. 16 of that Act, which replaces sec. 63 of ch. 15 of the Con. Stat. L. C., I find there the cases where jurisdiction is given to the Superintendent as to the revisal of the accounts of a Secretary-Treasurer. It is needless to say that the jurisdiction is an exceptional one, and although to be construed liberally within its limits so as to give this functionary effective jurisdiction and powers, it cannot be extended an iota beyond those limits. Now, it says that the Superintendent may cause the accounts to be laid before him in these causes, and we must confine it to the cases defined here, "of difficulties between the Commissioners or Trustees and the *Secretary-Treasurer in office*, or who has *abandoned* the office, or as in the French version, *le Secrétaire-Trésorier en charge ou sorti de charge*—not the case here, for the defendant is neither *in* office nor did he *abandon* his office, for if we consider the meaning of the word abandon in its ordinary sense, it is patent that it would be a false construction to put upon it to say that a person whose resignation of office has been accepted, abandoned it. The idea of the one negatives the other, and resignation is not abandonment nor *vice versa*. The statute then goes on to say, "or in case of a written declaration to the Superintendent from at least *five contributors to the local school fund*, having for its object the revision of the accounts of the *said* Secretary-Treasurer," that is the Secretary-Treasurer who is in office or has abandoned his office; again not the case here as regards the defendant, nor as regards the mode in which the complaint was made, and in following which mode could alone jurisdiction be given.

As I have said before, the plaintiffs do not allege any application for revisal of accounts by any persons, but say it was demanded as provided by law; but on looking at the sentence, which I may take as part of the declaration, as is stated therein, in order that I may ascertain how the superintendent assumed jurisdiction, I find these words "vu la requête que m'ont présenté MM. J. B. Coderre, T. Auclair, P. Lacroix, G. Prefontaine, Hubert Leduc and Pierre Coderre, par laquelle ils m'expriment le desir que je fasse ou fasse faire la révision des comptes du dit A. O. T. Beauchemin, ex-secrétaire trésorier de la dite Municipalité de Roxton." That is all. Not a word here that these persons

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were contributors to the local school fund, nor even their residence, nor that a written application was made—although perhaps the word *requête* may be taken as supplying that—nothing, in fact, to show that they came in any way within the meaning of the section, or had any rights to make this application; and if this application it was which gave the superintendent jurisdiction, he had clearly none, for I must take on demurrer the allegations as they are made, and presume, from the absence of any such quality in the applicants that they had it not, and not having it, or not making it appear that they had it, the jurisdiction of this functionary, which must be shown on the face of his sentence, disappears.

But supposing this difficulty obviated, and that the superintendent had authority to revise the accounts of the defendant, does that apply to the case where the secretary-treasurer has obtained his discharge from competent authority—from the Commissioners who employed him? That does not appear to be the meaning or intent of the section of the law invoked for that purpose, and for two reasons. In the first place, where a discharge has been granted something more than a revision is implied—it is of course included—it must mean a right to set aside the discharge, which is not impugned by the persons granting it, and to that end legislative authority must be given, and that has not been done. In the second place the Legislature has given the recourse in such a circumstance—40 Vic., ch. 22, sec. 36, amended by 41 Vic., ch. 6, sec. 19—whereby it is declared that the superintendent may in his own individual name sue before any court of competent jurisdiction any secretary-treasurer whatever in an action *en reddition de compte, en réformation, redressement ou révision de comptes*, each and every time that he is assured that such accounts have not been rendered or if, having been rendered, that they are informal, illegal, *fraudulent* or erroneous, and may demand that all agreements entered into between School Commissioners and the secretary-treasurer or any other persons, with reference to such accounts or their rendering, be *set aside, annulled or modified*, in whole or in part, such action to be brought by him only in case the Commissioners refuse or neglect upon demand to that effect to sue; and by the amendment power is given to the superintendent to sue any secretary-treasurer in office or *out of office* for the recovery of any sum which he may still owe. Here would appear, supposing to be true the charges defined in the sentence [illegible] the defendant, the mode of remedy to be adopted. There may or [illegible] collusion between the employers of the defendant who discharged h[illegible] charges made were supported by proof the superintendent might, under this section, if its retroactive effect is established, have called upon the proper parties, whoever they may be, to bring suit, and in their default to bring it himself but only before a Court of competent jurisdiction. So that we have here a mode of remedy [illegible] sanctioned by law, and a mode of remedy sanctioned by law which has been adopted. Upon this ground alone, the absence of jurisdiction in [illegible] to pronounce this sentence, I think the demurrer is maintainable.

In treating on the foregoing point I had assumed, contrary to the pretension of the defendant, that he was subject to the authority of a statute which was

only enacted after he had ceased to be an officer of the School Commissioners. It is not necessary here to make any dissertation upon the principle, that, generally speaking, statutes, unless so declared, have no retroactive effect. That principle is so well established, and the enactments of the 41 Vic., ch. 16, sec. 16, must be taken to apply to cases arising thereafter, and not previously thereto, but the difficulty is that in the section in question, which replaces sec. 63 of ch. 15 of the Con. Stat., under which alone defendants contend he could or might possibly have acted, the superintendent is given jurisdiction to revise accounts not only for the year ending on the first July previous, but *for any other year*. Now, can the Court, in defiance of the principle which forbids the application of *ex post facto* laws, unless ordered by legislative authority to do so, say that the general term, "any other year," includes the years anterior to the passing of the Statute? To state the proposition constitutes an answer to it. No Court could so apply it, and change the rights and liabilities of parties so as to make them subject to conditions not existing when they held office. That ground also seems untenable.

Another reason is as to the absence of any allegation showing how the proportion claimed from defendant was arrived at. The party sued has a material interest in having this information, and he has a right to say, "you must define to me the mode in which I am determined to owe proportionate amounts to each municipality. If you say it is to be proportionate to the respective values of the properties of the municipalities, those values must be shown, for if my liability exists as to one, it exists as to the other municipality, and there is nothing to show that the share claimed by the plaintiffs is binding on the township municipality, which in its turn may claim a larger share than would now appear to be allowed to it. When we turn to the resolution of the township commissioners—which is also referred to as forming part of plaintiffs' declaration—and which of course is the sole basis on which the transfer invoked is founded, all we find in it is an authorization to the president to sign a transfer *pour la part qui peut leur revenir dans la répartition*—no definite share mentioned. How, then, is the share demanded arrived at? Nothing in the declaration shows it, unless the allegation therein that the sentence was conclusive in defining and declaring the plaintiffs' rights in the amount awarded could be so interpreted, but no law has been shown allowing the superintendent to make any such division. I do not say no such law exists, for it is impossible for me to say with any degree of exactness what is, or is not in the Statute relating to public instruction and its innumerable amendments, but no such law has been brought under my notice, nor can I after diligent search find any such authority vested in the superintendent. The sentence is an entire document, and must show on its face the extent of the liability of the defendant. Would not an ordinary arbitration award be bad for vagueness if it awarded to one of the parties the share to which he might be entitled? If bad in such a case it is bad here.

In regard to another ground of demurrer, to the effect that the transfer could have no effect because the claim could not be divided so as to subject the debtor

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to two or more different actions for the same claim, there is no doubt of the principle therein involved, that a creditor cannot divide his debt for the purpose of suing for its several portions by different actions, and these are the words of Art. 15 of the C.C.P., and is the same principle which the Chief Justice, although he based the application of the principle he made in the case of Legaré v. Queen Insurance Company, 18 Jurist 134, upon Art. 1122 of the C.C., held to be correct, but I do not see its exact application here. The division must be the *voluntary act of the creditor*. The action here is on the sentence with which the creditor (if the Township Commissioners may be so called) had nothing to do. They were evidently unwilling parties to it. It was the superintendent determined the general terms of the division, such as it was, and not the creditor; and all that the latter did was to acquiesce in the sentence to the extent of saying that the plaintiffs might take their share therein, and probably what was done by them they might have been compelled to do under a suit at law, and it may have been that they made the transfer under stress of the probability of such proceeding. The question is not without difficulty, but looking at it that the division was the act of the superintendent and not of the Township Commissioners, and more in the nature of an apportionment than what can be strictly called a division, I cannot apply the principle invoked, which in the abstract is absolutely correct, to this case.

This does not affect what I have said as to the deficiency in showing how the division was made, which comes under another reason of demurrer, and in regard to it I will quote the words of the Chief Justice in the above cited case as answering an objection to it which had occurred to me. It may however be "said that the defendants ought to have pleaded by *exception à la forme* and "not by *défense en droit*. But it seems to me, it is sufficient for the defendants "to show that the plaintiff is wrong upon the face of his proceedings without "going a step further and pointing out to him how he may put himself right."

I have now examined, with all the care I am capable of, the different questions raised upon the issues of law, and I see no alternative but to maintain the demurrer on the foregoing grounds and dismiss the action. I am loth to dispose of any suit under such an issue unless the propositions of the demurrer are indisputable, and to my mind they are so here. I would have reserved the decision until after proof if it would have served any good purpose, but I cannot see that any proof could be adduced to alter the position of the facts submitted. The only question to be decided is whether the sentence is valid or not in law, and no allegation and no proof could add to or detract from its strength as now set forth in plaintiffs' declaration. A prolongation of the suit would merely have entailed additional expense on the parties, and led to more or less contention as to the admission of evidence, which, if the plaintiffs' pretension is correct, that the sentence is final and conclusive, could not be allowed.

John P. Noyes, for plaintiffs.

E. Racicot, for defendant.

(J. P. N.)

COURT OF REVIEW, 1883.

MONTREAL, 28TH FEBRUARY, 1883.

Coram SICOTTE, J., TORRANCE, J., RAINVILLE, J.

Francis et al. es qual. vs. *Dame Caroline Bousquet et al.*

HELD:—Where by a contract of marriage the intending husband makes a donation to his intended wife of the usufruct of certain immoveable property, upon condition that she will pay to his vendors a mortgage representing a portion of the price of the property; and that if the intending husband dies without paying another mortgage of $2,000 created by him upon said property, and his succession is insufficient to pay it, she will pay what balance may be required, and will be entitled to be reimbursed by his heirs upon expiration of usufruct for all said sums paid, and she takes possession of such property upon her marriage, and borrows money with the authority of her husband, with which these mortgages are paid off, she is personally liable for the amount so borrowed. The wife is also personally liable for the whole amount borrowed, although in the deed of obligation and mortgage given therefor she and her husband and the curator to the substitution created under such marriage contract, are all described as the "party of the first part," and the money is acknowledged to have been received and is promised to be repaid by the "party of the first part," and the mortgage securing payment is by the same party, and although the husband is described as acting *in his own name* and to authorize his wife, when it is proved to the satisfaction of the Court that the money borrowed was applied to the discharge of the mortgages.

The fact that the husband's vendors acknowledged by the same deed of obligation that they received the amount due them from the "party of the first part," and that the other hypothecary creditor by a separate deed acknowledged to have received his debt from the husband, and that there was no subrogation by either of these creditors in favor of the wife, will not affect the wife's personal responsibility when the proof establishes that these creditors were really paid by the money so borrowed.

This was an action by the executors of the will of the late Hosea B. Smith, to recover from the female defendant, Mrs. Marsan, the sum of $3,990 and interest, due under a deed of obligation and mortgage, dated 8th April, 1879.

Marsan, the husband, was made a party to the action for the purpose of authorising his wife, and one Joseph Brunet was also made a defendant, as curator to a substitution existing under a contract of marriage between Marsan and his wife, by which substitution the property mortgaged to plaintiffs as security for the amount sued for is affected.

The declaration of the plaintiff having set up the will of the late Mr. Smith, and the appointment of the plaintiffs as his executors and trustees; his death; the death of one of the trustees, and his replacement by the plaintiff Michael Babcock; the fact that the said trustees were still in the possession of the estate, and were administering the same; and that the substitution or trust created under the will and testament of Mr. Smith still subsisted, goes on to set forth a contract of marriage between Marsan and his wife, dated 28th June, 1872, by which separation of property was stipulated, and a donation was made by Marsan to his wife of the usufruct, during her lifetime or until her second marriage, of lots 1014 and 1015 St. Mary's ward, in Montreal, and buildings thereon, said property to devolve to her children born of said marriage upon her death or remarriage, which donation was made upon certain conditions and charges, in the contract set forth, and amongst others that she should pay to the acquittance of the donor the annual amount of $54 in favor of Messrs. Logan, from whom Marsan purchased the property, and that she would redeem the said rent and

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pay the capital thereof, amounting to $900, when it should become due; and upon the further charge that if Marsan should die before paying the Trust & Loan Company $2000, the amount of a mortgage then existing on the property, and there should not remain in his succession a sufficient sum to pay this amount, she would pay the same, and should be re-imbursed by the heirs of Marsan.

That by this contract the female defendant appointed her husband her general and special attorney, to manage and administer all her property, moveable and immoveable, present and future.

The declaration, having alleged that at the time of the marriage the property in question was subject to these mortgages, further alleges that after said marriage permanent and advantageous ameliorations were made upon the property by Mrs. Marsan, for which she became indebted to the other defendant, Joseph Brunet, in the sum of $700; and that being duly assisted and authorized by her husband, appointed tutor *ad hoc* for that purpose, she being at that time still a minor, she executed an obligation in favor of defendant Brunet for that sum, and as security for the payment of said sum hypothecated the property in question.

That Brunet afterwards, by transfer dated 11th January, 1877, transferred the said sum of $700 and interest, and the mortgage securing the same, to Messrs. S. H. May & Co., which transfer was duly signified upon the female defendant on the 2nd March, 1879.

That Marsan has always since his marriage acted as the agent and attorney of his wife, administered all her property, both real and personal, and transacted all her business.

That on the 8th April, 1879 (date of obligation sued on), female defendant was in possession of the two lots of land in question, and the greater part of the said several debts and sums above mentioned still remained unpaid, bearing a heavy rate of interest, and that it was for her advantage that these debts should be paid off, and a lower rate of interest substituted; and that the sums of $2,000 and $700, with arrears of interest, were overdue, and she was liable as the actual holder of the property for the said debts and arrears of interest, and to an hypothecary action by the Trust & Loan Company, and to direct actions by the Logans and S. H. May (as representing the former firm of S. H. May & Co.), for the said several debts and arrears of interest, and in default of surrendering the property was liable to be held personally responsible for the said debts; and that the said hypothecary creditors were then threatening legal proceedings, and the Trust & Loan Company had actually instituted proceedings to recover the amount of their mortgage.

That shortly prior to the 8th April, 1879, Mrs. Marsan, being desirous of discharging said mortgages, engaged P. E. Normandeau to obtain a loan for her of a sufficient sum of money to enable her to pay off the said debts, and Normandeau applied to the plaintiffs for a loan of $3,500 for that purpose, and offered as security a mortgage on the land in question, and that the plaintiffs consented to lend the amount to her upon the said security.

That under the contract of marriage, which only gives the enjoyment of the property to the female defendant during life, there was created a substitution, whereof she became the institute and her children the substitutes; and in order that the substitutes should be represented, and should concur in obtaining the loan and in granting a hypothec upon the property, a petition was presented to the court by female defendant and her husband, asking for the appointment of a curator to the substitution; and upon said petition a family council was held, and defendant Brunet was appointed curator, which appointment he accepted, and the same was duly homologated.

That on the 1st April, 1879, Brunet, in his capacity of curator, presented a petition, in which, after setting forth all the circumstances requiring the loan, he asked that he might be authorized to assist the female defendant, as the institute of the substitution, to effect a loan of $3,500 to pay off the debts and hypothecs and arrears of interest, etc., already mentioned, which petition was supported by the affidavit of the said Marsan, who swore that the said lots were hypothecated to the extent of $3,500 as already stated; and upon said petition a family council was held, and upon the advice of such council Brunet was authorized to assist the female defendant in effecting such loan.

The declaration then proceeds to set up the obligation upon which the present action is based (plaintiffs' Exhibit No. 14), by which female defendant (assisted by her husband and authorized by the curator Brunet) acknowledged herself to be indebted in the sum of $3,500 to the plaintiffs in their capacity with interest at seven per cent. per annum, payable semi-annually, on the 1st days of May and November in each year, as security for which she in said deed did mortgage the lots in question in favor of the plaintiffs. That there was a special clause in this obligation, stipulating that in the event of her making default, in any of the said payments, for 30 days after such payment should become due, the principal sum should become exigible.

That in this deed of obligation George R. Grant, as representing the estate of Sir Wm. Logan, intervened, and acknowledged the receipt of $1,030.25, capital and balance of interest due under the deed of sale from the Logans to Marsan, and granted a discharge therefor; and S. H. May, as representing the firm of S. H. May & Co., also intervened and acknowledged receipt of $50, balance of capital and interest due under said deed of obligation in favor of Brunet, which was transferred to May, as already stated, and granted a full discharge therefor.

The declaration then states that in this deed of obligation of 8th April, 1879, it was inadvertently stated that Marsan therein acted in his own name as well as for the purpose of authorizing his wife; whereas in fact he only acted for the purpose of assisting his wife, as stated in said authorization, and it never was the intention of the plaintiffs to lend said sum of money to Marsan or to bind him to pay the amount so loaned.

That it was fully agreed between the parties, as a condition of making the said loan, that the obligation of the female defendant to the Logans and Trust & Loan Company, or to the Mays should be paid, and the hypothecs held by them upon the property discharged out of the same loan; and that, in fact, said loan

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was made expressly for the purpose of paying off the said claims in the interest and for the benefit of the said female defendant; and for that purpose the amount of the loan was placed in the hands of plaintiff's solicitors, to be distributed by them in accordance with said agreement, and was by them deposited for safe-keeping in the Consolidated Bank of Canada, and cheques were drawn by them against such deposit in favor of Grant, of May, and of the Trust & Loan Company, for the amounts respectively due them.

That upon receipt of said amounts the Logans and May granted a discharge as set forth in said obligation; and the Trust & Loan Company, by a separate deed of acquittance, dated 8th April, 1879, also discharged the property from their claim.

The declaration further stated that although this latter discharge purports to state that the Company received the amount from Marsan by the hands of the Estate late H. B. Smith, out of the proceeds of said loan, they in fact received the amount from said female defendant through plaintiffs' solicitors, out of said loan. That the balance of said loan, with the exception of $24.70, was, at the request of said female defendant, paid to Normandeau, and was by him applied to the payment of notarial and legal fees and commissions connected with the procuring of said loan; and, as regards the $24.70, the same was paid over by said notary to the female defendant.

That the female defendant paid the instalment of interest which became due under the obligation in question on the 1st day of November, 1879, but has made default to pay all other instalments, amounting altogether to $490; and that under the clause of the deed the principal has become due, more than 30 days having elapsed since the falling due of each and all overdue instalments.

That the amount of said principal and interest due under said obligation form together the sum of $3,990.

That female defendant has no other immoveable property except that in question.

By the conclusions of the declaration the plaintiffs prayed that Brunet be ordered to appear and hear the judgment, and that female defendant be adjudged to pay plaintiffs in their said capacity $3,990 together with interest, as stated in said conclusions of plaintiff's declaration; and that the indebtedness of said female defendant for said sum be declared to be an hypothec and charge upon the said property, having rank and priority before the said Jos. Brunet in his said capacity, and before the persons called as substitutes; and that in default of payment by the said female defendant of the said debt and costs, or of the satisfaction thereof by the seizure and sale of her goods, plaintiffs be authorized to proceed to a judicial sale of the said real estate, without regard to said substitutes, and that the same may be sold free and clear of the said substitution, etc.

The defendants pleaded an *exception péremptoire*, in which they declared that the plaintiffs acted for and in the name of the heirs and legatees of the late Hosea B. Smith; that the late H. B. Smith, at the time of his decease, left several heirs who accepted his succession; and that the declaration and exhibits do not shew that the plaintiffs have the right to take the present action in the place of the heirs and legatees or *ayants cause* of the late H. B

The defendant Brunet in his quality pleaded specially, in this exception, that it was not alleged in the declaration that he was authorized, and as a matter of fact he was not authorized, to obligate himself as curator to the substitution alleged in the cause towards the plaintiffs in their said quality; and that the conclusions in the action against the substitution of which the said Joseph Brunet is the curator are unfounded and illegal, and not justified by the allegations of the declaration.

That the plaintiffs had not been subrogated in the rights of the succession of the late Sir Wm. Logan or of the Trust & Loan Company or of S. & H. May & Co.

The female defendant pleaded specially by this same exception that she could not be held, because she contracted the obligation sued upon for the purpose of paying her husband's debts to the knowledge of the plaintiffs; that no consideration was ever furnished to her for the said obligation; that the obligation of the 2nd Sept., 1875, signed by her in favor of Joseph Brunet, was illegal, null and void, as having been made by her for paying the debts due by her husband; that the debt for which she signed the said obligation was contracted by her husband long before their marriage, and that Joseph Brunet never had any right of hypothec on the said immoveable property mentioned in the said declaration to secure the payment of his debt.

That she was never responsible for the debt due Brunet, and all the facts mentioned in his petition shewing any responsibility on her part are false and untrue; that, in consequence, the transfer made by Brunet to the said May & Co. is null as respects her.

That the amount of the obligation sued upon was employed to pay her husband's debts, to the plaintiffs' knowledge, without the plaintiffs having been subrogated in the rights and privileges of the creditors of her husband, and that, in consequence, the obligation is null; that all the consideration furnished in the said deed was in favor of her husband.

The defendant concludes by praying that the deed of 2nd September, 1875, and the deed of the 8th April, 1879, be annulled and set aside, and that the action be dismissed with costs.

The female defendant filed a third plea, by which it is alleged that all the exhibits and all the facts alleged in the exhibits tending to make proof against the obligation of the 8th April, 1879, or changing or modifying it, were null. That, even supposing that she could have legally consented with her husband in favor of the plaintiffs, by the obligation in question, she could not be held to pay more than $\frac{1}{3}$rd of the sum claimed, namely, the sum of $1300.30, because the said obligation was entered into by Marsan and her and the said Brunet, without stipulation of joint and several liability, and because a joint and several liability in an obligation is not presumed, but, on the contrary, each party is presumed to have contracted for an equal part of the amount.

The plea further alleges that it was false that it was mentioned by inadvertence in the obligation of 8th April that Marsan acted as well in his own name as for the purpose of authorizing his wife.

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That it appears by the different exhibits produced that Marsan acted in his personal capacity, and that this was well understood, and the statement in the deed cannot be contradicted unless under an inscription *en faux*.

That moreover plaintiffs had already instituted an action against the said defendants upon the same obligation, declaring them jointly and severally liable.

That Mrs. Marsan could not be held liable, even for ⅓rd of the amount claimed, seeing that the obligation was null by reason of the same having been entered into by her for the purpose of paying her husband's debts, and that no legal consideration was given to her for said obligation.

The female defendant concluded that the obligation in favor of Brunet, and also the obligation in favor of plaintiffs might be declared null, and the action dismissed; and that if the Court should be of opinion that she is at all responsible under the last-mentioned obligation she be not held responsible for more than ⅓rd of the amount claimed.

The following is an extract from the deed of obligation of 8th of April, 1879:—

"Personally came and appeared:

"1st, Dame Caroline Bousquet, wife of Damase Marsan. * * *

"2nd, The above named Damase Marsan, herein acting in his own name and "to authorise, as he doth authorise, his said wife for the effects hereof; and,

"3rd, Joseph Brunet * * * herein acting in his capacity of curator to the "substitution created by the said contract of marriage * * *, and as such "curator duly and specially authorized to assist the said Dame Caroline "Bousquet for the effects hereof * * * party of the first part, and George "Seymour Brush, William Francis, and Michael Babcock * * * * of the "second part, which said party of the first part acknowledged to be well and truly "indebted unto said party of the second part in the sum of $3,500, Canada "currency, for a loan of a like sum from the said party of the second part * * "which said sum said party of the first part do hereby promise to well and truly "pay * * * and for security of the due and faithful payment of the said "sum of * * * the said party of the first part doth hypothecate * * *

To this deed Mr. Grant, representing the Logan Estate, and Mr. May, representing S. H. May & Co., intervened, and acknowledged to have received from the "party of the first part" the amounts due them respectively—and in consideration did acquit and discharge "the said party of the first part and whom it may concern." The case was tried before the Superior Court at Enquête and Merits. The plaintiffs examined Mr. Brush, one of the executors, who established that the substitution created under Mr. Smith's will was not yet open, and that the plaintiffs were still in possession of the estate, in their said capacities. They also examined the Notary who passed the deed of obligation, who proved that he had been employed by Mrs. Marsan to procure the loan, and that the proceeds of it were wholly employed in discharging the mortgages on the property held by the Trust & Loan Co., the Estate Logan, and May, and in paying the expenses connected with procuring the loan. He also proved that Mr. and Mrs. Marsan told him these creditors were pressing, and that a suit had been instituted by one of them.

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Tait, Q. C., (for plaintiffs): The questions which appear to be submitted for the consideration of the Court under the issues are the following:—

1. Have the plaintiffs, in their capacity of executors and trustees, a right to institute the present action?

2. If they have such rights, is the female defendant responsible for the amount of the loan for which the obligation and mortgage, of date 8th April, 1879, was given, or is the obligation void under article 1301 C. C., which provides that a wife cannot bind herself, either with or for her husband, otherwise than as being common as to property?

3. If liable at all, is she liable for the full amount of said obligation or for only one-third of such amount?

By reference to the will of the late Mr. Smith, and particularly to the third clause thereof, it will be seen that he appointed the late Mr. Nelson Davis and the plaintiffs Francis and Brush as his testamentary executors and fiduciary legatees; and directed that, in case of their resignation, infirmity, permanent absence from the province, or death, they should be replaced by other qualified persons, to be appointed judicially if possible, during the whole time that the substitution and trust created by his will should subsist; and by the 4th clause of his will he bequeathed and devised all his property to them in trust, and by the 10th clause directed that they should hold the same and exercise their office of executors and fiduciary administrators beyond the year and day, and until the complete fulfilment of his testamentary disposition.

The late Mr. Davis having died he was judicially replaced by the plaintiff, Mr. Babcock; and as the substitution and trust created by the will still subsists and the testamentary dispositions have not been completely fulfilled, the plaintiffs are still vested with the estate, and have undoubtedly, in their said capacity, the right to institute the present action.

Moreover, as the female defendant, assisted by the other defendants, contracted in the deed of obligation in question, with the plaintiffs, in their capacity of *testamentary executors* of the said will, and received the loan from them in that capacity, she cannot now be allowed to dispute their right to that capacity, or to deny that the plaintiffs in that capacity have the right to enforce the contract.

The solution of the second and third question rests almost entirely upon the determination of the question of fact as to whether the loan in question was made to the female defendant and to her only.

When all the circumstances of the case are considered, there is no difficulty whatever in determining this question in the affirmative; but it happens that apparently, through inadvertence in the preparation of the deed of obligation sued upon, a pretext has been found for saying that the loan was not made to the female defendant only, but was also made to her husband and to Brunet.

The deed commences with separate descriptions of the female defendant, of her husband, and of the defendant Brunet—that of the female defendant being the first—and then characterises them as "party of the first part." The declaration subsequently follows that the "party of the first part" acknowledged to owe and promised to pay, *etc.*, the amount of money in question. It is

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upon this alone that the female defendant rests her pretensions that the debt was due jointly by all three. Against this pretension there are the facts of the case, as alleged in the declaration and proved, and, besides them, the instrument contains the plainest internal evidence that the "party of the first part" meant the female defendant alone. As instances of this it is pointed out that in describing Brunet the document expressly states that he appears only for the purpose of authorising her. He is described as being a party to the deed "as such "curator, duly and specially authorised to *assist* the said Dame Caroline Bous- "quet for the effects hereof under deed of authorisation homologated by the pro- "thonotary on the fifth day of August."

It is clear, therefore, that he was not a borrower in his capacity of curator, but simply was a party authorised to *assist*, in so far as it might be necessary to do so on behalf of the substitution referred to; and as further evidence of this, the petition which he presented to the Court may be referred to, wherein he prays that he may be authorised *to assist* the female defendant in effecting the loan of $3,500 for the purpose of paying the claims in question, and to *assist her* in granting and executing all necessary deeds.

The words in the deed of obligation upon which the defendants principally rely with respect to the husband are those which state that Damase Marsan acts "in his own name, and to authorise his said wife."

It is quite clear, however, from all the circumstances of the case, that it was never intended that he was to be a borrower of the money, and that, in so far as he was made a party in his own behalf to the deed of obligation, it was a mere matter of inadvertence or surplusage.

The petition of the curator states that the female defendant is compelled to make the loan, and the curator asks to be authorized to assist her, and this petition is supported by the affidavit of Mr. Marsan, the husband, and according to the advice of the family council of which he formed a part his wife was authorized to effect the loan, assisted by him—"Assistée du dit Damase Marsan, son épouse, d'effectuer pour une période de cinq ans, dix ans, et pas pour une plus longue periode de temps, un emprunt de la somme de trois mille cinq cents piastres."

And, again, in mortgaging the property it is declared that the party of the first part hypothecates the property as security for the debt, which expression plainly means the female defendant, as she was the proprietrix of the property, and consequently the only person who could mortgage it.

But if there were any ambiguity in the obligation, as to the party who incurred the debt, the court will doubtless examine the circumstances under which the debt was contracted, together with the presumptions arising from the facts which are proved in the case, to determine its true character. (The St. Hyacinthe Building Society vs. Brunette et vir, 1 R. L. 557.)

And the plaintiffs are confident that, when all the facts and circumstances connected with the transaction are considered by the court and examined, any ambiguity which might appear to exist in the obligation will disappear, and it will be seen that the loan was made to the female defendant for her benefit, upon

the security of the property of which she was in possession, and for the purpose of paying debts, which she was either personally or hypothecarily liable to pay, and that the money so received was paid to the discharge of those debts.

The amount of the loan was $3,500; of this amount $1,030.35 was paid to the succession Logan, and $50 was paid to May in settlement of mortgages which they held upon the property in question, and which mortgages she had under taken to discharge by her contract of marriage with her husband. She was therefore directly liable for these amounts.

A further sum of the amount borrowed, namely, $2,230.25, was paid to the Trust & Loan Company for the amount of the mortgage held by them on the same property, and which she, the female defendant, undertook to pay by her marriage contract, in the event of her husband dying before doing the same; but the amount being overdue the Trust & Loan Company pressed for the payment of it, and she, being liable to an hypothecary action for the amount, was obliged to and did pay it out of the loan.

The sum of $24.40 was paid for costs due on proceedings taken by the Trust & Loan Company to recover this amount, and the balance, amounting to about $150—except a small sum of $10.91—was all paid out by Mr. Normandeau, as agent for the female defendant, in "fees and disbursements connected with the loan.

The pretension that the loan was made to all three defendants is, therefore, plainly unfounded.

The plaintiffs, therefore, submit that the obligation must be treated as an obligation by the female defendant authorised by her husband and assisted by Brunet as curator.

And that it is satisfactorily established that she effected the loan in her own interest and for the payment of debts for which she or her property was directly responsible.

To refuse a remedy against her for the whole amount of the debt would enable her to perpetrate an obvious fraud upon the plaintiffs, as she has directly benefited by their money to the full amount demanded.

P. H. Roy, for defendants:—La considération qui a été fournie à l'acte d'obligation ça a été en faveur de son mari pour acquitter la dette personnelle de son mari et dont elle n'était nullement responsable personnellement, excepté pour une partie telle qu'il sera expliqué ci-après.

La défenderesse pouvait être tout au plus tenue hypothécairement des créances garanties par les hypothèques sur les immeubles à elle donnés par son mari en vertu de leur contrat de mariage.

Le fait qu'elle pouvait être tenue hypothécairement ne pouvait la justifier de s'obliger personnellement au paiement d'une dette contractée par son mari, et elle prétend que les présents demandeurs ne pourraient exercer un recours hypothécaire sur les immeubles en question qu'en autant qu'ils se seraient fait subroger aux droits des créanciers hypothécaires antérieurs à l'acte de donation des immeubles en question.

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Il n'était pas de l'avantage de la défenderesse de contracter une obligation et de s'obliger personnellement pour acquitter des dettes dont elle ne pouvait être tenue qu'hypothécairement, surtout lorsque c'était pour dégrever des immeubles dont elle n'a que la jouissance et laquelle jouissance elle peut même perdre au cas de séparation de corps et de biens d'avec son mari pour quelque cause que ce soit.

Cette disposition de l'acte de donation est dans les termes suivants :

" 40. Si pendant le dit futur mariage la dite future épouse pour quelque raison " que ce soit ou puisse être, prenait une action en séparation de corps ou obte- " nait une séparation de corps par tout autre moyen que ce puisse être, dans ce " cas le dit futur époux rentrera en possession et jouissance de ce que ci-dessus " donné tant en biens meubles qu'en biens immeubles, tout comme si les deux " donations ci-dessus n'eussent jamais été consenties."

Rien ne fait voir par l'acte de donation qui est le contrat de mariage de la défenderesse Bousquet et du défendeur Marsan, que cette donation soit une donation universelle, et il n'y a aucune preuve à cet effet.

Et d'ailleurs la présente action n'est pas instituée contre la défenderesse comme pouvant être responsable comme donataire universelle de son mari, surtout pour une dette qui a été contractée après la donation. Ainsi sous ce rapport elle considère que le premier considérant est erroné, qu'il l'est également en disant qu'elle a assumé la responsabilité de ces dettes.

Voici quelles sont les charges imposées par l'acte de donation " 3o. à la " charge de payer à l'acquit du dit donateur la rente annuelle de $54 cours " actuel du Canada, consentie en faveur de Sieur Logan, et de faire le rachat " du capital d'icelle quand il y aura lieu. Cependant si la dite future épouse " paie le capital de cette rente, lequel est de neuf cents piastres dit cours ; elle " aura droit de se faire rembourser cette somme de $900 à l'expiration de son " usufruit."

Cette obligation est toujours restée l'obligation de Marsan et de ses héritiers, attendu qu'au cas où la défenderesse aurait racheté le capital de cette rente, elle avait le droit de s'en faire rembourser à l'expiration de son usufruit.

Les demandeurs pourraient peut-être avoir raison de réclamer le montant de cette somme qui a été acquittée avec le produit de l'argent prêté en vertu de l'acte d'obligation, s'ils s'étaient fait subroger aux droits des héritiers de Sieur Logan.

Cette somme due à la succession Logan forme à peu près le tiers du montant total de l'obligation en question. C'est ce qui pourrait expliquer pourquoi la défenderesse, qui n'avait pas un droit absolu dans ces propriétés et qui n'était pas tenue personnellement de payer les créances hypothécaires qui pouvaient exister sur ces immeubles, si ce n'est pour ce qui regarde la créance des Sieurs Logan à laquelle elle pouvait être tenue de la manière plus haut mentionnée, aurait consenti l'acte d'obligation sans aucune stipulation de solidarité, n'entendant par là s'engager que pour un tiers de la somme portée dans cette obligation.

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Quant à la créance du " Trust and Loan " qui existait avant l'acte de donation, la défenderesse n'a jamais été chargée de l'acquitter. La seule chose qui soit mentionnée au dit acte est celle-ci :

" Si le dit futur époux mourait ayant d'avoir acquitté en tout ou en partie " une obligation de $2 000 cours actuel du Canada, consentie à la Compagnie de " Prêt dite ' Trust and Loan Company of Upper Canada,' et que le reste de " sa succession ne suffirait pas pour payer cette somme, alors et dans ce cas la dite " future épouse serait obligée de fournir ce qu'il en manquerait, et à l'extinc- " tion de son usufruit elle se ferait rembourser ce qu'elle aurait ainsi payé par " les héritiers qui recueilleraient la succession du dit futur époux sans intérêt."

Or comme le défendeur Marsan n'est pas mort, elle n'a nullement été tenue de payer et d'acquitter cette créance.

Le moyen invoqué par la défenderesse, que dans l'acte d'obligation il n'y a aucune stipulation de solidarité, est un moyen sérieux, et il est évident par les faits plus haut mentionnés qu'il aurait été plus avantageux à la défenderesse de s'obliger conjointement et solidairement ; car l'intérêt qu'elle pouvait avoir dans l'acte d'emprunt ne la justifiait certainement pas de s'obliger conjointement et solidairement.

D'ailleurs, il faut accepter l'acte tel qu'il est rédigé, et aucune preuve légale ne peut être faite soit pour en changer ou en étendre le sens.

Aussi les demandeurs ont compris que l'acte d'obligation avait été consenti par les trois défendeurs. Et la preuve de cela, c'est que dans une action précédente, ils les avaient poursuivis conjointement et solidairement, ce qui démontre, disons-nous, que le défendeur Marsan n'a pas comparu à l'acte seulement pour autoriser son épouse mais bien aussi pour s'obliger personnellement puisqu'il était certainement la personne la plus intéressée à s'obliger, vû que cet emprunt était fait pour acquitter ses propres dettes et probablement contribuer à payer des hypothèques sur des immeubles qui pouvaient redevenir sa propriété d'après une des clauses du contrat de mariage.

Les défendeurs citent comme autorité à l'appui de la prétention que les demandeurs n'ont pas le droit de poursuivre, l'article 918 du Code Civil et l'article 19 du Code de Procédure, et à l'appui de la prétention que la femme ne peut s'obliger pour acquitter les dettes de son mari, les articles 1301 du Code Civil et 1431 du Code Napoléon, et 21 L. C. J., page 133, Buckley *vs.* Brunel, et les articles 989 et 990 concernant les contrats sans considération ou considération illégale, et sur la question de solidarité l'article 1105 et 1234 du Code Civil, démontrant que dans aucun cas la preuve testimoniale ne peut être admise pour changer les termes d'un écrit valablement fait.

The Superior Court (Loranger, J.) rendered judgment on the 30th November, 1882, in the following terms :

" Considérant que la considération de l'obligation du huit avril 1879, devant Mtre. Normandeau, notaire, sur laquelle repose la présente action, est un emprunt fait par la défenderesse, Caroline Bousquet,, pour acquitter et payer des dettes qui lui étaient personnelles et dont elle avait assumé la responsabilité comme donataire universelle de Damase Marsan ;

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"Considérant que la dite défenderesse s'est valablement engagée par le dit acte d'obligation pour elle-même et non pour garantir la dette de son mari et que, de fait, elle a payé avec l'argent emprunté des demandeurs, les dettes dont elle s'était chargée par son contrat de mariage avec le dit Damase Marsan ;

"Considérant que Joseph Brunet et Damase Marsan sont mal fondés dans les moyens qu'ils invoquent à l'encontre de la présente action, et que les demandeurs sont en droit de réclamer et recouvrer de la défenderesse Caroline Bousquet la totalité de leur créance ;

"Considérant que les défendeurs n'ont point prouvé les allégations de leurs exceptions, et que les demandeurs ont prouvé les allégations de leur déclaration ;

"La Cour renvoie les dites exceptions des défendeurs et, déclarant le dit Joseph Brunet ès-qualité, partie en cette cause, ordonne que le présent jugement lui soit appliqué autant que besoin peut être, en sa dite qualité de curateur à la substitution en question, et condamne la défenderesse Dame Caroline Bousquet à payer aux demandeurs ès-qualité, la somme de $3,990 cours actuel, dont $3,500 montant de la dite obligation qui est stipulé payable à terme avec intérêt à sept pour cent par an, mais qui est dès maintenant devenue due et exigible en entier par suite du non paiement des intérêts accrus sur le dit capital et conformément à une clause spéciale à cet effet insérée au dit acte d'obligation ; et $490 pour semestres d'intérêts accrus sur le dit capital jusqu'au premier novembre 1881 ; avec intérêt au taux de sept pour cent par an sur la dite somme de $3,500 du premier novembre 1881, et au taux de droit sur la dite somme de $490, du 15 avril 1882, jour d'assignation, et les dépens distraits à MM. Abbott, Tait & Abbotts, avocats des demandeurs ès-qualité.

This judgment was unanimously confirmed in review on the 28th February 1883.

Abbott, Tait & Abbotts, for plaintiffs.

P. H. Roy, for defendants.

(M. M. T.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 9th APRIL, 1883.

[IN CHAMBERS.]

Coram RAMSAY, J.

Ex parte *Grace Ham*, Petitioner for Writ of *Habeas Corpus*.

HELD:—That the mother has an absolute right to the charge of a child aged 12 (the father being dead), unless it be established that she is disqualified by misconduct, or is unable to provide for the child.

Where it appeared that the mother was a domestic servant, and that the child was well cared for by another, the Court, before granting to the mother the custody of her child, required the production of affidavits to establish that she was in a position to provide for the child's wants.

The petition was presented by Grace Ham, widow of the late Abraham Burnet.

RAMSAY, J. On Friday, 30th March, the petitioner applied for a writ of *habeas corpus* to Martin Phelan, to order him to bring up Emma Burnet, a child of tender years, daughter of the petitioner.

Mr. Phelan obeyed the writ immediately, and stated that the child was not detained against her will; that she had left the house of Mrs. Dagle, where she had been living, and came to his house for protection, which was afforded her by himself and his wife; that the mother had consented to her daughter remaining with him, and had even in his absence obtained a small sum of money on the pretext of its being part of the child's wages, to which Mr. Phelan said she was not entitled, as he had taken her very badly clothed, and had supplied her with all necessary clothing.

The mother in her affidavit said that she was a Wesleyan Methodist, and that her late husband, at all events since his marriage, had been a Wesleyan Methodist, and that they were married by a minister of that religion; that the child had been baptized in the Wesleyan Church, and had been brought up in that belief, and was a Protestant till she had gone to Mr. Phelan's house. The petitioner also complained that an effort was being made to change the child's religion.

I examined the child apart from her mother and Mr. Phelan, and she told me she was perfectly happy with Mr. Phelan and his wife, that she wished to stay there, that she wished to become a Roman Catholic, and that she was only a little over twelve years of age. She was well-clad and looked happy and in good health.

As the affidavits seemed to me insufficient, in not showing that the petitioner, who is a domestic servant, was in a position to provide for her child, and as the mother had already made an arrangement for her child which did not turn out satisfactory, and as the child seemed to be well cared for where she was, by people of great respectability, I adjourned the further hearing of the case until Saturday, in order to enable the petitioner to adduce other evidence of her being

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in a position to provide for the child's wants, and also in order that the Crown might be heard in the case. On Saturday Mr. Davidson and Mr. Cross resisted the application unless affidavits establishing the willingness and ability of the relations to take charge of the child were filed. Mr. Arthy, in whose service the petitioner is, then came forward, and offered to take charge of the child until she could be sent to her relations in Upper Canada, who, it was alleged, were both able and willing to provide for her. I did not deem this sufficient, as it afforded only a temporary refuge for the child, and I further adjourned the case till Monday, the 2nd April, and, finally, until to-day, in order to afford the petitioner time to produce affidavits in support of her petition.

These affidavits are now before me, and I have to deal with the merits of the application. The husband being dead, it becomes the absolute right of the mother to have the charge of a child of twelve years of age, unless it can be shown that she is unfit for such a trust, by misconduct, or that she is unable from any other circumstance to provide for her child. In either of these cases she forfeits the right, and the claim of any other relative, or even of a stranger, who can offer sufficient guarantees of character and means, will be preferred. In this case there is nothing against Mrs. Burnet's character, and the affidavits now produced show that her relatives are able and willing to provide a home for the child. I must, therefore, order that the mother shall have possession of her child. At the same time it is proper to add that it is not without reluctance I am obliged to remove the child from the protection of Mr. Phelan, who, with his wife, had done a great duty by this little girl, and behaved in a way highly creditable to himself. The religious question does not enter into consideration in this matter, because the mother, having a right to bring up her child, has a right to decide what religious teaching she shall receive, and the opinions of a girl at the age of twelve are not sufficiently formed to justify a judge in interfering with the natural order in the matter of guardianship. At a more advanced age this would be different.

Petition granted.

McGoun, for the petitioner.

Davidson, Q.C., & S. Cross, for the Crown.

(J. K.)

COUR DU BANC DE LA REINE, 1883.

EN APPEL.

MONTREAL, 27 JANVIER, 1883.

Coram MONK, TESSIER, BABY, CARON, *ad hoc* J J.

No. 215.

DAME HALL, ES-QUAL.,

ET

APPELANT;

LE MAIRE, etc. DE MONTRÉAL,

INTIMÉS.

JUGE:—1. Que la Corporation de la Cité de Montréal lorsqu'elle présente une requête aux tribunaux demandant la destitution pour cause de fraude ou autrement de Commissaires en expropriation n'agit pas dans l'exercice de pouvoirs législatifs ou judiciaires, mais fait un simple acte d'administration, et que comme corps administratif elle est soumise au droit commun et responsable, comme tout autre individu, pour le dommage qu'elle ou ses représentants causent à autrui.

2. Que dans une poursuite en dommages pour libelle contenue dans des plaidoiries, le temps de la prescription annale ne commence à courir qu'à la date du jugement final.

3. Que les injures écrites dans les plaidoiries, lorsqu'elles ont rapport aux faits en litige, ne sont reellement des injures qui donnent lieu à des dommages que lorsque la vérité n'en est pas prouvée, ou lorsque cette allégation n'est pas d'absolue nécessité pour la décision de la cause.

Cette action a été intentée contre la Cité de Montréal le 4 mai 1871, pour $20,000 de dommages soufferts par James Key Springle, le défunt époux de l'appelante, demanderesse par reprise d'instance, en conséquence de procédés judiciaires adoptés par la Cité pour le faire destituer de sa charge de commissaire en expropriation pour cause de fraude et de partialité. Le demandeur se plaignait d'avoir été ruiné par les diffamations contenues dans ces procédés que la Cité de Montréal avait sans raison et par malice, pris contre lui et fait durer pendant plusieurs années.

L'action avait été déboutée par la Cour Supérieure sur le principe qu'elle était prescrite. La Cour d'appel a renversé le jugement.

Les notes suivantes de l'honorable Juge Caron, qui sont savamment élaborées, donnent suffisamment les faits de la cause et les raisons de l'infirmation du jugement.

CARON, J. L'action maintenant devant ce tribunal a été instituée au nom de J. K. Springle, en son vivant ingénieur civil, pour $20,000 qu'il alléguait avoir soufferts, en conséquence de son injuste destitution par les défendeurs, comme commissaire en expropriation pour l'élargissement de la Rue St. Joseph. L'appelante, l'épouse du dit Springle décédé, est demanderesse par reprise d'instance, comme tutrice à ses enfants.

Les faits sont comme suit:

Le 14 avril 1868, James K. Springle, T. S. Brown et Damase Masson furent nommés commissaires conjoints pour déterminer le montant qui devait être accordé à l'Honorable Chs. Wilson pour l'expropriation d'une partie de sa propriété située au coin des rues St. Joseph et McGill.

Dame Hall, es-qual., et le Maire, etc., de Montreal.

Messrs. Springle et Brown, après avoir d'abord évalué la compensation qui devait être accordée à M. Wilson à $19,500, sur les objections des parties faites subséquemment, réduisirent, dans leur rapport final, cette somme à celle de $13,666.

M. D. Masson, ne s'accordant pas avec ses collègues, déclara dans son rapport que $7,500 étaient une compensation suffisante.

C'est alors, le 7 août 1868, que les intimés votèrent unanimement la résolution suivante: "That their attention had been called to the extraordinary "award recently declared by two of the Commissioners, (meaning the plaintiff "in this cause and the said Thomas S. Brown) appointed in the matter of "expropriation for the widening of St. Joseph street, in front of the property of "the Honorable Charles Wilson; and that the exorbitant amount awarded by "the majority of the Commissioners in that case, was such as to require in their "opinion that steps should be adopted immediately to stay the proceedings in "the interest of the public, and they therefore instructed the attorney of the "corporation to apply by summary petition to the Superior Court, or to a judge "thereof, to stay the proceedings and to remove and replace the two com-"missioners whose award is complained of, and who in their opinion *forfeited* "their obligations as such commissioners."

Conformément à cette résolution, les intimés, le 10 août 1868, présentèrent une requête à l'Honorable Juge Berthelot, par laquelle ils demandaient que les procédures des commissaires fussent suspendues, et que les dits Springle et Brown fussent destitués pour *avoir forfait à leurs devoirs et les avoir violés* (as having violated and *forfeited their obligations*). Les défendeurs alléguaient en outre dans leur requête: "That they had been credibly "informed that the terms of intimacy between the said Chs. Wilson, the party "to be expropriated, and James K. Springle and T. S. Brown, were inconsistent "and incompatible with the faithful and impartial discharge of their duties, "and that, in fact, during the enquête, the said James K. Springle and T. S. "Brown frequently dined with the said Charles Wilson, and had private con-"versation with him upon the subject of the expropriation, and received sug-"gestions and impressions *ex parte* conveyed by the said Charles Wilson in a "private and clandestine manner, and calculated to produce the effect of "obtaining the excessive award complained of; that during the argument of "the counsel engaged by the parties interested the said James K. Springle and "T. S. Brown affected to be interested, and to take notes, but that such "affectation of interest was merely a mockery and insult to the understanding "of the said petitioners, (to wit, the said defendants in this cause), and the "parties interested; that after a lengthened argument continuing till past four "o'clock of the 6th of the said month of August, the said T. S. Brown "declared his desire to retire for ten minutes to prepare his judgment which, "he stated, was then in a written condition, and that he had little or no doubt "of the concurrence of his co-commissioner J. K. Springle, such conduct being "unworthy of a commissioner and productive of the gravest suspicions as to "their impartiality or love of justice; that the said T. S. Brown hath frequently

"acted as commissioner in other cases of expropriation, and specially with the "said Damase Masson, and hath always conformed in opinion with his co-"commissioners, and has never differed from the said Damase Masson, nor "exhibited an extravagant and absurd award before the present one, to wit, the "said award now in question. That the said J. K. Springle and T. S. Brown "were appointed by the judge at the urgent instance and request of the said "Charles Wilson.

"That the said J. K. Springle and T. S. Brown have been at many periods "of time, and still are under pecuniary obligations to the said Charles Wilson, "and that the said J. K. Springle and T. S. Brown have not fulfilled their "said duties in a faithful, diligent and impartial manner; and therefore the said "petitioners prayed, in and by their said petition, for an order of the said judge "adjudging that the proceedings of the said three commissioners should be "stayed, and that the said J. K. Springle and T. S. Brown should be removed "from the office of commissioners as having violated and forfeited their obliga-"tions."

Les parties ayant lié contestation sur cette requête, les conclusions en furent accordées, le 17 septembre 1870, sur le principe seulement que les dits Springle et Brown, en exécution de leurs devoirs de commissaires en expropriation, avaient commis une erreur de jugement et avaient pris pour bâse de leur rapport de fausses idées d'expropriation. Aucune preuve n'avait été faite quant aux reproches de fraude et de partialité contre eux.

Appel ayant été subséquemment interjeté par les dits commissaires, le tribunal renversa le jugement, et les dits Springle et Brown furent réintégrés dans leur charge de commissaires en expropriation.

Le jugement de la Cour d'appel, prononcé le 20 septembre 1873, contenait le considérant suivant: "Considérant que la dite Cour (la Cour Supérieure) a "entièrement écarté comme non fondés les reproches faits aux appelants (les "dits Springle et Brown,) du manque de diligence, de fidélité dans l'exécution "de leurs devoirs, et surtout les reproches de fraude et de partialité, et que "sous ce rapport le dit jugement est non blâmable."

Ce dernier jugement fut le 11 novembre 1876 confirmé par le Conseil Privé, les conclusions de ce jugement en dernier ressort se lisant comme suit: "The "petition contained charges of very scandalous fraud and partiality. Their "Lordships think it unfortunate that such charges were made, because it turned "out there was no ground whatever for them. The respondents were removed "not for having carried into effect a right principle erroneously, but for having "adopted an erroneous principle. Their Lordships consider that the principle "adopted by the respondents was not erroneous, and therefore that the inference "of want of diligence drawn from it fails."

Comme on le voit, le tribunal de première instance, la Cour d'appel et le Conseil Privé ont déclaré à l'unanimité que les intimés n'avaient en aucune manière prouvé leurs accusations de fraude et de partialité contre les dits Springle et Brown.

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A cette action, les intimés répondirent par leurs défenses, qu'ils n'étaient pas responsables envers le demandeur Springle des dommages qu'il pourrait avoir soufferts en conséquence de la résolution et de la requête sus-mentionnées, parce qu'en agissant de la sorte ils auraient exercé des fonctions judiciaires et un pouvoir législatif, et cela d'après l'avis de leurs avocats.

Quelle est la nature de cette résolution, de la requête et des autres procédures qui en ont été la conséquence? En résumé, les défendeurs déclarent par ces documents que Messrs. Springle et Brown ont forfait à leurs obligations comme commissaires, qu'ils sont coupables de fraude et de partialité dans l'exécution de leurs devoirs, et demandent en conséquence leur destitution.

Je ne vois réellement pas comment on peut prétendre que c'est là légiférer. Il ne s'agit pas dans le cas actuel d'un règlement fait par les intimés, concernant des matières de leur juridiction ou de leur compétence, mais il est évident que ce sont de simples actes administratifs faits par eux dans cette circonstance.

Les intimés avaient le droit, pour des fins municipales, d'exproprier M. Wilson d'une partie de sa propriété moyennant une compensation à être établie par trois commissaires.

Durant la litispendence des procédés faits par eux à cet égard, ils croient que deux des commissaires agissent avec partialité contre eux. En leur qualité d'administrateurs des affaires de la Corporation qu'ils représentent (et non pas comme juges ou législateurs) ils demandent au tribunal la destitution de ces arbitres. Evidemment ce ne sont pas là des fonctions judiciaires ou législatives, mais bien des actes de pure administration, par lesquels les intimés demandaient aux tribunaux d'exercer leurs *fonctions judiciaires* en leur faveur, en accordant les conclusions de leur requête. Personne ne voudrait prétendre qu'une des parties dans une cause référée à des experts aurait le droit d'accuser faussement un des experts de partialité et de fraude. Il suffit d'énoncer une semblable proposition pour en faire voir toute la fausseté.

Et pourquoi une corporation aurait-elle plus de droit ou de privilége à cet égard que tout autre plaideur?

Serait-ce parce que les accusations faites par un corps public aussi important que l'est la Cité de Montréal, dont les procédés sont ordinairement publiés par plusieurs journaux, doivent avoir des conséquences beaucoup plus graves que les injures ou diffamations répétés par une seule personne? Il est évident que l'on ne pourrait pas sérieusement soutenir une pareille prétention.

Notre Code Civil, à l'article 356, décide cette question en déclarant que "les corporations civiles étant par le fait de l'incorporation rendues personnes "morales ou fictives, sont comme telles régies par les lois affectant les individus."

Le même principe est universellement reconnu en Angleterre et aux Etats-Unis.

Addison, dans son traité On the Law of Torts, pages 1297 et 1298, dit: "Although the general doctrine is well settled, that an action founded on tort "may be maintained against a municipal corporation, it is impossible to state any "rule definitely pointing out the cases in which such an action will lie.....It

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" may be stated generally, however, in illustration of the subject under consi-
" deration, that in the absence of any statutory provision or necessary intend-
" ment to the contrary, a municipal corporation may be liable in an action on
" the case, for an act which would warrant an action against an individual,
" provided the act is done by the express authority of the corporation."

On trouve la même doctrine dans *Angell & Ames*, On Corporations, page 385 ; "Now, both by civil and common law, corporations might be proceeded " against and punished for offences as well as natural individuals if the offence " was committed *communicato concilio*."

Au reste, comme la Cour Supérieure a déjà disposé de ce moyen contenu dans la défense en droit des intimés, je crois inutile d'en dire d'avantage sur ce point, d'autant plus que les arguments dont s'est servi M. le juge Beaudry en rendant ce jugement me paraissent irréfutables.

Mais, disent les intimés, les prétendues injures et diffamations libelleuses dont se plaint le demandeur Springle, se trouvent dans une requête présentée à la Cour de première instance, le 10 août 1868, et le bref de sommation en cette cause n'a été émané que le 4 mai 1871, il y a donc lieu d'appliquer l'article 2262 de notre Code Civil au cas actuel. L'action du demandeur doit être déboutée, leur droit étant éteint par la prescription annale. Et c'est aussi ce qu'a décidé la Cour Supérieure.

Cette difficulté est la plus sérieuse qui s'élève dans la présente cause.

Il y a une distinction importante à faire entre les injures écrites contenues dans une requête de la nature de celle faite par les intimés et les injures verbales ou écrites de tous les autres genres. Les premières, c'est-à-dire, celles contenues dans une pièce quelconque de la plaidoirie, sont censées répétées chaque fois que la partie se sert de cette pièce de la procédure, et cela jusqu'à ce que jugement intervienne sur ce point, tandis que ce n'est pas le cas pour les injures mentionnées en second lieu. Lorsque les intimés ont fait arguer leur requête par leurs avocats devant le tribunal, ils en ont demandé les conclusions. Pour cela, il leur a fallu soutenir que toutes les allégations qu'elle contenait étaient bien fondées et surtout leurs accusations contre le demandeur Springle. Puis ils y ont persisté jusqu'au jugement qui a été rendu en leur faveur le 17 mars 1870. S'ils n'y avaient pas persisté, évidemment le juge n'aurait pas eu le droit d'accorder les conclusions de leur requête.

Les injures écrites dans la plaidoirie, lorsqu'elles ont rapport aux faits en litige, diffèrent encore des autres espèces d'injures, en ce sens, qu'elles ne sont réellement pas des injures qui donnent lieu à des dommages que lorsque la vérité n'est pas prouvée, ou lorsque ces allégations ne sont pas d'absolue nécessité pour la décision de la cause. " La malice, dit Dumazeau, (I Vol. page 151) " s'infère de la nature et de la fausseté de l'accusation ; s'il y a absence totale " de preuve d'une accusation atroce, il y a absence de cause probable, de justi- " fication, et nécessairement malice par implication. Et ajoute Merlin, Réper- " toire, vo. Diffamation, No. 3 : Si pour récuser un expert, etc., je leur reproche de la corruption, je ne serai point répréhensible en prouvant les faits que

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" je leur impute ; mon accusation et mes reproches ne dégénéreront en diffama-
" tion qu'autant qu'il sera visible que je n'ai employé la voie judiciaire que
" pour avoir un prétexte de diffamer."

Cette malice s'infère, d'après Dumazeau, cité plus haut, du manque de preuve de l'accusation.

Et néanmoins ces auteurs ont écrit sous une législation spéciale qui, tout comme cela se fait en Angleterre et aux Etats-Unis, reconnaît aux parties et à leurs avocats le privilége d'alléguer dans leurs plaidoiries les faits les plus graves, pourvu qu'ils rentrent dans les moyens légitimes de la cause. Voir Code Pénal, art. 23, Loi du 17 mai 1819.

Nous n'avons aucune loi spéciale sur le sujet. Dans notre ancien droit, l'on trouve l'Ordonnance de François 1er du mois d'août 1539, qui défend de ne rien alléguer de calomnieux à l'égard de son adversaire, et les commentateurs de cette partie de l'Ordonnance ajoutent : " que le fait qui ne sera pas prouvé
" sera réputé calomnieux."

Domat, partie II, page 218, dit : " Les requêtes et les autres pièces d'écritures
" qu'on produit dans les procès doivent être mises au nombre des libelles
" diffamatoires quand elles contiennent des paroles injurieuses ou des faits qui
" nuisent à la réputation des autres ; il n'en faut excepter que les faits véri-
" tables et dont l'exposition est absolument nécessaire pour la décision du
" procès."

On lit au 9ème Volume de Guyot vo. Injures que : " Les injures faites en
" justice comme les accusations de crimes, etc., ne peuvent être punies lors-
" qu'elles sont vraies."

Dareau, des Injures. Récusation de juges, pages 18, 23, 437 et 438 : " Mais
" il en est autrement si l'accusation est appuyée sur des motifs injurieux à
" l'honneur du juge, ou même si, sans être conçue en termes injurieux, elle est
" mal fondée."

D'après ces mêmes auteurs, l'injure ou la diffamation à l'égard d'un juge, officier ou fonctionnaire public est un outrage et revêt un caractère plus grave.

Ces autorités démontrent que les intimés pouvaient avoir le droit d'alléguer dans leur requête les accusations dont se plaint le demandeur Springle, mais ils étaient tenus de les prouver.

Quand Springle devait-il poursuivre ? Du moment qu'il pouvait établir qu'ils avaient agi par malice. Il lui fallait donc attendre le résultat du procès engagé sur leur requête. C'est ce qu'il a fait, et je crois qu'il a eu raison. Et les intimés l'ont cru aussi, puisqu'ils n'ont nullement forcé le demandeur à procéder pendant l'instance.

Avant le jugement en dernier ressort sur cette requête, le demandeur Springle aurait été dans l'impossibilité de prouver aucun dommage. Car, ce jugement seul a constaté d'une manière irréfutable que les accusations contenues dans la requête des intimés étaient calomnieuses, puisque les requérants n'avaient pas réussi à les prouver.

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Le droit du demandeur d'obtenir des dommages a donc été en réalité suspendu jusqu'au jugement final qui a établi d'une manière définitive que M. Springle n'avait pas forfait (forfeited) à ses obligations comme commissaire évaluateur et qu'il avait été un employé fidèle des intimés.

La prescription annale de l'article 2262 de notre Code Civil ne pouvait donc courir que de ce jour-là contre l'action de M. Springle.

L'on trouve aussi la même doctrine dans les autorités suivantes citées par les appelantes dans leur factum :

Merlin; Répertoire du droit criminel, tome 2, page 540, No. 22.

"La prescription est également *suspendue* à l'égard des crimes et délits successifs (auxquels conviendrait mieux la qualification de permanents,) tant qu'ils "n'ont pas cessé, parceque jusque-là le crime ou délit est censé se commettre "à chaque instant."

Sourdat, De la Responsabilité, vol. 1, p. 384. "Toutefois, on comprend facilement que la prescription de l'action qui naît des délits successifs, c'est-à-dire "de ceux qui se perpétuent et se renouvellent pendant un certain espace de "temps, ne doit commencer à courir que quand le délit a complètement cessé. "Ainsi, la détention arbitraire est un délit successif; il dure autant que subsiste la détention et se commet tout entier jusqu'au dernier moment. La "prescription qui court à compter seulement du jour où le délit a été commis, "ne prend donc son point de départ qu'à cette dernière époque. Ce n'est point "là une exception à la règle."

Chassan, délits et contraventions de la parole, tome 2, page 83, No. 1249.

"On appelle délits successifs ceux qui se renouvellent et se perpétuent par "une série d'actes ou dans une série d'instants; on les appelle ainsi par opposition aux autres délits qui s'accomplissent par un seul fait, et qui se consomment dans un seul instant. Sous tous les régimes, dans l'ancienne comme "dans la nouvelle législation, on a fait la distinction, et tous les criminalistes "enseignent que la prescription des délits successifs s'ouvre, non à partir du "jour où ils ont commencé, mais à courir du moment où le délit a cessé. La "jurisprudence ancienne et moderne a confirmé cette doctrine."

Cass. 21 Oct. 1830 (S. V. 31. 1. 367.)

Jugé.—"La prescription est suspendue par le pourvoi en cassation du ministère public ou du prévenu."

Cass. 24 juin 1813 (S. V. 4. 1. 383.)

Jugé.—"L'usage fait sciemment d'une pièce fausse est un crime successif qui "ne s'arrête que par un acte positif de la part du coupable, indiquant qu'il ne "veut plus se servir de la pièce fausse; ce n'est qu'à compter de cet acte que la "prescription peut courir :"

Nîmes 19 Janv. 1819. (S. V. 19-21 2. 8.)

Jugé.—"Les auteurs d'un faux en écriture publique ou privée ne peuvent "d'ailleurs invoquer la prescription contre l'action publique tant qu'il reste en "leur pouvoir de faire personnellement usage de la pièce incriminée."

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Jugé.—" La prescription est suspendue pendant la durée de l'instance engagée devant les tribunaux civils pour faire juger des questions préjudicielles.

Cass. 30 janv. 1830 (S. V. 30. 1. 138.)
" 10 avril 1835 (S. V. 35. 1. 387.)
" 27 mai 1843 (S. V. 44. 1. 34.)
" 14 déc. 1844 (S. V. 46. 1. 755.)
" 7 mai 1851 (S. V. 51. 1. 802.)

Cette doctrine suivie en France l'est également en Angleterre et aux Etats-Unis. American Leading Cases, Hare & Wallace, pages 221-223. *Pharis* vs. *Lambert*, 1 Sneed 232.

Dans une cause semblable à celle-ci, de *Mainville* vs. *Young*, rapportée à la page 378, 5 Legal News, la Cour Supérieure, à Montréal, a prolongé à la demande du défendeur le délai pour plaider à l'action en dommages, jusqu'au troisième jour inclusivement après la reddition du jugement de la Cour d'Appel dans la cause où se trouvaient les plaidoiries qu'on alléguait être libelleuses.

Quant aux dommages soufferts, il parait qu'ils sont très-élevés. M. Springle a été ruiné par ces accusations, et la preuve des dommages est très-forte. Je crois que le jugement de la Cour Supérieure doit être infirmé, et les intimés condamnés à payer $3,000 de dommages avec intérêt et dépens.

JUGEMENT :

La Cour &c :

Considérant que la présente action est une action intentée par feu James K. Springle, maintenant représenté par les appelantes, demanderesses en reprise d'instance, pour le recouvrement de dommages au montant de $20,000, qui avaient été causés au dit James K. Springle par une résolution des défendeurs intimés passée le 7 août 1868, et par une requête présentée par les dits défendeurs intimés devant la Cour Supérieure, à Montréal, le 10 août 1868, demandant la destitution du dit James K. Springle, comme commissaire chargé de faire l'évaluation de l'indemnité à payer à l'honorable Charles Wilson pour l'expropriation d'un terrain requis pour l'élargissement de la rue St. Joseph de Montréal.

Attendu que la dite résolution et la dite requête contenaient des allégations injurieuses pour le dit James K. Springle et de nature à faire tort à sa réputation et à ternir son caractère.

Considérant que le dit Jas. K. Springle a contesté la dite requête, ainsi présentée par les défendeurs intimés, le 10 août 1868, devant la dite Cour Supérieure siégeant à Montréal.

Considérant que jugement n'est intervenu en cour de première instance sur cette requête et la contestation qu'en a faite le dit James K. Springle, que le 17 septembre 1870, et que la dite cour de première instance par son dit jugement a accordé les conclusions de la dite requête et renvoyé le dit James K. Springle de ses fonctions, mais pour cause d'erreur de jugement seulement, résultant de fausses idées sur la loi d'expropriation, écartant comme non fondés les reproches injurieux faits au dit James K. Springle, dans la dite requête des défendeurs intimés.

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Considérant que le dit jugement du 17 septembre 1870 a été porté en appel devant cette Cour par le dit James K. Springle, le 14 juin 1871, et que cette cour par son jugement, du 30 septembre 1873 a déclaré que la dite cour de première instance avait erré en destituant le dit James K. Springle de sa charge de commissaire, et a cassé le dit jugement du 17 septembre 1870.

Considérant que les défendeurs intimés ont interjeté appel du dit jugement du 20 septembre 1873, à sa Majesté en son Conseil Privé, et que ce dernier tribunal par décret du 28 novembre 1876, a confirmé le jugement de cette Cour et donné gain de cause au dit James K. Springle, prononçant ainsi un jugement final sur la requête contenant les allégations injurieuses dont s'est plaint le dit James K. Springle, dans son action en cette cause.

Considérant que le dit James K. Springle a institué la présente action le 4 mai 1871, pour dommages résultant d'allégations injurieuses faites dans la dite requête des défendeurs intimés, qui était alors encore pendante devant les tribunaux tant de première instance qu'en appel, et dont il n'a été finalement disposé que longtemps après l'institution de l'action, savoir par le dit décret de sa Majesté en son Conseil Privé en date du 28 novembre 1876, et que ce n'est qu'à compter de cette dernière date que le délit dont se plaint le demandeur dans son action, délit successif qui s'est renouvelé et perpétué depuis la date de la présentation de la requête devant la cour de première instance, a complètement cessé, et que la prescription de l'action naissant de ce délit a commencé à courir.

Considérant, partant, que dans l'espèce, il n'y a pas lieu à l'application des articles 2262 et 2267 du Code Civil concernant la prescription de l'action pour injures verbales ou écrites, non plus que de l'article 2188 du dit code, et partant, que la cour de première instance, en déclarant par le jugement dont est appel que l'action du dit James K. Springle était absolument éteinte et prescrite lorsqu'elle a été intentée, et par suite non recevable, a mal jugé ;

Considérant qu'il est en preuve que ces allégations injurieuses ont causé au dit James K. Springle des dommages considérables se montant à une somme d'au moins trois mille piastres ;

Considérant que les intimés n'ont en aucune manière prouvé ni justifié les dites allégations injurieuses au caractère du dit James K. Springle ;

Cette Cour casse et annule le jugement rendu par la Cour Supérieure, siégeant à Montréal le 31 mai 1880, et rendant le jugement que le dit tribunal aurait dû rendre, condamne les défendeurs intimés à payer aux appelantes en reprise d'instance ès-qualité, la somme de trois mille piastres courant, avec intérêt à compter du 4 mai 1871, date de la signification de l'action, et les dépens tant en cour de première instance qu'en appel.

Et la cour sur motion de MM. Barnard, Monk & Beauchamp, avocats des appelantes, leur accorde distraction de frais.

Barnard & Beauchamp, avocats des appelantes.

Rouer Roy, C. R., avocat des intimés.

(J. J. B.)

COURT OF REVIEW, 1882.

MONTREAL, 31ST MAY, 1882.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 290.

Kilgour vs. *Harvey* et al., and *Logan*, opposant, and *Kilgour*, opposant, and *Logan*, contestant.

HELD :—That the costs due on a judgment may be legally paid to and compensated by a debt due by the attorney of record of the party to whom such costs are awarded, notwithstanding that such costs have not been awarded by distraction to the attorney, in the absence of proof by the client that he had paid his attorney's costs.

This was a Review of a judgment of the Superior Court at Sherbrooke (Doherty, J.,) dismissing Kilgour's opposition with costs.

The opposition was fyled to a seizure made to enforce payment of certain costs awarded by judgment in the Circuit Court to J. Calder, Esq., attorney for Logan, *par distraction*, and for costs on the appeal from that judgment; no allowance of *distraction de frais* having been awarded to Mr. Calder in the Court of Appeal.

Kilgour, by his opposition, pleaded (amongst other things) that he had paid the costs in both courts to Mr. Calder, by payments in money and by compensation, and proved the fact of such payments and compensation.

The opposition was contested by Logan, and the Court below considered the payment and compensation of the costs in appeal to be, under the circumstances, illegal, and dismissed Kilgour's opposition, *quoad* such costs in appeal, with costs.

In Review this judgment was unanimously reversed; the judgment in Review being worded as follows:

"The Court here sitting as a Court of Review, having heard the parties by their respective Counsel upon the merits of this cause, and upon the demand of, and inscription for Review of the judgment rendered in the Circuit Court in and for the district of St. Francis, on the 31st day of October, 1881, having examined the record and the proceedings had therein, and maturely deliberated;

Considering that the plaintiff, opposant, hath proved that the costs sought to be levied by the writ of execution, of date 29th day of May, 1880, have been paid and compensated by a greater sum heretofore due by John Calder, attorney of opposant Logan, to wit, as follows, the sum of $30, amount of an order addressed by said Calder to plaintiff, of date 3rd day of February, 1880, and paid by plaintiff for said Calder on account of said costs, and the further sum of $207.50, amount of a note which plaintiff took up and paid for said John Calder, to wit, on or about the 5th day of February, 1880, said note made by Calder in favor of one H. W. Mulvena, of which note plaintiff then became the holder and owner;

Considering that opposant Logan hath not proved that he was entitled to receive said costs in lieu of said John Calder, or that he hath paid said costs to said Calder, who was entitled to receive as having asked for the same;

Kilgour vs. Harvey et al., and Logan, opposant.

Considering that there is error in the said judgment of the 31st day of October, 1881;—

Doth reverse the said judgment, doth set aside the seizure made of plaintiff's goods on the 4th day of June, 1880, and doth grant the conclusions of plaintiff's opposition, and declare that the costs sought to be levied under said writ have been paid and compensated, so far as necessary, by said sums of $30 and $207.50 currency, and doth condemn the opposant Thos. Logan to pay the costs, as well in the Circuit Court as in this Court, and costs *distraits* to Messrs. Ives, Brook & Merry, attorneys for said opposant Kilgour."

Judgment of S. C. reversed.

Ives & Brown, for Kilgour.
D. W. R. Hodge, for contestant.
(S. B.)

COURT OF REVIEW, 1882.

MONTREAL, 31ST MAY, 1882.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 836.

Bourdon et vir vs. *Picard et al.*

HELD:—1. That when the copy of the writ of summons served on a defendant differs from the original, the plaintiffs should be allowed, on motion to that end, after the filing of an exception *à la forme*, to serve a new and correct copy.

2. That the Court of Review will reverse a judgment refusing to grant such a motion, and, where it is evident that the difference between the writs is of a trifling character, they will grant costs to the moving party in both Courts.

This was a Review of a judgment of the Superior Court at Beauharnois maintaining *exceptions à la forme* filed by two of the defendants and dismissing the plaintiff's action with costs.

The exceptions were based on an informality contained in the copies of writs served on the defendants, which stated that the original writs were signed by the attorney of the plaintiffs instead of by the prothonotary of the Court, as they really were.

The plaintiffs moved to amend and to be allowed to serve new and correct copies of the writ.

The Court below rejected the motion, and maintained the exceptions, as already stated.

The Court of Review unanimously reversed this judgment, granted the motions of the plaintiffs, and dismissed the exceptions, with costs in favor of the plaintiffs in both Courts.

Judgment of S. C. reversed.

Thos. Brossoit, for plaintiffs.
L. A. Seers, for defendants.
(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 28th FEBRUARY, 1883.

Coram PAPINEAU, J.

No. 989.

Pangman vs. *Pauzé ès-qual.*, & *Robertson*, Opposant, & *Lamarche*, Opposant.

HELD:—That an application to inscribe *en faux* against the certificate of the Prothonotary regarding the posting of a report of distribution will not be granted, after the report has been homologated, in favor of an opposant who knew of the *faux* complained of prior to the judgment homologating the report.

PER CURIAM:—Léon Lamarche fait une requête civile pour faire révoquer et annuler le jugement qui a homologué le rapport de distribution des deniers prélevés en cette instance.

Il se fonde sur ce que ce jugement est basé sur un certificat faux. Le certificat dont il se plaint constate que le projet d'ordre a été affiché au greffe le lundi, 8 de janvier 1883, pendant qu'il n'aurait dû être affiché que le mardi 9. Il prétend en conséquence que tel certificat ne serait pas resté affiché tout le temps qu'il aurait dû l'être; qu'au lieu de rester affiché jusqu'au mardi, 23 janvier, il ne serait resté affiché que jusqu'au mardi 16 janvier.

Le requérant allègue avoir produit une contestation de la collocation de l'opposante, Georgiana Robertson, avec permission d'un juge, le 2 de février 1883, et avec un ordre de ce juge, au protonotaire, de ne pas livrer de copie du dit jugement: et, au shérif, de ne pas se dessaisir des deniers alloués à l'opposante jusqu'à nouvel ordre.

Il fait une requête demandant permission de s'inscrire en faux contre le certificat du protonotaire. Cette requête est signée par son avocat, muni d'une procuration.

Il demande aussi à la Cour de fixer le quantum du dépôt exigé par l'art. 63 du Code de Procédure Civile.

L'opposante fait à cette demande plusieurs objections, ci-après énoncées:

1o. Elle dit que le procureur doit être muni d'une procuration spéciale, aux termes de l'art. 161 Code de Procédure Civile, pendant que le procureur du requérant n'a qu'une procuration générale.

La procuration requise par cet article et par le Code du faux, d'où il a été tiré, est une procuration spéciale à l'effet de s'inscrire en faux. Il n'est pas nécessaire que ce soit une procuration pour inscrire en faux dans telle cause ou procédure, en particulier, ni contre telle ou telle pièce nommément.

Autrement il serait impossible à une personne absente du pays de faire faire ou d'autoriser validement une inscription contre une pièce fausse, dans le délai voulu.

La procuration spéciale est exigée afin que la partie, au nom de laquelle l'inscription est prise, ne puisse pas ensuite désavouer la procédure, et aussi afin qu'on puisse avoir recours contre cette partie et la tenir responsable des dommages s'il y a lieu (Serpillon, Code du faux p. 156.)

2o. Objection : La requête en faux doit être signifiée à la partie adverse (Code de Procédure Civile, art. 162) ; or elle n'a été signifiée dans cette instance, qu'à l'opposante, pendant qu'il y a plusieurs autres créanciers colloqués par le jugement attaqué.

Paquin vs. Painé et qual. et Robertson, Opposant, and Lamarche, Opposant.

La requête ne demande la révocation du jugement qu'en autant qu'il porte préjudice au requérant. C'est là la mesure de son droit et de son action. N'ayant pas droit de se plaindre des autres collocations, le requérant ne doit considérer comme sa partie adverse que celle qui est intéressée à lui résister.

3o. Objection : Le requérant ne conclut aux frais que contre l'opposante, et non contre le protonotaire qui a préparé l'ordre sur un certificat que l'on prétend faux, et de la fausseté duquel le protonotaire seul est responsable et non l'opposante.

Cette objection pourrait être prise en considération lorsque la Cour aura à se prononcer sur les frais, et non lorsqu'il s'agit d'admettre ou de repousser la production de la requête.

4o. La procuration attachée à la requête est antérieure au faux dont on se plaint.

La réponse à cette quatrième objection se trouve comprise dans la réponse à la 1re.

5o. Objection : Il ne peut pas y avoir d'inscription en faux contre un certificat antérieur au jugement, parce que la Cour, en prononçant le jugement, a jugé que toute la procédure antérieure était régulière ; la demande d'inscription en faux ne pouvait se faire qu'avant le jugement (art. 164 Code de Procédure Civile). L'opposante Robertson a cité aussi la règle de pratique du 4 janvier 1854.

Cette règle de pratique n'a rapport qu'à un exhibit. Ici, ce n'est pas d'un exhibit mais d'un certificat donné par l'officier de la Cour, qu'il s'agit.

D'ailleurs cette règle de pratique, qui obligeait à demander permission de s'inscrire en faux contre un exhibit, dans les 4 jours de sa production, est virtuellement abrogée par l'art. 164 Code de Procédure Civile.

Le requérant est-il encore dans les délais pour demander de s'inscrire en faux contre le dit certificat, après que le jugement de distribution est homologué ?

Cela ne me paraît pas douteux, dans le cas où le faux n'est parvenu à la connaissance de celui qui veut s'inscrire en faux que postérieurement à l'homologation du jugement de distribution, car il est bien établi, par l'art. 505 du Code de Procédure Civile, qu'on peut rétracter, sur requête civile, un jugement obtenu sur une pièce fausse et dont la fausseté n'a été connue que depuis tel jugement.

Dans l'espèce actuelle, le faux paraît avoir été découvert avant le jugement, puisque l'affidavit, annexé à la contestation produite par le requérant, est en date du 17 de janvier 1883, et que le jugement de distribution n'a été homologué que le 22 de janvier 1883.

Il n'y a pas une allégation dans la contestation, ni dans la requête civile, ni dans la demande d'inscription en faux, que la connaissance de la fausseté du certificat ne soit parvenue au requérant qu'après la date du jugement. Outre cette

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allégation, il faudrait un affidavit du requérant, affirmant qu'il n'a pas eu connaissance du faux avant la date du jugement. Tel affidavit n'est pas dans le dossier.

Il est même probable que le requérant a eu connaissance de ce certificat et de sa fausseté, parce qu'il allègue avoir produit une opposition dans la cause avant l'homologation du jugement de distribution, et alors il était en position de surveiller la procédure, par son avocat.

Pour prétendre que le requérant n'en a pas eu connaissance, avant le jugement, il faudrait pour ainsi dire admettre la supposition de l'avocat de l'opposante Robertson, que l'affidavit du nommé Sentenne a subi une altération en y insérant le nom du requérant, Léon Lamarche, pour le faire servir à l'appui de la contestation de celui-ci, quoique cet affidavit eût été fait originairement, pour servir dans une contestation mue entre d'autres parties dans la présente cause.

Dans l'une ou l'autre hypothèse, la Cour ne se croit pas suffisamment autorisée à permettre de produire la requête civile et l'inscription de faux ; deux procédés qui demandent *prima facie* en faveur de ceux qui les veulent adopter une base presque certaine, à l'appui de leur droit.

The following was the judgment of the Court :—

" La Cour * * * Considérant que le requérant n'allègue pas et ne justifie pas que le prétendu faux dont il se plaint dans sa requête, ne soit parvenu à sa connaissance que postérieurement au jugement homologuant le rapport de distribution et dont il demande la rétractation ;

Considérant au contraire que le dit jugement est en date du 22 de janvier 1883, et que l'affidavit allégué à l'appui de sa requête est en date du dix sept de janvier, c'est-à-dire cinq jours avant la date du dit jugement ; que le dit requérant était partie dans la cause, par le fait de son opposition à fin de conserver produite avant le jour où le dit projet de distribution a été affiché, et que sous ces circonstances, sa requête est tardive aux termes de l'article 164 du Code de Procédure ;

Cette requête est renvoyée avec dépens distraits à MM. Bethune et Bethune, avocats de la dite Dame Georgiana Robertson."

Petition rejected.

Archambault & Archambault, for Lamarche, opposant.

Bethune & Bethune, for Robertson, opposant.

(S. B.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 25TH JANUARY, 1883.

Coram HON. SIR A. A. DORION, CH. J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 462.

ROSS ET AL. *es qual.*, APPELLANTS;

AND

CONVERSE, RESPONDENT.

HELD:—1. That the effect of the special Act of the Dominion, 41 Vict. ch. 38, was to clothe the appellants with all the powers of assignees under the Insolvent Act of 1875.

2.—That proof that notices claiming payment of the calls sued for were mailed to the shareholders, was sufficient evidence that such calls were made.

This was an appeal from a judgment rendered by the C. C. at Sherbrooke on the 31st day of October, 1881, dismissing the appellants' action, on the ground that they had no quality to sue.

The appellants claimed to be the assignees of "The Canada Agricultural Insurance Company," and that they had been duly appointed as such under a special Act of the Dominion, 41st Vict. ch. 38, and they sued the respondent, a shareholder in said Company, to recover from him the amount of two calls on the stock of the company.

TESSIER, J.:—En lisant le préambule du Statut en question et les sections qui suivent, il est facile de conclure que le Parlement a nommé ces syndics officiels conjointement avec les pouvoirs de poursuivre dans l'intérêt des créanciers et de ceux des actionnaires qui ont déjà payé leurs versements, pour liquider finalement les affaires de cette compagnie.

Le préambule dit :—"Considérant que les actionnaires ont résolu qu'il est de "leur intérêt que les affaires de la compagnie soient liquidées, qu'à cette fin ils "ont nommé Philip S. Ross et W. J. Fish, syndics et liquidateurs, qu'il serait "opportun d'ajouter G. H. Dumesnil aux dits syndics et liquidateurs..... "qu'ils ont fait quelque progrès dans la liquidation de la compagnie, et qu'une "action immédiate est désirable dans l'intérêt de la compagnie et de ses créan- "ciers, il est décrété : que les biens et effets de la dite compagnie seront, "sans qu'il soit fait aucune *cession* ou *rien autre chose* de sa part, confiés aux "dits Ross, Fish and Dumesnil comme co-syndics, et toutes personnes y "intéressées comme *actionnaires, créanciers,* assurés ou autrement seront *dès* "*lors à toutes fins,* dans la même position que si les dites parties étaient des "syndics officiels."

Il semble que cet acte spécial du Parlement s'il veut dire quelque chose, constitue les demandeurs comme syndics officiels *des actionnaires et des créanciers,* mais s'il y avait doute, cela disparaîtrait par le fait prouvé en cette cause que depuis la passation de ce statut, il y a eu une assemblée générale des créanciers, à laquelle il a été nommé des inspecteurs, mais pas d'autres syndics. En vertu de la section 79 de l'acte de Faillite de 1875, cela les constituerait syndics définitifs.

Ross et al. es qual. and Converse.

Il a été fait une autre objection savoir: que les versements n'avaient pas été légalement appelés.

Le Statut n'indique pas de mode spécifique; il suffit dans ce cas qu'il y ait une notice raisonnable aux actionnaires. Or il est en preuve qu'une notice a été adressée par la poste aux actionnaires et au défendeur Converse en particulier, et de plus notice publique dans un journal anglais et dans un journal français un mois d'avance. Ce point a été décidé dans plusieurs causes dans lesquelles cette question avait été spécialement plaidée par exception.

Les appelants ont cité plusieurs précédents, entr'autres Fisher's Harrison's Digest, (p. 7160).

"A circular sent to every shareholder in a Railway Company informing him "that the Directors have resolved on making a call, constitutes the call."

Ross vs. Franchère, Legal News, vol. 5, p. 23; Abbott's Digest, Vo. Corporations, 36 and 37; Angell & Ames, on Corporations, p. 517.

Les demandeurs ayant donc prouvé que le défendeur est un des actionnaires, qu'il a payé au présent demandeur les deuxième et troisième versements, il est difficile d'en venir à une autre conclusion que celle de condamner le défendeur Converse à payer aux demandeurs ès-qualités la somme demandée.

The following was the written judgment of the Court:—

"The Court * * *

Considering that the appellants in the capacity of joint assignees of the Canada Agricultural Insurance Company claim the sum of $100, being the amount of two calls made by them of ten per cent. each on five shares of the capital stock of the said Company owned by the respondent, which calls were due and payable as stated in the declaration;

And considering that the respondent has pleaded the general issue, and has not alleged any irregularity in the appointment and proceedings of the said appellants;

And considering that by an Act passed by the Dominion Parliament in the 41st year of Her Majesty's reign, under the chapter 38, the assets and estate of the said Canada Agricultural Insurance Company were vested in the said appellants as joint assignees, to be in the same position toward all parties interested, and to all intents and purposes, as if they were official assignees;

And considering that since their appointment as joint assignees, as aforesaid, to wit, on the 16th day of July, 1878, a meeting of the creditors of the said Canada Agricultural Insurance Company took place, at which meeting the creditors present appointed inspectors, but not assignees;

And considering that under the provisions of the Insolvent Act of 1875, and of the Acts amending the same, the appellants have become the assignees of the estate, in default of any appointment of an assignee or assignees by the creditors at their first or any subsequent meeting, and have thereby become vested with all the powers of assignees under the said Insolvent Act of 1875;

And considering that the said appellants have since their said appointment acted and been recognized as such assignees by all parties interested, and specially by the said respondent, who has already paid to them in their said capacity two

calls of $50 each on the five shares owned by him in the said capital stock of the said Company;

Ross et al. es qual. and Converse.

And considering that there is error in the judgment rendered by the Court below, to wit, by the Circuit Court for the District of St. Francis sitting at Sherbrooke, on the 31st October, 1881;—

This Court doth reverse the said judgment of the 31st October, 1881, and proceeding to render the judgment which the Court below should have rendered, doth condemn the respondent to pay to the said appellants *ès-qualité* the sum of one hundred dollars currency, being for the amount of two calls, to wit, a fourth and a fifth call of ten per cent. made on the capital stock of the said "The Canada Agricultural Insurance Company," with interest on the sum of $50 from the 2nd day of April, 1879, and the balance from the 2nd of July, 1879, and costs as well in the Court below as on the present appeal."

Judgment of C. C. reversed.

Camirand & Hurd, for appellants.
A. W. Atwater, counsel.
G. O. Doak, for re[illegible]ent.
D. Macmaster, C[illegible]nsel.
(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 14TH MAY, 1883.

Coram PAPINEAU, J.

(Sitting at *Enquête*.)

No. 1966.

Ducharme vs. *Loyselle*.

HELD:—That under no circumstances can the defendant be examined as a witness, in an action *en séparation de corps*, to prove the plaintiff's case.

PER CURIAM:—La demande est en séparation de corps, basée sur trois chefs distincts.

La demanderesse a fait assigner son mari comme témoin et veut l'interroger sur le principal chef de sa demande.

Elle se fonde sur les autorités suivantes:

III. Laurent No. 206, p. 245 et 246; Idem No. 316, p. 370;
IV. Demolombe No. 474 et 476; I Dalloz Vo. Adultère, No. 77.
II. Toullier No. 759 à la fin.
17 L. C. Jurist, p. 242, Starke vs. Massey.
V. Aubry et Rau § 491, page 181;
I. Merlin Quest: Vo. Adultère § 10, No. 3.

L'avocat du défendeur fait objection à cette preuve comme étant illégale.

L'article 307 du Code Napoléon ressemble beaucoup à l'article 186 de notre code, en ce qu'il dit que la séparation de corps "ne pourra avoir lieu par le consentement mutuel des époux;" le nôtre dit, "elle ne peut être fondée sur le consentement mutuel des époux." Il en diffère sur un point important, celui de l'instruction de la cause. Le Code Napoléon porte qu'elle sera *intentée*,

Ducharme vs. Loyselle.

instruite et jugée *de la même manière que toute autre action civile*, et l'article 879, du Code de Procédure Civile Français, est dans le même sens. Notre Code Civil s'exprime ainsi : " Cette demande est intentée, *instruite* et jugée de " la même manière que toute autre action civile, avec cette *différence* qu'il *n'est* " *pas permis aux parties d'en admettre les allégations dont il doit toujours être* " *fait preuve devant le tribunal.*"

Demolombe qui, de tous les commentateurs du Code Napoléon, paraît être le plus disposé à permettre d'interroger les époux sur faits et articles, pour en tirer des aveux, sur les faits qui peuvent entraîner la séparation de corps, après avoir discuté la question, se borne à dire : (T. IV. No. 476). " Il me *semble* toutefois qu'on n'en doit pas conclure que l'un des époux ne puisse pas chercher, " dans l'interrogatoire sur faits et articles de l'autre époux, des moyens de " preuve tirés alors non point de son aveu volontaire, mais de ses dénégations " même, plus ou moins embarrassées, mensongères et contradictoires. C'est à " la sagacité des magistrats qu'il appartient de les apprécier."

Le Code Napoléon, assimilant l'instruction de ces causes à celle de toute autre action civile, laisse au juge la discrétion qu'il peut exercer sur le mode d'instruction dans les causes ordinaires. Notre Code, au contraire, est en termes prohibitifs ; " il n'est pas permis aux parties d'en admettre les allégations dont " il doit *toujours* être fait preuve devant le tribunal." Et notre Code de Procédure Civile (article 976) précise davantage : " La demande en séparation de " biens ne *peut être accordée sur la confession, ou les admissions* de la partie " défenderesse ; les allégations de la demande *doivent* être établies par une " *autre* preuve légale," et l'article 989 C. P. C. assujettit l'instruction de la cause en *séparation de corps* à la disposition de cet article 976.

Ce que la loi ne permet pas la cour ne doit pas, ne peut pas le permettre. Ce qui ne *doit* pas se faire, aux termes de la loi, la Cour ne doit pas adjuger qu'on le fera, surtout lorsqu'il s'agit de l'application d'une loi touchant l'ordre public, comme dans le cas actuel.

L'objection faite par l'avocat du défendeur à ce que l'on interroge ce dernier, sur le fait principal de la demande en séparation de corps, est maintenue.

Je rappellerai que jugement ayant été rendu, dans le même sens, par son Honneur Mr. le juge Johnson, aux séances d'enquête, le 13 de décembre 1880, *in re* No. 1297 C. S. M. Massie & Rhéaume, il fut fait une requête à la Cour de pratique, pour réviser cette décision. Après examen des autorités alors citées je confirmai, le 31 décembre 1880, le jugement prononcé aux séances d'enquête. *

Le même jour, 13 décembre 1880, je décidais la même question qui avait été discutée avec beaucoup de soin et d'autorités dans la cause No. 289 C. S. M. de Renaud vs. Trudel, par deux des avocats les plus distingués du barreau de Montréal.

Objection to evidence maintained.

F. X. Choquet, for plaintiffs.
P. B. Lavolette, for defendant.
(S. B.)

Sed vide Starke vs. Massey, 17 L. C. J. 242. [Reporter's note.]

SUPERIOR COURT, 1883.

MONTREAL, 31st MARCH, 1883.

Coram LORANGER, J.

No. 989.

Pangman vs. *Pauzé es-qualité, & Robertson*, opposant, and *Pangman et al.*, petitioners.

HELD:—1o. That the pledge allowed to be deposited, in lieu of suretyship, under art. 1963 of the Civil Code, may consist of a hypothec on real property.
2o. That in the present instance the hypothec offered was not sufficient.

PER CURIAM:—Dans l'espèce actuelle il s'agit d'un cautionnement à être fourni à Dame Georgiana Robertson, veuve de feu John Pangman, pour la prestation d'une rente viagère annuelle de $332.34. Les requérants ont été colloqués chacun pour la somme de $1,685.15, formant en tout $5,055.45 à prendre sur un capital de $7083.60 réservé par le jugement de distribution, mais ne peuvent retirer le montant de leur collocation qu'à la condition de fournir, ainsi que l'exprime le dit jugement, *bonnes et suffisantes cautions que la rente sera payée à la dite Dame Robertson jusqu'à sa mort.*

La proportion des requérants dans le jugement de cette rente est de $128.19 chacun, c'est-à-dire $384.57, pour les trois, et ils demandent maintenant à être admis à donner des garanties hypothécaires au lieu d'un cautionnement.

Leur offre, telle que consignée dans les conclusions de leur requête est dans les termes suivants: *Attendu qu'aux termes de l'article* 1963 *du C. C. celui qui ne peut trouver de caution est admis à offrir en gage un nantissement suffisant; et attendu qu'ils ont déposé au bureau du protonotaire de cette cour une sûreté hypothécaire d'une valeur plus que suffisante pour assurer à la dite Dame Georgiana Robertson le service de sa rente viagère; qu'ils seront admis à fournir au lieu du cautionnement la sûreté hypothécaire décrite dans l'acte authentique du* 13 *mars courant sur les immeubles décrits au dit acte.*

Dame Robertson s'oppose à cette demande et insiste sur le droit que lui confère le jugement de distribution, d'exiger un cautionnement, garantie qui suivant elle ne peut être remplacée par les hypothèques qui lui sont offertes.

Personne ne met en doute le droit du débiteur tenu de fournir un cautionnement, de donner à la place s'il ne peut trouver de caution un gage suffisant en nantissement.

Les termes de l'article 1963 sont clairs et précis.

Cet article ne contient au reste aucune dérogation au droit antérieur au code.

Le droit du débiteur d'offrir un gage en remplacement du cautionnement est reconnu par Pothier et Pigeau, mais aucun de ces auteurs ne s'appliquent sur la nature de ce gage. Il doit être suffisant et tel qu'il puisse être facilement réalisé. Mais le débiteur peut-il offrir une hypothèque au lieu du gage?

Cette question a donné lieu à une grande controverse en France, et a suscité un conflit d'opinions entre les commentateurs les plus accrédités. Laurent a consacré à l'étude de cette question une page où il ne ménage guère la satyre à l'adresse de M. Troplong, qui aurait, dit-il, trouvé moyen de dire oui et non sur

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la question. Cet auteur et avec lui Pont et Aubry et Rau repoussent la théorie soutenue pourtant par le grand nombre, savoir, le débiteur incapable de fournir des cautions, peut être admis sous l'autorité de l'article 2041 à offrir une hypothèque. Or l'article 1963 de notre code est la reproduction fidèle de l'article 2041 du Code Napoléon.

Il résulte de l'ensemble des autorités citées par les parties, que la théorie la plus accréditée est celle qui est enseignée par Massé & Verger, savoir que l'article 2041 en parlant du gage ou nantissement, ne dispose que par voie d'exemple, et que le débiteur doit être admis à offrir une hypothèque, lorsque la célérité de l'affaire s'accommode de la formalité de l'hypothèque. C'est aussi celle de M. Troplong, qui malgré ce qu'en dit Laurent, ne s'est pas contredit sur le sujet, mais a donné à l'article 2041 un sens large, de manière à en faciliter l'application, eu égard à la nature de la créance garantie, la valeur et de la garantie offerte et la facilité de sa réalisation. *On peut dire*, ajoute Pont, sur le même article, *que l'hypothèque est un gage dans l'acception du mot, et pourvu qu'elle vienne en rang utile, le créancier y trouve toutes les garanties désirables, et n'a dès lors aucun motif de la refuser.*

Dans l'espèce actuelle il s'agit de remplacer la garantie que Dame Robertson possédait ; cette garantie consistant en une hypothèque sur les biens de feu son époux. On offre de la remplacer par une garantie de la même nature ; quel motif raisonnable peut-elle avoir pour la refuser ? Je n'en vois aucun.

Qu'elle insiste pour que cette hypothèque porte sur des biens libres et soit d'un montant suffisant pour couvrir non-seulement le montant de sa rente, mais même au-delà pour obvier aux retards dans la prestation de la rente, ou aux frais qu'elle pourrait être exposée à encourir. C'est son droit, et la cour la maintiendra dans l'exercice de ce droit ; mais elle ne saurait exiger davantage.

Ceci nous amène maintenant à l'examen de l'autre question, savoir la garantie offerte par les requérants est-elle suffisante ? Si la requête est bien fondée en droit, je regrette de dire qu'elle ne l'est pas en fait, et elle devra être renvoyée. J'ai cru devoir exprimer mon opinion sur la question de droit, malgré qu'il n'eut peut-être pas été nécessaire de le faire ; mais la question ayant été soulevée, j'ai dû la décider.

Madame Pangman est colloquée pour la somme de $7083.60 et les requérants demandent à percevoir sur cette somme celle de $5055.45. Leur proportion dans la rente viagère est de $384.57, et ils offrent comme sûreté du payement de cette rente, une garantie hypothécaire égale au capital $5055.45 enregistré sur trois lots de terre évalués à la somme de $10,000 par le nommé Resther. Quelque soit la valeur de ces immeubles, la garantie offerte est déterminée et fixée au chiffre $5055.45, ce qui constitue un capital insuffisant pour couvrir la rente annuelle de $384.57. Les requérants ne recevront que la somme de $5055.45 il est vrai, mais leur obligation ne consiste pas dans le remboursement de cette somme ; c'est la prestation de la rente qu'ils sont obligés d'assurer, et ils doivent une garantie qui non seulement peut être réalisée facilement, mais dont la valeur réalisée soit suffisante pour produire une somme d'intérêts égale au montant de la rente.

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En outre la garantie hypothécaire offerte par les requérants porte sur trois lots différents et provenant de sources différentes, mais formant maintenant un seul et même immeuble s'il faut en croire le certificat d'évaluation de Resther.

Le premier lot (No. 1207 222) aurait été acquis par la compagnie The Montreal Loan and Mortgage Company, à une vente judiciaire qui eut lieu le 27 novembre 1880, et le certificat du registrateur est suffisant quant à ce lot.

Il appert que cette compagnie aurait vendu à M. de Bellefeuille ce même lot le 29 novembre 1880 pour le prix de $3500 qui a été payé en entier.

Le certificat du régistrateur me paraît insuffisant quant aux lots 1207-223 et 1207-224; ces terrains n'ont pas été comme l'autre acquis à vente judiciaire, et le certificat devrait remonter à dix ans au moins.

Tout en admettant que dans l'espèce, comme il s'agit de remplacer la garantie hypothécaire que possédait Mde Pangman sur les biens de son mari pour la prestation de sa rente, les créanciers de la succession de ce dernier peuvent être admis à remplacer le cautionnement qu'ils lui doivent par une autre hypothèque de même valeur, je me vois obligé de rejeter la présente requête, vû que la garantie offerte n'est pas suffisante. La requête des requérants est en conséquence renvoyée avec dépens.

AUTORITES.

Pro:—Troplong; Massé & Verge sur Zachariæ, vol. 5, p. 81; Favard, vo. Caution, Par. 2; Arrêts de la Cour de Limoges, 31 août 1809; Arrêt de la Cour de Rouen, 4 juillet, 1828; Pont, 2 p. 218; Pothier; Pigeau.

Contra:—Aubry & Rau, 3, p. 497 Sirey, coll-nouv. 3, 2, 71; Laurent, vol. 18.

Petition rejected.

DeBellefeuille & Bonin, for petitioners.

Bethune & Bethune, for opposant.

(S. B.)

COURT OF REVIEW, 1882.

MONTREAL, 31ST MAY, 1882.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 145.

Wood et ux. vs. *Wilson.*

HELD:—That when a tutor is sued by his ward, when of age, to render an account, and he pleads that he has been always willing to do so; but asks that the action be dismissed with costs; and at the same time prays *acte* of the production of an account fyled with the plea, the plea will be dismissed, and the defendant be ordered to fyle his account purely and simply in due form.

This was a review of a judgment of the Superior Court at Ste. Scholastique (Mathieu, J.), rendered on the first day of April, 1882, which maintained the plaintiff's action and also dismissed the defendant's plea, and granted *acte* to the defendant of the production by him of his account as tutor.

The facts and circumstances of the case are sufficiently explained in the judgment, which was worded as follows:—

"La Cour * * * considérant que le défendeur a le 17 juillet mil huit cent cinquante été nommé tuteur à la demanderesse Grace Wilson sa fille, et qu'il a accepté la dite tutelle et comme tel géré les biens de la dite demanderesse;

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Considérant que par l'article 308 du Code Civil le tuteur est comptable de sa gestion lorsqu'elle finit, et que le défendeur, avenant la majorité de la demanderesse, était tenu de lui rendre un compte suivant la loi de sa gestion comme tuteur ;

Considérant que le défendeur a le vingt-trois janvier dernier produit un compte de sa gestion comme tuteur des biens de la dite demanderesse pendant sa minorité, et que par ce compte il appert que le défendeur ne doit rien à la dite demanderesse, mais qu'au contraire c'est la demanderesse qui doit au défendeur ;

Considérant que par l'article 527 du Code de Procédure Civile, les demandeurs étaient tenus de prendre connaissance du compte et de produire leurs débats de compte s'ils entendaient le contester sous un délai de quinze jours, et que par l'article 530 du dit Code de Procédure Civile, à défaut de produire les débats dans le délai fixé, la demanderesse est censée admettre le contenu du dit compte qu'elle ne conteste pas ;

Considérant que la demanderesse devait connaître approximativement les biens dont son père le défendeur en cette cause avait eu la gestion, et que son action quoique bien fondée quant à la reddition de compte n'avait cependant aucun but utile, vû que par la reddition de compte, il appert que loin que le défendeur doive à la demanderesse, c'est la demanderesse qui doit au défendeur ;

Considérant que le défendeur a demandé le débouté de l'action des demandeurs, avec dépens contre eux, et a aussi demandé par son plaidoyer à ce que les demandeurs soient condamnés à lui payer la balance de son compte ;

Considérant que le défendeur ne peut obtenir le paiement de cette balance du compte par un plaidoyer dans la manière et forme du plaidoyer produit en cette cause ; mais qu'il aurait dû le faire par une demande incidente et par requête comme l'indique le Code de Procédure Civile ;

Considérant que l'action des dits demandeurs est bien fondée en droit et qu'elle doit être maintenue, et que les défenses du dit défendeur sont mal fondées ;

A renvoyé et renvoie les défenses du dit défendeur ; et a maintenu et maintient l'action des dits demandeurs et la déclare bien fondée ; et donne acte au dit défendeur de la production du dit compte de tutelle reçu devant Mtre. H. Howard, notaire, le vingt-sept décembre mil huit cent quatre vingt-un, et produit en cette cause le vingt-trois janvier mil huit cent quatre vingt-deux, réservant au défendeur son recours pour le reliquat du compte ; et vû le degré de parenté des parties en cette cause et la nature des contestations, cette cour déclare que chaque partie paiera ses frais."

The Court of Review reversed this judgment ; rendering the following judgment :—

"The Court here sitting as a Court of Review, having heard the parties by their counsel upon the judgment rendered in the Superior Court of the district of Terrebonne, on the 1st of April last (1882), having examined the record and proceedings had in this cause, and maturely deliberated ;

Considering that there is error in the said judgment ;

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Considering that the action is *en reddition de compte;*

Considering that the defendant has in substance pleaded that he had previously offered to account, and that the plaintiff was his debtor;

Considering that the defendant was by law obliged to render the account demanded by the action in due form, and in manner susceptible of being debated (débattu);

Considering that defendant has failed to render such account as by law was due;

Considering that the contestation and merits were with reference to the obligation to render an account merely; and no *reliquat* or balance could be in question until such account has been rendered and debated:

Doth reverse the said judgment of the 1st of April, 1882, and proceeding to render the judgment that the said Superior Court ought to have rendered in the premises; doth adjudge and condemn the defendant, within one month from this date, to render *en justice* to plaintiffs a true and faithful account, under oath, of the *tutelle* and his administration of the property of plaintiff, Grace Wilson, since the 17th July, 1850, accompanied by all documents, *pièces justificatives* relating and pertaining to said account, and to the inventory or inventories of the estate of the late Margaret McConat, her mother; each party paying his own costs in the said Superior Court up to the date of the rendering of the said judgment of the 1st of April last, and with costs of this Court of Review against the defendant in favor of plaintiffs, *distraits* to Messrs. Prévost & Préfontaine, their attorneys.

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

Mr. Justice Johnson dissenting as to the costs, in the Superior Court, which he is of opinion ought to be paid by the plaintiff."

Judgment of S. C. reversed.

Prévost & Turgeon, for plaintiffs.

J. Pelletier, for defendant.

(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 21ST APRIL, 1883.

Coram TASCHEREAU, J.

No. 1135.

Carter vs. *Molson, & Molson*, Opposant.

HELD:—That a seizure of "all the right, title and interest" of the defendant in and to certain real property described, under and by virtue of a deed of sale, of which a full description is given, is illegal and in violation of the arts. 632, 637, 638 and 648 of the Code of Civil Procedure, and that the defendant has a legal interest in pleading such illegality.

This was an opposition *afin d'annuler* by the defendant to a seizure of "all the right, title and interest" of the defendant in and to certain real property

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described, under and by virtue of a deed of sale, of which a full description was given, on the ground mainly of uncertainty.

The following was the judgment of the Court :

" La Cour * * * Considérant que le demandeur a fait saisir sur le défendeur des droits immobiliers d'une nature indéfinie, et que cette saisie est constatée par le procès-verbal et les annonces du shérif comme étant de tous les droits et intérêts du défendeur dans et sur la propriété décrite en le dit procès-verbal et en les dites annonces par et en vertu d'un certain acte de vente y mentionné ;

Considérant qu'une saisie immobilière ne peut être faite que de la propriété même des immeubles ou des droits incorporels auxquels ils sont affectés ; que si la saisie porte sur la propriété même, les droits de propriété du saisi, soit au total, soit à une partie divise ou indivise de l'immeuble, doivent être clairement énoncés dans le procès-verbal et les annonces, et si elle porte sur des droits incorporels, la nature précise de ces droits doit y être indiquée ; que faute de ces énonciations essentielles, la désignation des biens saisis est insuffisante, prête à l'incertitude et à confusion et est de nature à écarter les adjudicataires et à leur faire craindre des procès futurs ;

Considérant que la désignation insuffisante des droits saisis en cette cause ne peut être complétée par la référence qui y est faite à l'acte de vente dont il y est fait mention, attendu qu'une désignation faite dans un procès verbal de saisie doit être précise par elle-même, quant à ce qui fait réellement l'objet de la saisie, et que dans la désignation en question il est impossible de voir s'il s'agit de la propriété de tout l'immeuble, ou d'une partie de l'immeuble ou d'un démembrement de la propriété, ou bien de droits incorporels seulement, et de quels droits incorporels ;

Considérant que pour ces motifs la saisie opérée en cette cause, et tous les procédés subséquents à icelle, sont en violation des articles 632, 637, 638 et 648 du Code de Procédure, et que l'opposant a intérêt d'invoquer leur nullité ;

Rejette la contestation du demandeur, maintient l'opposition afin d'annuler du défendeur opposant, déclare la saisie et les annonces faites en cette cause nulles et de nul effet, et donne main levée de la dite saisie à l'opposant ; le tout avec dépens contre le demandeur contestant."

Opposition maintained.

Barnard & Co., for opposant.
Abbott & Co., for plaintiff.
S. Bethune, Q.C., counsel.
(S. B.)

COURT OF REVIEW, 1883.

MONTREAL, 23rd JANUARY, 1883.

Coram SICOTTE, J., TORRANCE, J., RAINVILLE, J.

No. 445.

The Hon. J. A. Mousseau, Attorney General, vs. *Bate es-qualité.*

HELD:—That proceedings in the nature of a *scire facias*, to set aside Letters Patent of invention, issued under the Dominion Statute 35 Vic : ch. 26 cannot be instituted in the name of a Provincial Attorney General, and can only be legally brought by the Attorney General of Canada.

This was a review of the following judgment rendered by the Superior Court at Montreal (Taschereau, J.), on the 1st December, 1882 :

" La Cour * * * Considérant que l'acte des Brevets de 1872, n'exige pas, avant qu'un brevet soit accordé et à peine de nullité de tel brevet, la production d'un modèle d'invention décrite en tel brevet, mais au contraire permet au commissaire des brevets de dispenser le requérant de telle production, s'il (le dit commissaire) le juge à propos pour quelque bonne cause ;

Considérant que le dit commissaire exerce à cet égard une discrétion absolue et remplit une fonction d'une nature judiciaire, et que la justice et la convenance de ses décisions finales en pareille matière ne peuvent être mises en question, surtout, lorsqu'aucune fraude ne lui est reprochée ;

Considérant que le brevet d'invention en question en cette cause est un document public qui fait preuve, *prima facie*, de son contenu et de la régularité de de tous les procédés qui en ont précédé et accompagné l'octroi ;

Considérant qu'en l'absence de toute preuve (et il n'en a pas été fait en la présente cause), le dit brevet d'invention est présumé avoir été accordé d'une manière légale et régulière, et le dit commissaire est aussi présumé avoir exercé sa discrétion dans le sens d'une exemption conforme au dit " Acte des Brevets de 1872 " (section 15) ;

Considérant que le dit commissaire, puisqu'il avait le droit de dispenser indéfiniment le requérant de toute production de modèle, avait à plus forte raison le droit de l'en dispenser pour un temps déterminé, sauf à exiger telle production de modèle lorsqu'il le jugerait à propos après l'émission de Lettres Patentes, ce qu'il paraît avoir fait dans l'espèce ; que sa décision à cet égard est inattaquable ; et que le brevet d'invention n'est pas nul par le seul fait que le commissaire aurait après coup exigé la production du modèle, après avoir exempté le requérant de le produire lors de l'émission ;

Considérant, en outre, que le brevet d'invention dont l'annullation est demandée en cette cause a été accordé par le dit commissaire des Brevets, agissant pour le Gouvernement du Canada, sous les dispositions de l'acte des Brevets de 1872, et de ses amendements ; que le dit acte (sections 29, 30 et 31) pourvoit aux procédures à être prises pour faire annuller les brevets d'invention accordés sous l'empire de ses dispositions, et donne juridiction en pareille matière à la Cour Supérieure de la Province de Québec, quand le breveté a son domicile dans la dite Province, laquelle Cour est alors appelée à mettre à effet une loi ex-

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clusivement fédérale ; que par "l'acte de l'Amérique Britannique du Nord, 1867," les brevets d'invention et toute législation qui s'y rapporte sont sous le contrôle et la juridiction exclusive du Parlement du Canada ; que par l'acte 31 Victoria, chapitre 39, le Procureur Général du Canada est seul compétent pour régler et conduire toute contestation formée pour ou contre la Couronne concernant les sujets qui relèvent de l'autorité ou de la juridiction de la Puissance, et par conséquent était seul compétent pour porter action pour faire annuller un brevet d'invention accordé par le Gouvernement de la Puissance en vertu d'une loi fédérale ;

Considérant que le Procureur Général de la Province de Québec ne peut, par la voie d'un bref de *scire facias* demander l'annullation que des Lettres Patentes qui ont été octroyées par le Gouvernement de la dite Province et sous l'empire des lois provinciales ;

Considérant qu'un brevet d'invention ne peut être annullé sur *scire facias* que d'une manière absolue et pour toute l'étendue de la Puissance, et ne saurait l'être quant à une Province seulement, et qu'ainsi (outre les raisons ci-dessus) le Procureur Général d'une Province serait tout à fait incompétent pour s'adresser aux tribunaux de cette Province pour demander telle annullation de brevet qui aurait son effet pour toute l'étendue du Canada ;

Maintient la défense, annulle et met de côté le bref de *scire facias* émis en cette cause et déboute le dit demandeur ès-qualité de sa demande ; et quant aux frais de défense encourus par le dit défendeur, la Cour recommande qu'ils lui soient payés par qui de droit."

The Counsel for the plaintiff submitted the following argument in Review, on the question as to the right of the Provincial Attorney General to sue :

"We find first in Sec. 30, Cap. 31, Con. Stat. Can., practically the same provision as is contained in Section 29 of the present Act, except that under that Act only Upper and Lower Canada were included, and there being no provision requiring the patentee to elect domicile, the action might be brought in either province, whereas under the Act of 1872 the information must be laid before the court of the place where the patentee elected domicile.

The next Act we refer to is also a Statute of United Canada, commonly called the Code of Civil Procedure of Lower Canada, Art. 1035. The Attorney-General referred to in said article was necessarily the attorney general of United Canada.

We now come to section 135 of B. N. A. Act as follows :—"Until the "Legislature of Ontario or Quebec otherwise provides, all rights, powers, "duties, functions, responsibilities or authorities at the passing of this Act, "vested in or imposed on the attorney general, solicitor general, &c., of the Pro-"vince of Canada, &c., by any law, statute or ordinance of Upper Canada, "or Lower Canada, or Canada, and not repugnant to this Act, shall be vested "in or imposed on any officer to be appointed by the lieutenant governor for "the discharge of the same or any of them."

Now we will look in vain through the B. N. A. Act to discover anything repugnant to the position occupied by the attorney general in this case ; indeed

sec. 92, sub-sec. 14 is in direct confirmation of the right of the local attorney general. If the taking of the present action is not an act performed in the administration of justice, it is difficult to see what it is. If the local attorney general shall not represent the Crown in matters relating to the administration of justice under the Patent law, what reason can be given for his doing so under the Criminal law? The fact is that before the Courts of the Province the Crown is represented and acts through the attorney general of the Province. This view was very forcibly put by Judge Strong in a case of The Attorney General of Ontario vs. The Niagara Bridge Company, reported in 20 Grant, Chanc. Ont., p. 34. But does the Dominion Stat. of 1868, cap. 39, sec. 3, interfere with the doctrine above laid down? We think that a fair construction of it is not inconsistent with the views we have already taken. It does not say that the Minister of Justice shall represent the Crown in relation to all laws passed by the Dominion Parliament, but only in relation to laws administered under the authority of that Parliament, and for example, as require to be put in execution by Dominion Courts. But the Patent Act is not such a law. It is administered like the Criminal Law by the Provincial Courts. So also in the subsequent clause of the same section, where it is stated that the Minister of Justice shall have the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subjects within the authority or jurisdiction of the Dominion. The argument of the Judge *a quo* was: The Patent Law is within the jurisdiction of the Dominion; therefore, by section 3, cap. 39, Stat. Can. 1868, the Minister of Justice must have the regulation and conduct of all litigation where the name of the Crown is used under it. It is a sufficient answer to this to say that the same argument would compel the Minister of Justice to represent the Crown in the Criminal Court. But we think it evident that the words litigation for or against the Crown in said section mean nothing more than those cases where the Crown appears as an ordinary litigant, with rights to enforce in its own behalf and for its own benefit, as for example, upon all contracts entered into by the Crown represented by any of the public departments of the Dominion, or where damages or remedies have accrued to the Crown in consequence of the infraction of some law of the Dominion. So the attorney general of any of the Provinces appearing for the Crown of his Province could conduct litigation before our Courts, to compel the performance of obligations. If this section means more than this, it is contrary to section 135 of the B. N. A. Act, and is unconstitutional. On the whole, it appears to us evident that the plaintiff has *locum standi* in this case, and in fact it has been so decided in an analogous case (Attorney General of Quebec vs. The Montreal Telegraph Company) by his Honor Mr. Justice Torrance."

The counsel of the defendant, with a view to obtain a confirmation of the judgment appealed from on its merits, acquiesced in the argument of the plaintiff's counsel as to the mere right of the plaintiff to institute such a proceeding as the present one.

The Hon. J. A. Mousseau, Attorney-General, vs. Bate es-qualité.

The following was the judgment in Review:

" La Cour * * * Considérant que par le Statut du Canada, 31 Victoria, chap. 39, de 1868, il est statué que le ministre de la justice sera d'office Procureur-Général de sa Majesté, en Canada, ayant la surintendance de toutes les matières se rattachant à l'administration de la justice en Canada, n'étant point de la juridiction des gouvernements qui le composent;

Considérant qu'il est de plus statué par le même statut que le Procureur-Général du Canada remplira les devoirs qui dépendent de la charge du Procureur-Général d'Angleterre, et aussi les devoirs qui par les lois des différentes provinces, dépendent de la charge de Procureur-Général de chaque Province, jusqu'à l'époque de la mise en vigueur de l'acte de l'Amérique Britannique du Nord, 1867, lesquelles lois doivent être administrées et mises à effet par le Gouvernement de la Puissance, qu'il réglera et conduira les contestations formées entre le Gouvernement ou quelque département public, concernant les sujets qui relèvent de l'autorité ou de la juridiction de la Puissance.

Considérant que dans l'espèce, le litige est concernant un brevet d'invention octroyé au nommé Bate par le ministre de l'agriculture, un des départements publics du Canada, et auquel le nommé Holman objecte en conformité aux dispositions du Statut du Canada, chapitre 35, (ought to be 35 Vic. ch. 26,) de 1872, et tel qu'il est permis par la section 29.

Considérant que par le Statut de 1872, section 52, le chapitre trente-quatre des Statuts Refondus de la ci-devant Province du Canada concernant les brevets d'invention, et toutes les lois et autres actes relatifs aux brevets d'invention ont été et sont abrogés;

Considérant que la législation sur les brevets d'invention est exclusivement dans les attributions et pouvoirs du Parlement et du Gouvernement Fédéral, et que par l'acte de 1868 déjà cité tout ce qui peut avoir rapport à l'exposition d'un statut Fédéral, et du Statut relatif aux brevets d'invention est du ressort et des attributions du département de la Justice du Gouvernement Fédéral, il suit que le bref de *scire facias*, dont parle la section 29 du Statut de 1872, doit émaner sur le *fiat* du Procureur Général du Canada et non du Procureur-Général de la Province de Québec;

Considérant aussi que par l'acte de 1868, le parlement du Canada a modifié et changé, tel que prévu par l'acte de l'Amérique Britannique du Nord, 1867, les dispositions des sections 129, 130, 134 et 135 de cet acte concernant certains pouvoirs à être exercés par les officiers en loi des Provinces, tant que le Parlement du Canada n'y aurait autrement pourvu, et qu'à raison de cette législation ces pouvoirs et attributions ne peuvent être maintenant exercés qu'aux termes des lois promulguées par le Parlement du Canada;

Adjuge et déclare que le bref de *scire facias* émané dans l'espèce sur le *fiat* du Procureur-Général de la Province de Québec, a été mal émané et contrairement aux dispositions de la loi sur la matière; confirme, pour ce motif, le jugement de la Cour Supérieure du premier de décembre, 1882, sans adjuger et décider sur les moyens invoqués par le contestant et sur les autres motifs articulés dans le jugement en question;

Réserve au dit contestant ses droits à procéder comme il avisera pour obtenir le *fiat* de l'officier désigné par le Statut, pour l'émanation d'un bref de *scire facias*.

"Condamne le contestant au paiement de frais encourus en Cour de Révision."

The Hon. J. A. Mousseau, Attorney General, vs. Bate es-qualité.

Judgment of S. C. confirmed.

Archibald & McCormick, for plaintiff.
Church & Co., for defendant.
(S. B.)

PRIVY COUNCIL, 1883.

LONDON, 18TH APRIL, 1883.

Coram LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

CARTER,

APPELLANT;

AND

MOLSON,

RESPONDENT.

HELD:—That inasmuch as the Code of C. P. failed to attach any penalty whatever for not filing the statement required by art. 766, the penalty imposed by art. 2274 of the C. C. and by ch. 87 of the Cons. Stat. of L. C., sec. 12, sub-sec. 2, cannot be enforced.

PER CURIAM:—This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec; by which that Court, by a majority of three to two, reversed a judgment of the Superior Court of Lower Canada.

The judgment is in the following terms:—

"6th March, 1882,

"Present: The Honorable Sir Antoine Aimé Dorion, Knight, Chief Justice; the Honorable Mr. Justice Monk, the Honorable Mr. Justice Ramsay, the Honorable Mr. Justice Tessier, the Honorable Mr. Justice Baby.

"The Court of our Lady the Queen, now here, having heard the appellant and respondent by their Counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of appeal filed by the appellant, and the answers thereto, and mature deliberation on the whole being had;

"Considering that the appellant, arrested on a *capias ad respondendum* at the suit of the respondent, has been discharged, by giving security, under article 825 of the Code of Civil Procedure, that he will surrender himself into the hands of the sheriff, when required to do so by an order of the Court or judge, within one month from the service of such order upon him or upon his sureties, and that in default such sureties will pay the amount of the judgment in

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principal, interest, and costs. And considering that, by article 766 and the following articles of the Code of Civil Procedure, express provision has been made concerning the matters provided for by chapter 87 of the Consolidated Statutes of Lower Canada and article 2274 of Civil Code, as to the obligation of a debtor who, having been arrested on a *capias ad respondendum*, has been admitted to bail, to file a statement of all the property, real and personal, of which he is possessed, and that the provisions of sections 13 and 18 of the said chapter 87 of the Consolidated Statutes and article 2274 of Civil Code have thereby been repealed under the provisions of article 1360 of the Code of Civil Procedure;

"And considering that, although by the first paragraph of the abovementioned article 766 of the Code of Civil Procedure, a debtor who has been admitted to bail is bound to file the statement and declaration of all the property of which he is possessed, according to article 764 of the said Code, within thirty days from the judgment rendered in the suit in which he was arrested, it is not provided in the said article, nor in any other article of the said Code, nor in any provision of law now in force, that, in default of filing such statement and declaration, such debtor shall be imprisoned or be subject to any penalty whatsoever;

"And considering that the judgment of the Superior Court sitting at Montreal on the seventeenth day of September, one thousand eight hundred and eighty, by which it was ordered that the said appellant should be imprisoned in the common gaol of this district for one year, is not, under the allegations of the petition on which said order was made, justified by law, and that there is error in the said judgment;—

"This Court doth reverse the said judgment of the seventeenth day of September, one thousand eight hundred and eighty, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the petition of the said respondent presented to the said Superior Court on the third day of September, one thousand eight hundred and eighty, and doth condemn the said respondent to pay to the appellant the costs incurred in the said Superior Court on the said petition, as well as those incurred on the present appeal.

("The Honorable Justices Ramsay and Baby dissenting.)"

The question, which their Lordships have found to be one of considerable difficulty, depends on the true construction of the two codes of Lower Canada, the Civil Code, more particularly art. 2274 and arts. 2613 and 2614, and the Code of Civil Procedure, more particularly art. 766 and those following it, and art. 1360. There were careful and elaborate provisions for framing the two codes in question: but, notwithstanding all the precautions taken, there may be, and in fact in the present case there are, doubts as to what is the meaning of the language employed. And the Civil Code of Lower Canada, art. 12, is "that "when a law is doubtful or ambiguous it is to be interpreted so as to fulfil the "intention of the Legislature, and to attain the object for which it was passed."

It is therefore material to inquire how and why the two codes were enacted, so as to ascertain what was the intention of the Legislature, and what the object for which they were enacted.

First, by Statute 20 Viet., c. 43, which afterwards became the second chapter of the Consolidated Statutes of Lower Canada, Commissioners were appointed, who were directed (secs. 4, 5 and 6) to reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the laws of Lower Canada which relate to civil matters, and are of a general and permanent character, whether they relate to commercial cases or others, but excepting the laws relating to seignorial or feudal tenure, and to reduce into another Code, to be called the Code of Civil Procedure of Lower Canada, those provisions which relate to procedure in civil matters and cases, and are of a general and permanent character. They were directed to embody therein such provisions only as they held to be then actually in force. They might suggest such amendments as they thought desirable, but were to state them separately. And they were directed to follow, as far as might be, the arrangement of the *Code Civil* of France. It was provided that, as the commissioners proceeded with their work from time to time, there should be an opportunity given to the Judges to review their work, and make suggestions to the commissioners, who were to consider, but were not bound to adopt, their suggestions. And by sect. 13 the commissioners were required from time to time to incorporate with the proper portions of the said Codes such amendments as the Governor in Council thinks it right to recommend for adoption by the Legislature after considering the reports of the commissioners, and those of the judges if any, but such amendments shall be carefully distinguished from the actual law. And then by sect. 14, "When "the said Codes, or either of them, are completed, with such amendments as "last mentioned, printed copies thereof, and of the reports of the commissioners, "and of the judges if any, shall be laid before the Legislature, in order that "such Code or Codes may be made law by enactment; and if it be found "advisable that either of the said Codes be completed and submitted to the "Legislature before the other, the Civil Code of Lower Canada shall be the "first so completed and submitted.

"2. Either House may propose any amendments to either Code, but such "amendments shall be proposed by resolutions, which may be passed by the one "House and sent to the other for its concurrence, and shall be subject to amend-"ment by the other, and be dealt with as a Bill might be until finally agreed to "by both Houses, and shall then be communicated to the commissioners, who "shall with all possible despatch incorporate the substance of the amendments "so agreed to with the proper Code, which may then be passed as a Bill at the "same or any other session."

The Civil Code was the first completed and submitted to the Legislature, and it was amended by resolutions agreed to by both houses, but the Legislature did not quite pursue the course indicated by the latter part of sect. 14, sub-sect. 2. By 29 Viet., c. 41, sect. 2, the commissioners were directed to incorporate the amendments with the Civil Code, adapting their form and language (when

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necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

Power was also given to the Governor to select any Acts and parts of Acts passed during the last and present sessions, and cause them to be incorporated. And power was given to the commissioners to make verbal and formal amendments, and so soon as the said work of incorporation was completed the amended Code was to be submitted to the Governor, who may cause a correct printed copy thereof, attested by his signature and that of the Provincial Secretary, to be deposited in the office of the clerk of the Legislative Council.

Then by Sect. 6, "The Governor in Council may after such deposit of the "roll last mentioned, declare by proclamation the day on and after which the "said code, as contained in the said roll, shall come into force and have effect "as law, by the designation of 'the Civil Code of Lower Canada,' and upon, "from, and after, such day the said code shall be in force accordingly." The Governor in Council, by proclamation, named the 1st August, 1866, as that day.

A precisely similar course was taken as to the Code of Civil Procedure of Lower Canada. The Statute 29 & 30 Vict., c. 25, being in the same words as those of 29 Vict., c. 41, except that (Code of Civil Procedure of Lower Canada) is throughout substituted for (Civil Code of Lower Canada.) The day fixed by the proclamation for this Code coming into force is the 28th day of June, 1867.

So that there was a period of nearly ten months, during which the Civil Code was in force, before the Civil Code of Procedure came into force.

It seems implied in that part of the judgment which states "that there are express provisions "in the Code of Procedure as to these matters," and that "the provisions of Sects. 12 and 18 of the Consolidated Statutes and "Art. 2274 of the Civil Code have thereby been repealed under Sect. 1360 of "the Code of Civil Procedure," that the majority of the Court of Queen's Bench put the construction on Art. 1360 of the Code of Civil Procedure, that it repealed not only all laws in force before the passing of either code, but also all parts of the Civil Code which touched procedure.

The literal meaning of the words "laws in force at the time of the coming "into force of this code" includes the Civil Code, for, as already pointed out, the Civil Code came into force some months before the Code of Civil Procedure did; but their Lordships are scarcely prepared to hold that the intention and object of the Legislature was that when a matter is included in the Civil Code which might without impropriety have been included in the Code of Procedure, and an express provision is made in the Code of Procedure upon that particular matter, the provisions of the Civil Code are abrogated as being laws concerning procedure in force at the time when the Code of Procedure came into force. The two subjects from their nature overlap, and in the Code Civil of France, as well as in the Canadian Codes, much which might well be put into the one code is placed in the other. There seems nothing to prevent laws in both codes

relating to the same subject from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.

The 20th title of the Canadian Civil Code, relating to imprisonment in civil cases, is one which might have been placed under the head of procedure; and so might the 16th title of the French Code Civil, entitled, "De la Contrainte par Corps en Matière Civile," have been placed in the "Code de Procédure Civile." But neither in the Canadian Codes nor in the French Code has this been done.

The general intention and object of the Legislature seems to have been that the two codes should stand together, and be construed together, and it may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the codes did not come into force on the same day.

It is not, however, necessary to decide this, as, by a different chain of reasoning the same result may be come to.

The preamble to the Statute 20 Vict., c. 43, which afterwards became the Consolidated Statutes, chap. 2, is this:—

"Whereas the laws of Lower Canada in civil matters are mainly those which at the time of the cession of the country to the British Crown were in force in that part of France then governed by the custom of Paris, modified by provincial statutes, or by the introduction of portions of the law of England in peculiar cases; and it therefore happens that the great body of the laws in that division of the province exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin. And whereas the laws and customs in force in France at the period above mentioned have there been altered and reduced to one general code, so that the old laws still in force in Lower Canada are no longer reprinted or commented on in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them. And whereas the reasons aforesaid and the great advantages which have resulted from codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the codification of the civil laws of Lower Canada."

From this preamble and the whole scheme of the legislation, their Lordships think that it was one main object of the Legislature to make the codes as one may say self-contained. This object, however, has been apparently lost sight of in several places, and, amongst others, in the Art. 2274 of the Civil Code, which is in the following words:—

"Any debtor imprisoned or held to bail in a cause wherein judgment for a sum of 80 dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property for the benefit of his creditors, according to the rules and subject to the penalty of imprisonment in certain cases provided in chap. 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure."

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This cannot be understood, without reading and construing the statute referred to in order to see what rules and what penalties of imprisonment were provided by that statute, and then determining which of them were kept alive by this Article; for, though this Article does contain an express provision as to at least part of chap. 87, and so by Art. 2613 and 2614 of the Civil Code does abrogate at least so much of chap. 87, yet it seems impossible to deny that the Legislature did intend, at all events until the Code of Civil Procedure should come into force, to re-enact by reference to the abrogated statute some penalties, and apply them to the things specified in Art. 2274. And there is great difficulty in doing this. For though chap. 87, s. 12 (1) does, in certain cases included in Art. 2274, but not quite co-extensive with it, require a debtor against whom judgment for 80 dollars or upwards has been rendered to file a statement of his property and creditors, and a declaration of his willingness to abandon the property in said statement mentioned to his creditors, and by sect. 12 (2) does impose a penalty on a defendant neglecting to file such statement, yet there are no penalties co-extensive with Art. 2274, and there certainly are many penalties which, by chap. 87, s. 18, are imposed upon debtors who have not been arrested, against whom a judgment has gone in a commercial cause, which cannot by any construction be kept alive by Art. 2274. Those difficulties are all removed if Art. 2274 is read as meaning "according to the rules and "subject to the penalty provided in certain cases in chap. 87, *until the Code of Civil Procedure comes into force, and then* in the manner and form specified "in the Code of Civil Procedure."

It is not to be denied that this is introducing words not to be found in the enactment, and so far is objectionable. But their Lordships think that Art. 2274 of the Civil Code shows an intention on its face to hand over the whole of its subject matter to be dealt with by the provisions of the Civil Code of Procedure, or if that intention cannot be found on its face, then that the law contained in that enactment is "doubtful and ambiguous," and though not without some doubt and difficulty, they think that the object and intention of the Legislature is such as to justify this construction.

If it is adopted all difficulty vanishes. The articles of the Code of Civil Procedure do impose many penalties, but they do not impose the penalty of imprisonment for a year on the person refusing to perform that duty which he is by the express terms of Art. 766 bound to perform.

The question how he is to be compelled to do so does not arise on this appeal. It is enough to say that he is not liable to imprisonment for a year.

Their Lordships think that the appeal must be dismissed. They will so humbly advise Her Majesty.

The appellant must pay the costs of this appeal.

Appeal d[illegible]

(S. B.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1883.

LONDON, 30TH JUNE, 1883.

Present the Rt. Hon. LORD WATSON, the Rt. Hon. Sir BARNES PEACOCK, the Rt. Hon. Sir ROBERT P. COLLIER, the Rt. Hon. Sir RICHARD COUCH, and the Rt. Hon. Sir ARTHUR HOBHOUSE.

THE CANADA CENTRAL RAILWAY COMPANY, APPELLANTS;

vs.

MURRAY ET AL., RESPONDENTS.

HELD:—That an appeal from the Supreme Court of Canada will not be allowed where the only issue raised is one of fact.

In this case a judgment was rendered by an Ontario Court upon the verdict of a jury in favor of the respondents.

The appellants appealed to the Supreme Court, and a judgment was rendered therein confirming the decision of the Ontario Court; two Judges of the Supreme Court being dissentient.

Thereupon an application was made to the Privy Council by the appellants, for leave to appeal from the judgment of the Supreme Court.

Leave was refused; and the following remarks of his Lordship, Lord Watson, in rendering judgment, indicate the principle upon which such applications are dealt with by the Privy Council.

LORD WATSON. Their Lordships are of opinion that this application ought to be refused.

The case made by the petitioners, the railway company, is that they were not liable to the plaintiff as having employed him to make certain fencing along the line. They allege that that contract was made with a gentleman of the name of Foster, who was not only a servant of the company, but a contractor with the company, dealing with them as an independent contractor. The judge put the question to the jury, whether they were satisfied that the plaintiff contracted in the belief that he was dealing with the company, and further put the question to them whether the company had fostered that belief, and dealt with the plaintiff on the footing that they had contracted with him, and, in the event of the jury coming in point of fact to the conclusion that both those questions should be answered in the affirmative, he directed them that a verdict should follow for the plaintiff. The jury found for the plaintiff. The questions that seem to have been discussed in the Court below may be said to be two—First, whether there was evidence to go to the jury at all making the petitioners parties to the contract by adoption or recognition, and in the second place whether the evidence was sufficient to establish the fact that they had recognised or adopted the contract which was admittedly made by Foster with the plaintiff. There has been difference of opinion in the Court below. The majority of the judges were of opinion that the verdict was warranted by the evidence before the jury, and the

The Canada Central Railway Company vs. Murray et al.

course taken by the judge was consequently not only justifiable, but right. The view taken by the minority of the Court was that there was no evidence to go to the jury upon that point, at least no evidence of a satisfactory description, and that therefore the verdict of the jury ought to be set aside, and judgment entered for the defendants.

Now, the questions so raised appear to their Lordships to involve no issue except an issue of fact. The question before the Court was whether there was evidence in point of fact, and what was the effect of that evidence.

That the judges below have differed upon a question of fact in regard to an ordinary contract of employment does not seem to be any reason for permitting an appeal, having regard to the terms of the statute which now regulates these appeals.

Their Lordships are also desirous in this case to lay down the rule, that they will in future expect parties who are petitioning for leave to bring an appeal before this board to state succinctly, but fully, in their petition the grounds upon which they make that demand. They will certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings in this case, over which the board, until an appeal is permitted and brought, have no control whatever, and which they cannot accept on an *ex parte* statement, which an application of this kind is.

Petition to appeal refused.

(S. B.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 25TH JANUARY, 1883.

Coram The Hon. Sir A. A. DORION, Ch. J., MONK, J., TESSIER, J., BABY, J.

No. 858.

THE MONTREAL, PORTLAND AND BOSTON RAILWAY CO.,

APPELLANTS;

AND

LA BANQUE D'HOCHELAGA,

RESPONDENTS.

HELD:—That on motion of the owner of bonds with *coupons* attached, this Court will order such of the *coupons* as are not in litigation in the appeal to be detached by the Clerk of the Court, and delivered over to the party moving.

The respondents made the following motion:

"Inasmuch as certain bonds or debentures issued by the Montreal, Chambly and Sorel Railway Company, herein represented by the appellants, said bonds being numbered respectively 0406, 0407, 0408, 0409, 0410, 0411, 0412 and 0413, and each having a number of coupons representing payments of interest therein, were filed with plaintiffs' (respondents) action in the Court below, and are now of record in the present appeal:

"Inasmuch as the judgment now appealed from is based, as was plaintiffs' action, upon those of said coupons annexed to said bonds or debentures that became due at divers dates, the last whereof on the 2nd day of January, 1880;

"Inasmuch as there are also coupons attached to said bonds for interest becoming due at dates subsequent to said 2nd of January, 1880, which last mentioned coupons are in no way necessary in the present case in appeal, and have no bearing upon or connection therewith;

"Inasmuch as respondents have need of said last mentioned coupons for other purposes:

"That order be given to the clerk of this Court to detach from said bonds the coupons becoming due subsequent to the said 2nd of January, 1880, and to deliver the same to the respondents."

The Montreal, Portland and Boston Railway Co. and La Banque d'Hochelaga.

Motion granted.

Beique & Co., for respondents.
W. F. Ritchie, for appellants.
(S. B.)

PRIVY COUNCIL, 1883.

LONDON, 11TH JULY, 1883.

Coram LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR ARTHUR HOBHOUSE.

MACDONALD, APPELLANT;

AND

WHITFIELD, RESPONDENT.

HELD:—1. That the promissory notes in question in this case, which were endorsed first by the appellant and secondly by the respondent, were so endorsed by said parties as co-sureties for the maker.

2. That according to the law of England in force on the 30th of May, 1849, the said parties so endorsing as co-sureties were liable *inter se* to contribute equally towards payment of said notes.

This was an appeal from the judgment of the Court of Queen's Bench at Montreal, reported in the 26th L. C. J., p. 69.

PER CURIAM:—Edward Macdonald and George Whitfield, who are respectively appellant and respondent in this appeal, were, in the year 1875, directors of a trading corporation known as the St. John's Stone China Ware Company, which carried on business at St. John's, in the district of Iberville and Province of Quebec. At that time the concern was not in a very prosperous condition, and in the month of July, 1875, the balance due by the company in its account current with the Merchants' Bank of Canada was upwards of $17,000. The appellant was president and chairman of the Board of Directors; and he had endorsed the company's promissory notes, for its accommodation, to the Merchants' Bank, to the amount of $65,000. It appears that he had also given his personal guarantee to the bank, for the overdrafts of the company upon its account current, to the extent of $10,000.

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In July, 1875, the company, being in want of funds, applied to the bank, through the appellant, for further [illegible] and on the 24th of that month, the agent of the bank at St. [illegible] written answer to the application, addressed to the late M[illegible] secretary of the Company, in these terms:—

"Dear Sir,—Respecting your president's application to the bank for further extension of your credit, I have the pleasure to inform you that you have been allowed an extension of four or five thousand dollars in case of need. The bank, however, requires that the present advances, [illegible], be secured by the personal guarantee of your directors, should renewals be required, which could be done by their endorsation of the notes. Your account current is now overdrawn seventeen thousand six hundred and fourteen dollars and fifty-four cents; and by giving me the company's note, endorsed as required, for 8,500 dollars, you will reduce your overdrawn account, leaving a balance of 700 dollars of above loan.

"I enclose a letter of guarantee along with a note, for signature by your directors, as required by the bank, to take the place of Mr. Edward Macdonald's personal security for the like amount."

Along with this communication there were sent to the secretary of the company the letter of guarantee, and also the note therein mentioned.

The letter in question, which was dated the 24th July, 1875, and addressed to the agent of the bank, was expressed as follows:—

"Dear Sir,—In consideration of the Merchants' Bank of Canada allowing the St. John's Stone China Ware Company to overdraw their account to the extent of ten thousand dollars, we herewith deposit with you, as collateral security for the due payment of such overdraft, the demand note of the company, endorsed by the following directors individually. . . . And we hold ourselves liable without prejudice to the ordinary legal remedies. Subscribe ourselves, your obedient servants."

The note which accompanied the foregoing form of letter for signature by the directors was a promissory note by the company for $10,000, payable on demand to the order of the appellant, at the office of the Merchants' Bank of Canada in St. John's.

Having regard to the pecuniary relations then subsisting between the company and the bank, the arrangements thus proposed by the latter are sufficiently intelligible. The bank had made large advances by discounting, or, in other words, purchasing the paper of the company endorsed for its accommodation by the appellant, and had also advanced upon [illegible] of $17,000 on current account, which was only secured, to the extent of $10,000, by the personal guarantee of the appellant. In these circumstances the bank was willing to make a further advance of from $4,000 to $5,000, provided the company complied with these three conditions:—In the first place, advances upon current notes which had been discounted by the bank were, in the event of renewals being required at maturity, to be secured by the personal guarantee of the directors of the company, such guarantee to be given by their endorsation of the renewal notes. In

the second place, the note of the company for $8,500 duly endorsed by the directors as aforesaid, was to be delivered to the bank in payment and extinction *pro tanto* of the advances on current account, so as to reduce the debit balance of the company to nine thousand odd dollars. And, in the third place, the demand note for $10,000, when duly signed and endorsed by the directors, was to be deposited with the bank as a collateral security for overdrafts on account current, and was to be substituted for the appellant's personal security for the like amount.

No mention is made in the bank's letter of the manner in which the additional advance, or extended credit, of four to five thousand dollars was to be allowed to the company. It is obvious, however, that the bank was not prepared, and did not agree, to give the extended credit without security; and also that the result of carrying out the conditions upon which it was to be given would be to reduce the balance due on current account about $700 only below the amount of the demand note covering that account. It, therefore, seems matter of reasonable inference that the additional advance was to be made by the bank discounting the promissory note or notes of the company, duly endorsed by its directors.

On the 5th August, 1875, the directors of the St. John's Stone China Ware Company met for the purpose of considering the answer returned by the bank to the application, made through the appellant, for an extension of the company's credit. At that meeting all the directors of the company, five in number, were present, viz., the appellant, the respondent, and Messrs. Marler, Coote, and Macpherson. The minute of the meeting of the 5th August, 1875, as entered in the minute-book of the company, bears that "the letter of the "agent of the Merchants' Bank of the 24th ultimo was submitted, and the "directors agreed to give the personal endorsation asked for by the bank, and the "secretary was instructed to have the said notes drawn out, signed as required, "and handed over to the Merchants' Bank."

In pursuance of that resolution the secretary of the company drew out two notes, for $8,500 and $4,500 respectively, which he signed as promissor on behalf of the company, the name of the appellant being inserted as payee, just as it had been in the demand note for $10,000 sent by the bank for signature and endorsation. Mr. Marler, one of the five directors of the company, was also the manager of the Merchants Bank of Canada, in St. John's, and was precluded from signing any of these promissory notes by the regulations of the bank. All the other directors endorsed the demand note for $10,000 (after it had been signed by the secretary for the company) in the following order, (1) the appellant, (2) the respondent, (3) Mr. Coote, (4) Mr. Macpherson. It does not clearly appear whether Mr. Macpherson did or did not become a party to the two notes for $8,500 and $4,500; but these were certainly endorsed by the other three directors, in the same order in which their signatures were put on the $10,000 note. Neither does it appear at what dates these two bills for $8,500 and $4,500 were made payable; but it appears to their Lordships to be established that they were new discount bills, and that they were renewed on

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more than one subsequent occasion, the last renewal of the first of these notes having been made on the 21st March, and the last renewal of the second upon the 26th March, in the year 1877. These renewal bills were not signed by Macpherson, but they were endorsed by the appellant, by Mrs. Whitfield, per procuration of her husband the respondent, and by Mr. Coote, in the same order as before.

The letter of guarantee sent by the bank was subscribed by the appellant as well as by Messrs. Coote and Macpherson, and their names were inserted in the blank left for that purpose; but it was not signed by the respondent, nor was his name entered therein. When thus completed, the letter was handed to the bank along with the $10,000 demand note.

On the 27th December, 1877, the Merchants' Bank of Canada instituted a suit against the appellant, the respondent, and Mr. Coote, in the Court of Queen's Bench for Lower Canada, for recovery of the sums then due to the bank as holder for value of the said demand note for $10,000, dated the 24th July, 1875, and of the two renewal notes for $8,500 and $4,500, dated the 21st and 26th March, 1877. The demand of the bank was not resisted either by the appellant or by Mr. Coote, but the respondent appeared and defended the action. After a variety of proceedings, which it is unnecessary for the purposes of this case to notice in detail, Mr. Justice Chagnon, on the 1st September, 1879, ordained the three defendants, jointly and severally, to pay to the bank the contents of the two notes of the 21st and 26th March, 1877; and also ordained the appellant and Mr. Coote, jointly and severally, to make payment to the bank of the contents of the demand note for $10,000.

On the 7th January, 1878, the respondent, availing himself of the provision of Article 1953 of the Civil Code, brought an action *en garantie*, before the same Court, against the appellant, concluding to have the appellant condemned, to acquit and relieve him of any sum of principal and interest, for which decree might be given against him in the suit at the instance of the bank. In the declaration filed by him in that action, the respondent treated the three promissory notes in question as if they had been ordinary commercial paper. His allegations, in regard to each of these notes, were in substantially the same terms, and after reciting the making of the note by the company, payable to the appellant, thus proceed:—

"Lequel billet la dite St. John's Stone China Ware Company remit au dit défendeur Edward Macdonald, qui là et alors signa et endossa le dit billet et le remit au dit demandeur en garantie George Whitfield, qui là et alors signa et endossa le dit billet et le remit au dit Isaac Coote, qui là et alors signa et endossa le dit billet et le remit à la dite Merchants Bank of Canada, qui en est encore porteur et propriétaire."

The plea founded by the respondent on that allegation was to the effect that the defendant,

"Etant, ainsi qu'il appert par les allégués ci-dessus, endosseur précédent et antérieur au dit demandeur en garantie, sur tous et chacun des trois billets plus haut mentionnés, est obligé et tenu en loi de rembourser, garantir et indemniser

le dit demandeur en garantie de tous troubles et de toute condamnation qui pourrait intervenir contre lui, sur et à raison des dit billets, et dans et à raison de la dite action instituée par la dite Merchants' Bank of Canada." Macdonald and Whitfield.

In this action of warranty judgment was given by Mr. Justice Chagnon on the 1st September, 1879. The learned Judge held that the evidence given by the respondent himself, with regard to the circumstances in which these notes were made and endorsed, showed that the property of the notes was not passed by the endorsations, and that there was, in point of fact, no delivery by one endorser to another. And, inasmuch as that testimony, in his opinion, contradicted the allegations upon which the respondent's claim of indemnity was based, he dismissed the action as laid, reserving to the respondent any recourse which might be competent to him against the appellant.

An appeal was taken by the Merchants' Bank of Canada against the judgment of Mr. Justice Chagnon of the 1st September, 1879, in so far as it absolved the respondent from liability to the bank in respect of the demand note for $10,000. The respondent also appealed against the judgment of the same date, in his action *en garantie*. On the 18th June, 1881, the two actions were consolidated by an order of the Queen's Bench.

Thereafter, on the 23rd September, 1881, the Court of Queen's Bench gave judgment in the conjoined causes. The Court, in the suit at the instance of the bank, reformed the judgment of Mr. Justice Chagnon, and condemned the respondent in payment to the bank of the $10,000 demand note, with interest and costs. In the action at the respondent's instance, the Court reversed the judgment appealed from, and condemned the appellant to guarantee, acquit and indemnify the respondent from all the condemnation in principal, interest and costs pronounced against him by the judgment in favor of the bank, and further condemned the appellant to pay to the respondent the whole costs incurred by him in the suit at the bank's instance. The present appeal has been brought against the judgment, in the action *en garantie*, of the 22nd September, 1881, by Edward Macdonald, the defendant in that action.

The learned Judges of the Court of Queen's Bench were of opinion that the two promissory notes for $8,500 and $4,500, dated the 21st and 26th March, 1877, were mere renewals of notes which the Company had, prior to the 24th July, 1875, discounted with the bank, upon the endorsation of the appellant; and a finding to that effect is set forth as one of the considerations on which the formal judgment of the Court proceeds. Dorion, C. J., who delivered the judgment of the Court, said, "the two notes of the 21st and 26th of March, 1877, "are renewals of other notes which, prior to the 24th July, 1875, were endorsed "by Macdonald alone."

The learned Judges were also of opinion that the note for $8,500 was the only one which the bank, by its letter of the 24th July, 1875, required from the Company, in order to cover its overdrafts upon current account; and, further, that it was the only note which the directors of the Company, by their resolution, embodied in the minute of 5th August, 1875, agreed to give, endorsed by them, to the bank. Upon this point Dorion, C. J., said:—"It is also to be

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"remarked that the bank merely asked the endorsement of the directors on a "note for $8,500, to cover the overdrawn account of the Company, and that by "the resolution it was only agreed to give the endorsation asked for, while the "note endorsed by the directors to cover the overdrawn account is for $10,000; "the resolution, therefore, does not apply to the note in question, and cannot "be invoked as containing an agreement on the part of Whitfield (the respond-"ent) to endorse this note of $10,000 as surety for the Company."

The views thus expressed by the learned Chief Justice are, in the opinion of their Lordships, founded on a misconception of the true import of the written communication made by the bank to the Company on the 24th May, and of the action taken upon that communication by the directors of the Company on the 5th August, 1875. It must be borne in mind that the Company required a further credit, or in other words a further advance from the bank, and as the bank had not asked for the endorsements of the directors, except as a consideration for making the required advance, it is improbable that the directors agreed to give or gave their endorsations, without making provision for the Company getting, in exchange for these endorsations, the advance of $4,000 to $5,000, which the bank was willing to allow. If the note for $4,500, which the directors then endorsed, was a new note for discount, then the Company got the advance, in respect of which they were asked, and presumably agreed, to give their endorsations upon the notes required by the bank. As regards the note for $8,500, the suggestion that the bank merely required the endorsements of directors upon it in order "to cover the overdrawn account of the Company" is inconsistent with the terms of the bank's letter, which states expressly that the $8,500 note was required, not "to cover," but "to reduce," the account. A renewal note could not possibly reduce the overdrafts. The plain import of the letter is that the bank required not a renewal but a new note for $8,500, which was to be discounted, and the proceeds, instead of being paid to the Company, applied in extinction *pro tanto* of these overdrafts, in order to bring the balance due below $10,000.

The evidence of Mr. Marler and of the appellant is to the effect that these two documents were new discount notes and not renewals, and their testimony is corroborated by that of the respondent himself. He was adduced as a witness for the appellant, and was examined in regard to the two notes for $3,500 and $4,500 bearing date 21st and 26th March, 1877. These were undoubtedly renewals of the two notes of that amount given to the bank in August, 1875, but the respondent did not assert that they were, as the learned Judges have assumed, "renew-"als of other notes which, prior to the 24th of July, 1875, were endorsed by "Macdonald alone." His statement is:—"The note for eight thousand five "hundred dollars and the one for four thousand five hundred, are renewals for "former notes of the amount between the same parties."

These facts, connected with the making and issue of the three promissory notes for $10,000, $3,500, and $4,500 in August, 1875, are only of importance in so far as they tend to explain the true legal relation in which the appellant and the respondent as parties to these notes, stand towards each other. The

respondent maintains that, although neither of them gave or received value for the notes, but put their respective endorsations upon them for the accommodation of the St. John's Stone China Ware Company, the appellant, having first written his name upon the back of the notes, has thereby become liable to him, in the same manner, and to the same effect, as if he had been a prior endorser upon a proper commercial bill.

Had the appellant been, in point of fact, the holder of the notes, and had the respondent, in these circumstances, given his endorsements to the Merchants' Bank of Canada, which was about to discount them, the appellant would have been bound to indemnify the respondent against any demand made upon him by the Bank, or any subsequent holder, to the same extent as if the respondent had been a proper endorser. That was held to be the legal effect of such an endorsement in "Penny v. Innes" (1. C. M. & R. 439).

In the present case the appellant, although his endorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the endorsements of both were given for one and the same purpose, viz., in order to induce the bank to discount two of the notes, and pay the proceeds to the promissor, the St. John's Stone China Ware Company, and also to give the Company credit in account current to the amount of the third note. It was argued, however, for the respondent, that, in the absence of some special contract or agreement between them, *dehors* the notes themselves, strangers giving their endorsements successively must be held to have undertaken the same liabilities *inter se* which are incumbent on successive holders and endorsers of a note for value. The appellant and respondent must therefore, it was said, be assumed to stand towards each other in the relation of prior and subsequent endorsers for value, inasmuch as it had not been proved, *habili modo*, that they had specially agreed that their endorsements were to have the effect of making them co-sureties for the promissor. On the other hand, it was contended for the appellant that all the directors who endorsed the notes in question must now be treated as co-sureties, seeing that their endorsements were made, without reference to the order of their signatures, in pursuance of a mutual agreement to give their joint guarantee to the bank that the notes would be duly retired by the Company.

Their Lordships see no reason to doubt that the liabilities, *inter se*, of the successive endorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior endorsement must, according to these principles, indemnify subsequent endorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note, may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as endorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to have the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accor-

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dance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such facts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him; but, in that case, he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.

The appellant has not attempted to establish an independent collateral agreement by the respondent, to contribute equally with him and the other endorsers, in the event of the Company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the Company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the Company. And, in the opinion of their Lordships, that is the proper legal inference to be derived from the circumstances of the present case.

Their Lordships construe the bank letter of the 24th July, 1875, as preferring a direct request that the directors should become bound to the bank as co-sureties for the Company. The bank did not require that the appellant should become surety for the Company, that the respondent should then become surety for the appellant, and that Mr. Coote, in his turn, should guarantee the solvency of the respondent. What the bank asked was "the personal guarantee of your directors," and what the directors agreed to give at their meeting on the 5th August, 1875, was "the personal endorsation required by the bank." Apart from the mere circumstances of the order in which the endorsements were made, the *res gestæ* of the meeting of 5th August, as disclosed in evidence, make it perfectly plain that the directors were asked and agreed to become co-sureties for the Company, without any stipulation whatever as to their becoming *inter se* sureties for each other, or as to the order of their endorsing. Their Lordships attach no weight to the terms of the so-called letter of guarantee which was returned to the bank, along with the demand note for $10,000, or to the fact that it was not signed by the respondent. The letter contains no obligation of guarantee, and simply explains, what would otherwise have sufficiently appeared from the bank's own letter, that the $10,000 note was not for immediate discount, but was to be held by the bank as a collateral security for the Company's debit balance in account current.

But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabilities *inter se* of these endorsers for the accommodation of the Company, regard must be had, not to the contract in pursuance of which they became endorsers, but to the order of their endorsements, as evidencing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the

present, the signing of their names on the note, by way of endorsement, in order to induce the bank to discount it to the promissor, is not, as between the endorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities *inter se*, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was correctly laid down by the Court of Common Pleas in Reynolds v. Wheeler, 10 C. B. (N.), 561. In that case, one Cheeseman drew a bill, and asked Reynolds to accept it for his accommodation, which Reynolds did. The bank refused to discount, whereupon Wheeler, at the request of Cheeseman, endorsed, and the bill was then discounted, Cheeseman receiving the proceeds. The bill was renewed at maturity, Reynolds, on this occasion, being drawer and Cheeseman acceptor, whilst Wheeler endorsed it as he had done before. Reynolds paid the renewal bill, and claimed contribution from Wheeler as a surety with him for the same debt. Wheeler resisted the claim on the same plea which is put forward by the respondent in the present case, viz., that, in the circumstances, he had only agreed to undertake the liability evidenced by the endorsement, and consequently he was not liable in relief or contribution to one who, like Reynolds, had previously become party to the bill as drawer or acceptor. But the Court overruled the plea. Erle, C. J., said, "The substance of the transaction is this—Cheeseman was in want of money, and "applied to Reynolds and to Wheeler to lend him their names in order to "obtain it. If the money had been raised by the joint and several note or "bond of the three, it could not have for a moment been contended that "Reynolds, paying the whole, would not have been entitled to contribution. "The machinery adopted here was the drawing of a note by Cheeseman upon "Reynolds, and the endorsement of it by Wheeler." And Williams, J., stating the law to the same effect, said, "If the relation of surety subsists he "(Reynolds) is entitled to contribution, and we are entitled to disregard the "form of the instrument."

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In the present case the directors of the St. John's Stone China Ware Company one and all agreed with each to become sureties to the bank for the same debts of the Company. That was the substance of the agreement to which they came on the 5th August, 1875, and the fact that the machinery which they adopted for carrying out their agreement was the making of three promissory notes by the Company, payable to the appellant, and successively endorsed by him and his co-directors, cannot have, in law, the effect of altering the mutual relations established by that agreement, and of substituting for these the liabilities of proper endorsers of an ordinary commercial note.

It was argued, however, that the respondent gave his endorsements at the request of the appellant, and must, therefore, be held to have given them on the faith of his having recourse against the appellant as a prior endorser. That contention was rested upon certain statements made by the respondent in his deposition as a witness for the appellant. He stated, "I was asked to endorse

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"the notes in question by Edward Macdonald, in fact urged to do so, to sign "them, that it was all right, which I did." Again, in answer to the question by his own counsel, "At whose instance did you endorse the notes in question?" he says, "At the instance of Edward Macdonald." The argument is really without foundation in fact. There is not a word in those statements to suggest that the appellant, Edward Macdonald, did anything more than urge the respondent to carry out the agreement which had already been come to by all the directors present in order to aid the finances of the Company.

The authority of Reynolds *v.* Wheeler, and similar cases, is in no wise affected by the decision of the House of Lords in the Scotch case of Steele *v.* Mackinlay, which is referred to in the judgment of the Court below. In that case A, acting on behalf of his sons B and C, arranged with D that the latter should make an advance to them of 1,000*l.* upon their personal security. D accordingly drew a bill for that amount on B and C, and delivered it to A, in order that he might procure their acceptances. A did obtain their acceptances, and before returning the accepted bill to D, he wrote his own name upon the back of it. The acceptors failed to retire the bill, and D, the drawer, brought an action against the representative of A (who had died in the meantime) for recovery of its contents, upon the allegation that A had signed as a co-acceptor, or at all events with the intention and effect of becoming a surety to him for the acceptors. Parole evidence was led, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independent engagement by him to guarantee payment of the bill by his sons. The admissibility of the evidence, so far as it bore upon the facts and circumstances connected with the making and endorsement of the bill, was not questioned either at the bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D was neither supported by the principles of the law-merchant, nor by any inference derivable from these facts and circumstances. But the House rejected the parole evidence adduced by D in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the "Mercantile Law Amendment (Scotland) "Act, 1856," which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

The respondent's Counsel, in the course of the argument, referred to the case of "Jansen *v.* Paxton" (28 C.P., U.C., 439), decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian Courts. With the same view, they cited the case of "Macdonald *v.* Magruder," decided in 1830 by the Court of New York, United States (3 Peters, 470, and 8 Curtis, 491). These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their endorsements on a bill, as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper endorsers, liable to indemnify each

other successively, according to the priority of their endorsements, unless it had been specially stipulated that they were to be liable as co-sureties. It is unnecessary to enter into a minute criticism of these cases. Some of them are, in their circumstances, distinguishable from the present case; but there are undoubtedly to be found in the opinions of the learned Judges by whom they were decided *dicta* which seem to recognize the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (Article 2340) enacts that "in all matters relating to bills of exchange not "provided for in the Code, recourse must be had to the laws of England in "force on the 30th day of May, 1849." By Article 2348 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in "Reynolds *v.* Wheeler."

Their Lordships will, accordingly, advise Her Majesty that the judgment appealed from ought to be reversed; and that the action *en garantie* at the respondent's instance ought to be dismissed, with the declaration that the appellant and the respondent made their several endorsements upon the promissory notes in question, along with other directors of the St. John's Stone China Ware Company, as co-sureties for the said Company, and are, in that capacity, entitled and liable to equal contribution *inter se*.

The respondent must pay to the appellant the costs of this appeal, and also the costs incurred by him in the Courts below.

Judgment of the Court of Queen's Bench, Montreal, reversed.

(S. B.)

COUR DE CIRCUIT, 1883.

L'ASSOMPTION, 19 JUIN, 1883.

Coram MATHIEU, J.

No. 592.

Wilhelmy vs. *Brisebois*.

Jugé:—1o. Que les connétables dûment nommés pour veiller au maintien du bon ordre dans les églises, pendant le service divin, remplissent des fonctions publiques et, comme tels, ne peuvent être poursuivis en dommages à raison d'aucun acte par eux fait dans l'exercice de leurs devoirs, à moins qu'avis de telle poursuite ne leur ait été donné au moins un mois avant l'émanation du bref d'assignation au désir de l'art. 22 du C. P. C.

2o. Que sous notre droit toutes les tutelles sont *datives*, et que la mère d'un enfant mineur, ne peut, en cette seule qualité, instituer pour lui, *comme sa tutrice naturelle*, aucune action, mais doit au contraire être nommée sa tutrice, conformément à la loi, pour pouvoir intenter telle action. (C. C. arts. 249, 304; 1er Pigeau, p. 69, 3 éd.)

La demanderesse allègue qu'elle est veuve et mère de Ferrier Mathieu, âgé de vingt ans, et *sa tutrice naturelle*. Que son fils bien que mineur, a les habitudes d'un homme mûri par l'âge et jouit de l'estime générale de ses concitoyens. Que

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le 31 décembre 1882, et le 6 janvier 1883, le défendeur, par pure malice, insulta son fils, le dit Ferrier Mathieu, dans l'église de Lachenaie pendant le service divin ; le força à s'asseoir, se lever ou s'agenouiller, dans son banc, alors que les autres personnes demeuraient assises ou debout, selon qu'elles le jugeaient à propos.

Que le défendeur tout en se prétendant connétable, aurait agi ainsi malicieusement, alors que le dit Mathieu était paisiblement assis dans son banc, et ce, au grand scandale des fidèles et à la honte et humiliation du dit Mathieu, qui a beaucoup souffert dans sa sensibilité et son amour propre par suite des dites insultes.

Que le 6 janvier, le défendeur, par malice, alla de nouveau au banc du dit Mathieu, le força de se lever alors qu'il ne le désirait pas, et le menaça de le sortir de l'église s'il ne lui obéissait pas. Que le même jour, à la porte de l'église, le défendeur aurait répété qu'il sortirait Mathieu de l'église, s'il ne lui obéissait pas.

Que le défendeur n'agissait ainsi que pour se venger de Mathieu ; et que le curé aurait même déclaré au prône que le défendeur n'avait droit de parler à personne dans l'église et était simplement tenu de faire rapport aux marguilliers.

Que le dit Mathieu demeure avec sa mère qui, elle-même, a beaucoup souffert de ces insultes, et elle réclame maintenant du défendeur, *en qualité de tutrice naturelle* de son fils, la somme de $200 à titre de dommages-intérêts.

A cette action, le défendeur a plaidé qu'aux époques susdites, il était connétable, dûment nommé pour veiller au maintien du bon ordre dans l'église de Lachenaie.

Qu'en cette qualité, et comme fonctionnaire remplissant un devoir public, il aurait, en effet, invité Mathieu à se conformer aux usages de la dite église et à se tenir assis, ou debout avec tous les assistants, tel que réglé dans les diverses parties du service divin.

Qu'il agissait ainsi en sa dite qualité et avait droit à un avis d'un mois avant l'institution de cette action qui par conséquent était prématurée.

Par une seconde exception, le défendeur disait que sous l'empire de notre Code, aussi bien que sous le régime coutumier en France, il n'existe aucune tutelle naturelle, mais que toutes les tutelles sont *datives* ; et que la demanderesse ès-qualité de tutrice naturelle, ne pouvait exercer aucune action, et qu'il était nécessaire qu'elle fût régulièrement nommée par un conseil de famille tutrice, pour pouvoir exercer telle action.

Par une troisième exception, le défendeur dit qu'en vertu du statut, il a été nommé par deux juges de paix, connétable de l'église de la dite paroisse de Lachenaie, et cela, à la réquisition de Messire Normandin, curé.

Que depuis sa nomination, il a accompli les devoirs de sa charge qui consistent à assister les marguilliers dans le maintien du bon ordre dans l'église, et ce, sous peine d'amende.

Que suivant les règles établies de temps immémorial, le défendeur avait droit de dire au fils de la demanderesse de se tenir assis, debout ou à genoux, suivant le cas ; et que malgré ces avis, le dit Mathieu persistait à se tenir en contraven-

tion aux règles et usages admis et reconnus, et notamment, à rester assis pendant la préface, moment où il est de règle invariable de se tenir debout, partout où s'exerce le culte catholique. Wilhelmy vs Brisebois.

Que dans le but de provoquer le défendeur, ainsi qu'il l'a lui-même reconnu, le dit Mathieu a continué son irrévérence à diverses reprises, et qu'en conséquence le défendeur était bien fondé à faire maintenir le bon ordre, et en le faisant, n'a causé au dit Mathieu aucun dommage.

Qu'au reste, si le dit Mathieu a souffert des dommages, il doit en imputer la faute à lui seul.

Qu'à tout événement, ces dommages, si aucun il a souffert, sont personnels à Mathieu et ne pouvaient donner ouverture à la présente action de la demanderesse, agissant en sa prétendue qualité de tutrice naturelle.

Le défendeur, a, de plus, produit une défense au fond en fait à l'encontre de cette action.

Les parties ayant procédé à la preuve, la Cour rendit le jugement suivant :

"Considérant que le défendeur remplissait des devoirs publics, et que, conformément à l'art. 22 du Code de Procédure Civile, il avait droit à un avis d'un mois, lequel avis ne lui a pas été donné ;

"Considérant que la demanderesse ès-qualité de tutrice naturelle à son fils mineur réclame $200 qu'elle prétend lui être dues pour dommages causés à son dit fils mineur ;

"Considérant que la demanderesse ne réclame que des dommages soufferts par son dit fils ;

"Considérant qu'elle n'a pas qualité comme *tutrice naturelle* et qu'elle ne pouvait agir que comme tutrice dûment nommée en justice, ce qu'elle n'a pas fait ;

"Considérant de plus que le défendeur a agi dans les limites de ses attributions et que le dit Mathieu contrevenait à l'ordre, en ne se tenant pas comme il le devait dans la dite église :

"La Cour renvoie la dite action avec dépens, distraits à Messieurs Prévost et Turgeon, avocats du défendeur."

Action renvoyée.

Calixte Lebeuf, pour la demanderesse.
Prévost & Turgeon, pour le défendeur.
(J. G. D.)

CIRCUIT COURT, 1883.

MONTREAL, 20TH MARCH, 1883.

Coram LORANGER, J.

No. 7636.

The Corporation of the County of Hochelaga vs. *The Corporation of the Village of Côte St. Antoine.*

HELD :—That a tax to cover certain necessary expenses of the corporation of a county cannot be imposed on the different municipalities within the county otherwise than by By-Law, and that an attempt to impose such tax by resolution is illegal.

The question involved in the present case is fully explained in the following remarks of the Court :—

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PER CURIAM :—La Corporation du comté d'Hochelaga à sa séance du 24 dec. 1881, a autorisé, par résolution le Préfet et le sec.-trésorier du comté d'Hochelaga à faire un emprunt de $1200 pour acquitter certaines dépenses urgentes et à signer un billet promissoire pour ce montant, à six mois de date à être escompté par la Banque du Peuple ou par toute autre Banque.

Par une deuxième résolution adoptée à la même séance, il fut décidé qu'une taxe spéciale pour une somme ne devant pas excéder celle de $1200, (c.-à-d. le montant du dit billet) qui était pour couvrir certains mémoires de frais d'avocats dans des causes jugées contre la corporation du comté d'Hochelaga, serait prélevée sur les municipalités qui composent le dit comté d'Hochelaga, suivant le rôle respectif de chacune de ces municipalités, et que dès que la dite somme serait perçue, dépôt en serait fait à la Banque du Peuple pour payer le billet en question.

Par une troisième résolution, le préfet et le secrétaire-trésorier furent autorisés à payer sur et à même l'escompte du dit billet, les créances portées aux dits mémoires de frais.

A cette même séance, il fut en outre résolu sur proposition de M. Raymond Préfontaine secondé par M. Jérémie D. Décarie, que l'évaluation de la municipalité de la Côte St. Antoine, (la défenderesse) était de un million huit cent quarante huit mille, neuf cent vingt-deux piastres ($1,848,922).

Le 4 mai suivant, savoir mai 1882, une lettre aurait été adressée par le sec.-trésorier de la corporation du comté d'Hochelaga au secrétaire trésorier de la défenderesse, la mettant en demeure de payer sa proportion dans la dite somme de $1200.00 basée sur la dite évaluation, savoir la somme de $123.00, montant de la présente action.

Le 13 septembre dernier 1882, la demanderesse aurait résolu de poursuivre la collection de la proportion dué par chacune des municipalités du comté d'Hochelaga, dans la dite somme de $1200.00, et avis de cette résolution aurait été donné le 21 septembre à la défenderesse par lettre adressée à son secrétaire-trésorier. La défenderesse ne s'est pas conformée à cet avis et de là l'institution de la présente action.

Les moyens de défense de la défenderesse se réduisent aux suivants :

1o. Aucun règlement n'a été passé par le conseil du comté d'Hochelaga à l'effet d'imposer la taxe réclamée ; la résolution du 24 dec. 1881 est nulle en autant que nulle taxe ne peut être imposée par voie de résolution.

2o. Défaut de pouvoir du Conseil à souscrire ou consentir aucun billet promissoire.

3o. Pas d'avis donné à la défenderesse de la résolution en question.

4o. Parce qu'aucune répartition n'aurait été légalement faite préalablement ni communiquée à la défenderesse préalablement à l'impôt de la dite taxe.

A l'argument la défenderesse a limité sa défense aux deux propositions suivantes, sur lesquelles elle fait reposer sa cause.

1o. L'imposition d'une taxe ne peut se faire que par règlement. 2o. Dans l'espèce nul avis de tel règlement n'a été donné. L'article 464 détermine les règlements qui sont du ressort de tous les conseils municipaux, ils sont indiqués

dans les articles 465 et suivants jusqu'à 500 inclusivement, et parmi se trouve l'article 489 qui règle le mode à employer pour prélever l'impôt sur les biens cotisables de chaque municipalité ; or cet article ne reconnait d'autre mode que celui du règlement.

L'article 460 indique quels sont les pouvoirs que le conseil peut exercer par voie de résolution, et il exclut l'impôt de la taxe.

Les pouvoirs des conseils municipaux sont déterminés et définis par le code municipal et ne peuvent être exercés que de la manière et dans les conditions prescrites par le code, sous peine de nullité. Les tribunaux ont maintenu que le contribuable recherché en justice pour des taxes imposées en vertu de procédures irrégulières ou contraires aux dispositions du code municipal, pouvait même, après paiement, se faire relever de la condamnation. On trouvera un arrêt de la cour d'appel, du 4 mars 1878, qui comporte que celui qui a payé une taxe imposée par un règlement nul, a droit d'en être remboursé, avant même que ce règlement soit déclaré nul et qu'il ne soit tenu préalablement de poursuivre la nullité du règlement.

Un conseil municipal ne pouvant imposer une taxe autrement que par règlement, l'objection de la défenderesse serait bien prise pour cette partie ; mais on répond que dans l'espèce actuelle il s'agit du conseil du comté, qui avait à repartir sur les municipalités qui le composent une dette commune, et qu'il n'a fait que déterminer la proportion due par chacune d'elles ; en d'autres mots que la résolution en question, ne comporte pas un impôt de la taxe, mais seulement une répartition de la somme à être payée en proportion de l'évaluation de chaque municipalité ; que l'impôt de la taxe était du ressort du conseil local auquel incombait l'obligation de prélever le montant de la dite répartition.

Cette proposition, toute plausible qu'elle paraisse de prime abord, est combattue par les dispositions même du code. Le conseil de comté n'ayant assumé une dette pour l'avantage général du comté, a seul le droit d'imposer la taxe requise pour en acquitter le montant, sur toutes les municipalités intéressées. Il transmet une copie du règlement contenant l'impôt au secrétaire trésorier de chaque municipalité, et ce dernier prélève la taxe, telle que déterminée par le conseil de comté, en la manière ordinaire.

En référant aux articles 939, 940, 941, 942 et suivants, on trouve tout le rouage à suivre pour cet impôt. Toute taxe imposée par un conseil de comté pour des fins générales ou spéciales est prélevée sur toutes les corporations locales de ce comté à proportion de la valeur de tous leurs biens imposables affectés au paiement de cette taxe, (art. 938) et constitue une dette payable par elle au conseil du comté, d'après les conditions et aux termes déterminés par ce conseil ; le montant de cette dette est perçu dans la municipalité locale comme taxe locale sur tous les biens imposables affectés à cette taxe, sans qu'il soit besoin de faire d'autres règlements ou ordres à cet effet.

Le mode de perception de cette taxe est indiqué aux articles 954 et suivants.

La défenderesse est bien fondée à dire que la résolution [illegible] déc. comporte l'imposition de la taxe. Au reste les termes mêmes de [illegible] résolution ne laissent aucun doute à cet égard ; ce n'est pas seulement la [illegible] de la dette

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entre les municipalités imposables, mais l'impôt même de la taxe pour acquitter la dette.—Résolu:

"Qu'une taxe spéciale d'une somme qui ne devra pas excéder $1200 qui est "le montant qui est jugé nécessaire pour rencontrer des dépenses urgentes, "comme mémoires de frais à payer dans certaines causes, dans lesquelles "jugements ont été rendus contre le comté d'Hochelaga, soit prélevée parmi "les municipalités de ce comté suivant l'évaluation et à titre; qu'aussitôt que "cette répartition sera perçue, dès et au fur et à mesure qu'elle sera collectée "qu'elle soit déposée à la Banque du Peuple au crédit du conseil du comté "d'Hochelaga pour rencontrer à son échéance le billet qui vient d'être autorisé."

Le conseil du comté n'avait pas le droit de procéder autrement que par règlement, et cette résolution est nulle.

La demanderesse a prétendu à l'argument qu'il n'y aurait eu là qu'une informalité sans importance, attendu que la défenderesse avait reçu avis de cette résolution et n'avait souffert aucun préjudice; et se prévalant de l'article 16 qui déclare que nulle objection à la forme fondée sur l'omission de formalités même impératives, ne peut être admise à moins d'une injustice réelle, elle demande qu'il soit passé outre nonobstant l'absence de règlement. L'article 16 doit être interprété dans un sens large; ainsi l'a jugé l'Hon. Juge en Chef Meredith dans la cause Parent *vs.* La corporation de la paroisse de St. Laurent (Q. L. R., p. 258, vol. 2). C'est dans l'appréciation du préjudice causé que le tribunal est appelé à étendre le [illegible] cet article et à l'interpréter largement; mais lorsqu'il s'agit de form[illegible]t l'omission entacherait de nullité les procédures attaquées, la cour [illegible] d'appliquer la loi dans toute sa rigueur. Ainsi le veut au reste l'artic[illegible]-même.

Dans l'espèce actuelle, il ne peut pas y avoir de doute; le code en assignant à chaque conseil municipal les pouvoirs qu'il peut exercer a indiqué le mode qu'il avait à suivre pour cela. Il a défini clairement les pouvoirs qui incombent au conseil de comté, ceux qui incombent au conseil local, de même que ceux qui peuvent être exercés par les deux, les conditions, la manière et la procédure à suivre dans chaque cas, et les pouvoirs qui peuvent être exercés par résolution ou par règlement; et malgré qu'il soit du devoir des cours d'aider à l'exécution des ordonnances et des mesures adoptées par les autorités municipales, cependant elles doivent maintenir les corporations dans les limites des pouvoirs qui leur sont assignés, et empêcher qu'elles ne s'écartent dans la promulgation de leurs ordonnances, des règles que la loi leur a imposées pour la protection des contribuables. Il y a entre la résolution adoptée par un conseil et un règlement une grande différence. La première ne porte pas sur des objets de pure administration, quoique dans certains cas, elle comporte des dépenses publiques importantes; mais lorsque pour donner suite à la résolution, il s'agit d'imposer une taxe, le cas est différent. Il faut alors la promulgation de l'ordonnance du conseil, et cette ordonnance n'est connue que sous un nom dans notre régime municipal, c'est le règlement. On comprend facilement l'utilité et la nécessité de cette promulgation, sans laquelle les contribuables seraient livrés à la merci

et à l'arbitraire des conseils municipaux ou de leurs employés. La publicité des règlements qui imposent une taxe est de rigueur, et cette absence de publicité rendait le règlement sans effet.

The Corporation of the County of Huntingdon vs. The Corporation of the Village of Côte St. Antoine.

Dans le cas actuel, la défenderesse se plaint que la résolution en question n'a jamais été publiée ni promulguée et ne lui a même pas été [illegible]

Je suis d'opinion sur le tout, qu'il n'y a pas lieu à l'ap[illegible] du C. M., et que la résolution du 24 déc. 1881, est nulle, [illegible] de base à une action contre la défenderesse.

Le conseil de comté devra, pour se faire rembourser [illegible] municipalités locales qui le composent, procéder par la voi[illegible] Code Municipal pour l'impôt de la taxe sur chacune d'elles.

L'action de la demanderesse est en conséquence déboutée avec [illegible]ns, sauf recours.

Action dismissed.

Chas. A. Vilbon, for plaintiff.
Dunlop & Lyman, for defendant.
(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 12TH FEBRUARY, 1883.

Coram PAPINEAU, J.

No. 989.

Pangman vs. *Pauzé ès-qual.*, & *Robertson*, Opposant, and *Lamarche*, Contestant.

HELD:—That a report of distribution cannot be contested after it has been duly homologated, even by authority of a judge.

This was a motion to reject a contestation of the report of distribution prepared and filed by the prothonotary and duly homologated.

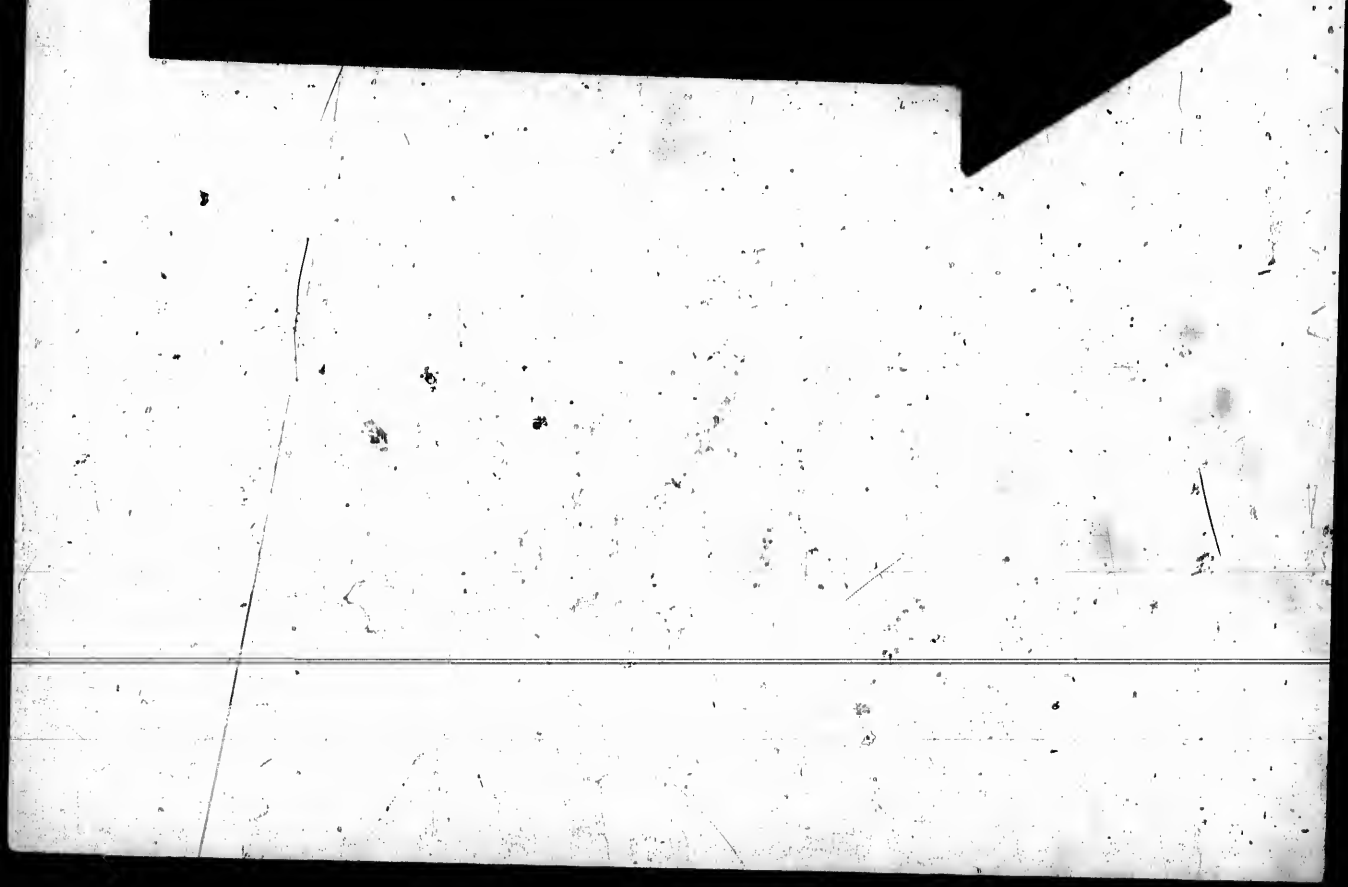
The contestation was filed several days after the judgment homologating the report was rendered, and was so filed under a special authority granted by the Hon. Mr. Justice Papineau in chambers.

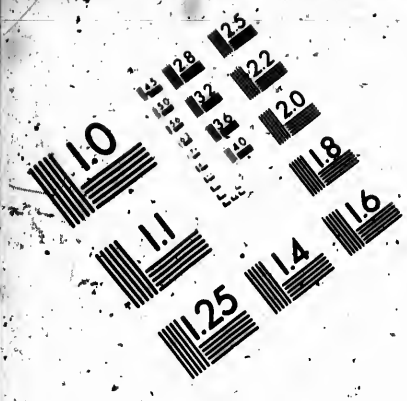
The opposant Robertson thereupon moved to reject the contestation, on the ground that it could not be legally filed under the circumstances, even by authority of a judge.

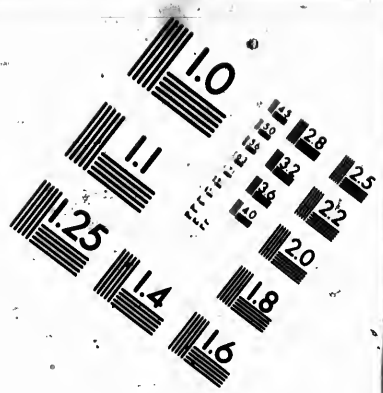
The Court granted the motion and rejected the contestation.

Contestation rejected.

Bethune & Bethune, for Robertson, opposant.
Archambault & Archambault, for contestant.
(S. B.)







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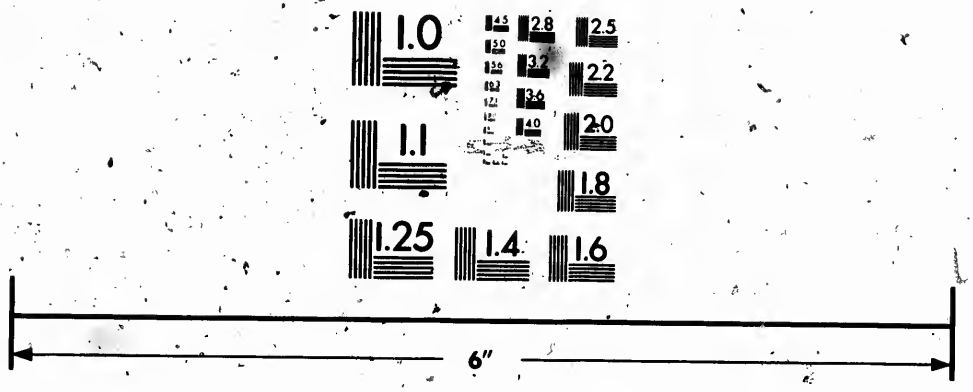

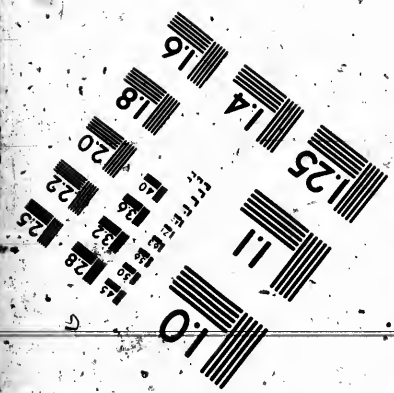

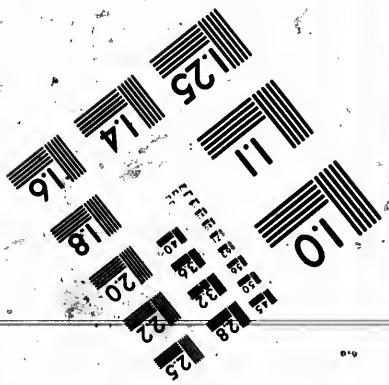

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SUPERIOR COURT, 1883.

MONTREAL, 9TH MARCH, 1883.

Coram LORANGER, J.

No. 989.

Pangman vs. *Pauzé ès-qual.*, and *Robertson*, Opposant, and *Pangman et al.*, Petrs.

HELD:—That the Court may, in its discretion, and when sufficient cause is shown, extend the delay within which security may be given by creditors posterior to a creditor collocated in a report of distribution, for the value of a life rent under art. 1914 C. C., even after the delay fixed by the judgment homologating the report has elapsed.

This was a petition by three creditors, whose claims were next in rank to that of the opposant, who was collocated in the report of distribution, for the value of a life rent under art. 1914 C. C., to be allowed to put in security under said article and in terms of the judgment homologating the report.

The report was homologated on the 22nd January, 1883, and a delay of one month from that day was accorded by the judgment for putting in such security.

As the petition was only presented on the 5th March, 1883, the petitioners asked to have the delay extended, on the ground that the record had been *en délibéré* during a considerable part of the month, in connection with proceedings tending to get rid of the opposant's collocation altogether.

The opposant resisted the application, on the ground mainly that she had obtained a *droit acquis* by lapse of time, and that the Court had no authority to extend the delay which was fixed by the judgment.

After consideration, the Court was of opinion that the time could be legally extended, and that the circumstances justified an extension of four days' delay from the granting of the application, and the petition was accordingly granted on those terms, and on the condition that the name or names of the security should be notified to the opposant at least one day before the expiration of the four days' delay.

Petition granted.

DeBellefeuille & Bonin, for petitioners.
Bethune & Bethune, for opposant.
(S. B.)

SUPERIOR COURT, 1882.

MONTREAL, 30TH SEPTEMBER, 1882.

Coram PAPINEAU, J.

No. 1935.

Giles ès-qual. vs. *Jacques.*

HELD:—That an assignee or receiver of an insolvent Insurance Company, incorporated in and doing business prior to its insolvency in Ontario, is bound to give security for costs in a suit brought by him here; notwithstanding that he resides here and has in his possession here all the books and titles to claims of the said Company.

PER CURIAM:—Le défendeur fait requête demandant que le demandeur ès-qualité fournisse caution *judicatum solvi*, attendu qu'il ne poursuit pas en son nom personnel et que la compagnie dont il est le receveur n'a pas de bureau

Gilles et qual. vs. Jacques.

d'affaires dans la Province de Québec, ni aucun établissement quelconque; qu'elle n'y fait pas d'affaires et qu'elle est insolvable et en état de liquidation.

Les parties ont fait une preuve sur ces faits.

Il est prouvé que le demandeur et sa famille résident à Montréal, mais ce demandeur ne poursuit pas en son nom personnel, et sa résidence, à lui, n'a rien à faire avec la cause, car ce n'est pas lui qui aurait à payer les frais.

Le demandeur établit par sa propre déposition que la Compagnie dont il est le receveur n'a plus de bureau principal dans la province d'Ontario. Il prouve aussi qu'il tient un bureau ici à Montréal, sur la rue St. Jean, où il a les livres et titres de créance de la Compagnie, mais il dit en même temps que cette compagnie n'y fait plus d'affaires d'assurance. Le bureau de Montréal n'est, de fait, que pour la collection des créances, et le demandeur est tenu de faire rapport à la Cour de Chancellerie, dans la Province d'Ontario.

Supposé que le défendeur obtienne jugement contre le demandeur dans la cause, pour ses frais, où pourra-t-il faire exécuter ce jugement?

Sera-ce au bureau que tient le demandeur à Montréal, sur les livres et titres de créance de la compagnie? Mais ces valeurs ne sont entre les mains du demandeur que comme officier de la Cour de Chancellerie et ne peuvent être saisis.

Il faudrait donc produire sa réclamation devant la Cour de Chancellerie, en Ontario.

Le cautionnement *judicatum solvi* est ordonné par la loi, précisément pour éviter cet inconvénient d'aller hors du pays se faire payer des frais par des gens qui ne résident pas ici.

La requête du défendeur est accordée et cautionnement devra être fourni sous quinze jours.

Petition for security for costs granted.

Préfontaine & Major, for plaintiff.
Pagnuelo & St. Jean, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 27TH JANUARY, 1883.

Coram Hon. Sir A. A. DORION, CH. J., RAMSAY, J., CROSS, J., BABY, J.

No. 100.

THE MERCHANTS' BANK OF CANADA,

APPELLANTS;

AND

WHITFIELD,

RESPONDENT.

HELD:—That the only penalty which the failure to proceed on an appeal to Her Majesty in Her Privy Council for more than six months after security has been given can entail, is the execution of the judgment appealed from.

This was a motion to have the appeal to Her Majesty in Her Privy Council declared abandoned and forfeited, for want of proceedings during more than six months after security was given on the appeal.

The Merchants' Bank of Canada and Whitfield.

The CHIEF JUSTICE remarked, that the only penalty that could result from the failure to proceed on the appeal was that mentioned in Art. 1181 of the Code of C. P., namely, the right to execute the judgment appealed from, and that this Court had frequently rendered judgment in that sense.

The following was the judgment of the Court :—

"The Court having heard the parties by their Counsel respectively on the motion of the appellants, praying that the said respondent be declared to have abandoned and forfeited the appeal to Her Majesty in Her Privy Council from the judgment rendered in this cause on the 23rd day of September, 1881, leave to institute which was granted to him by the Court, on the 20th day of March last (1882), and upon which appeal to Her Majesty the said respondent gave security on the 20th May last (1882), and be declared to be deprived (*decha*) of said appeal, seen the certificate produced with said motion, and on the whole, mature deliberation being had; doth reject the said motion with costs."

Motion rejected.

Abbott & Co., for appellants.
E. Z. Paradis, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 25TH JANUARY, 1883.

Coram Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., BABY, J.

No. 475.

RIDDELL ET AL., APPELLANTS,
AND
EVANS, RESPONDENT,
AND
HANNAN ET AL., PETITIONERS.

HELD:—That where parties show sufficient legal interest in the subject matter of the appeal, they will be allowed to intervene and obtain an order of suspension of the case in appeal until judgment be rendered on proceedings instituted in the Court below by the petitioners, provided due diligence be used in the prosecution of such proceedings.

On the petition of said petitioners, the Court rendered the following judgment :—

"The Court * * * considering that the petitioners have shown that they had instituted in the Superior Court an action to recover the sums of money in dispute in this cause, to which action the appellants and the respondent have been made parties;

"Considering that the claim of the petitioners appears to have been made in good faith, and that any judgment in the present cause could not be available to either of the parties until a decision on the claim made by the said petitioners be had;

"And considering that the petitioners have shown that they had a sufficient interest in the determination of the present case to entitle them to be received as intervening parties, and to have the proceedings therein suspended until they shall have had an opportunity to establish what rights they may have to the monies which are the subject of the contestation in this cause;

Riddell et al. and Evans and Hannan et al.

"This Court doth order that the said petitioners be received as intervening parties in the present cause, and that the proceedings therein be suspended until they shall have had occasion, by using due diligence, to establish what rights they may have to the monies which form the subject of the contestation in the present cause. Costs reserved.—(The Honorable Justices Ramsay & Baby dissenting.)

Petition allowed.

Robertson & Co., for petitioners.
Greenshields & Co., for appellants.
Macmaster & Co., for respondent.
(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 24TH MARCH, 1883.

Coram JETTE, J.

No. 146.

Symes et vir vs. *Farmer*, & *Farmer*, Curator, Opposant.

HELD:—1o. That the incapacity arising from insanity only begins from the date of the interdiction, and that up to that time the interdict remains, as regards third persons, at the head of his patrimony and preserves the gestion thereof, and that third persons, not having quality to demand the interdiction, are entitled to serve all necessary notices and significations on the interdict prior to his actual interdiction.

2o. That when the change of *status* of a party to a suit only occurs after the proceedings by way of execution against him have commenced, such proceedings may continue, notwithstanding such change of *status*.

This was an opposition to the sale of the defendant's real property, which was under seizure at the suit of the plaintiffs, by the curator to the defendant, who had been interdicted for cause of insanity, after the seizure had been effected, on the ground (*inter alia*) that the defendant was notoriously insane at the time the seizure was made, and actually confined as a lunatic in the Long Point Asylum, where he was served with a copy of the *procès verbal* of seizure, and that the seizure was under the circumstances illegal. And that at all events no sale could take place on the defendant.

At the argument, *Beaudin*, for the opposant, cited Art. 335 of the Civil Code and 4 Carré, p. 133. Ques. 2188. And *Bethune, Q. C.*, for plaintiffs, cited D'Estimanville vs. Toussignant, 1 Q. L. R. 39, Arts. 327 et 334 of the Civil Code, Art. 546 Code of Civil Procedure. Dalloz, R. P., 1848, 2e pt. p. 175, and 5 Laurent, No. 317.

The following was the judgment of the Court:

"La Cour * * * Considérant que la demanderesse créancière du défendeur

Symes et vir vs. Farmer, and Farmer, curator, opposant.

par jugement en date du 16 de novembre 1881, pour une somme de $10,300, a fait saisir le 29 juin 1882, en exécution du dit jugement, les immeubles décrits au *procès verbal* de saisie en cette cause et les a fait annoncer en vente pour le 25 du mois d'août suivant, mais que l'opposant, nommé le 2 du dit mois d'août, curateur au défendeur son fils, interdit pour démence, a contesté la légalité de cette saisie et par son opposition produite le 10 du même mois, en demande l'annulation; attendu que lorsqu'elle a été pratiquée le défendeur était aliéné et en démence et interné comme tel à l'asile de la Longue Pointe, et que par suite:

1o. Telle saisie ne pouvait être faite légalement avant qu'un curateur eût été nommé au dit défendeur, et 2o toutes les significations faites au dit défendeur en cet état étaient illégales et nulles, (l'opposant ayant, à l'audition, abandonné les autres moyens par lui invoqués;)

Considérant que la demanderesse a contesté cette opposition et a soutenu la légalité de la dite saisie et en demande le maintien;

Considérant qu'en droit l'incapacité de l'interdit ne commence qu'à compter de la sentence d'interdiction et que jusque là l'individu, même en état de démence, reste vis-à-vis des tiers à la tête de son patrimoine et en conserve la gestion, et que ces tiers, n'ayant pas qualité pour provoquer son interdiction, ne peuvent s'adresser qu'à lui pour toutes significations qui les intéressent, pour l'exercice et la conservation de leurs droits contre lui;

Considérant, en outre, que le changement dans l'état d'une partie qui ne se produit qu'après que les procédures pour l'exécution du jugement contre elle ont été commencées, ne peut arrêter l'exécution de ce jugement;

Considérant que dans l'espèce l'interdiction du défendeur n'a été prononcée que longtemps après la saisie et à la veille de la vente annoncée, et qu'en conséquence toute la procédure faite sur la dite saisie et dont l'opposant ès-qualité se plaint était régulière et légale;

Vu les articles 327 et 334 du Code Civil et 546 du Code de Procédure Civile;

Maintient la contestation de la demanderesse et renvoie et déboute l'opposition du dit opposant ès-qualité avec dépens, distraits à Maîtres Bethune & Bethune, avocats et procureurs de la contestante."

Opposition dismissed.

Bethune & Bethune, for plaintiffs.
Loranger & Beaudin, for opposant.
(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 18TH JUNE, 1883.

Coram LORANGER, J.

No. 1312.

Hall vs. *McShane.*

HELD:—Where it was stipulated by a charter party that a steamship, then in England, should, "with all convenient speed, sail and proceed to Montreal, to arrive there *between opening of navigation*, 1879," etc., and the vessel arrived at Montreal 18th May, navigation having been open 1st May; that the stipulation as to time was not a condition precedent, and that no date being specified, the arrival of the vessel on the 18th May was within the terms of the contract, more especially as the defendant, when notified that the vessel had sailed from Liverpool on 1st May, made no objection on the ground of delay.

PER CURIAM.—This is an action by the owners of a certain vessel chartered by the defendant, for dead freight, the defendant having neglected to provide for the cargo as stipulated in the charter party.

The facts of the case, as disclosed in the declaration, are as follows: The defendant, through his agent David Shaw, agreed with the plaintiffs, owners of the steamships Cervin and Bernina, to charter the said steamships for the transportation of cattle from the port of Montreal to London, during the season of navigation of 1879. The charter party is dated Glasgow, 17th January, 1879, and contains, among others, the following conditions and stipulations: that the said ships "shall, with all convenient speed, sail and proceed to Montreal, to "arrive there *between* opening of navigation 1879, and thereafter run regularly, "and with all dispatch, between Montreal and London, to be dispatched from "Montreal in regular rotation with other steamers under charter to same char-"terer, up to first October, 1879, which steamers shall not exceed five, to be sup-"plied (by certain other owners therein mentioned) in charterer's option; one "week's interval may take place between the sailing of each steamer from Montreal, "or so near thereunto as they can safely get, and there load from the factors of said "defendant a full and complete cargo of live cattle in the between and upper "decks, as many as the vessel can carry.....and being so loaded "shall therewith proceed to London, or so near thereunto as she can safely get, "and deliver the same immediately on arrival to the said freighter or his "assigns."..... .....

Then comes the price agreed per head of cattle shipped, the usual clause concerning the care to be given to the same, and the risks and perils of the sea, the demurrage, the penalty in case of non-performance of the contract, which is to be the estimated amount of freight; and, finally, it is declared that the vessels are to be consigned to the freighter's *agent at Montreal, David Shaw.....owners to cable departure of steamers when leaving for Montreal to said David Shaw.*

The plaintiffs allege that in accordance with the said contract, the steamer Cervin proceeded to Montreal, where she arrived on the 18th May, 1879, fitted in every way for the voyage, and to receive, stow and carry the cargo agreed upon; the defendant having been previously notified through his agent, the said David Shaw, on the first of the same month, that the said vessel was on her way to

Hall vs. McShane.

Montreal; that on her arrival at Montreal, the defendant was also notified of her readiness to receive the cargo, but that he refused to acquiesce in such notification; that on the 22nd or 23rd days of the same month (May, 1879) the defendant, owing to his said refusal, was protested that the cattle spaces on the said vessel would be let at the best rates then obtainable, and that he would be held responsible for any loss which the said vessel and the plaintiffs might sustain in consequence of his refusal to carry out the said charter party; but that, notwithstanding such protest, the defendant having persisted in his refusal to load the vessel, the plaintiffs were compelled to seek for another cargo, which they succeeded to have on the 28th day of May, and out of which they only realised the sum of £1052 sterling, whilst, had the defendant supplied her with the cargo as agreed by the charter party, they would have received the sum of £1770 sterling; and they now claim the difference between those two sums under said charter party.

The defendant admits the charter party, but pleads, 1st. That when it was signed, it was agreed that the same would become void and of no effect in the event of American cattle being prohibited from being imported into Canada, or in the event of the Privy Council in England passing an order putting into force the Contagious Diseases (animals) Act of the year 1878 as regards cattle coming from the United States, requiring them to be slaughtered on their arrival in England, or in the event of any restriction being placed by law upon shipment of cattle; that by order in council passed at Ottawa on the 6th May, 1879, and renewed on 4th day of June of the same year, for the period of six months, the importation or introduction in the Provinces of Quebec, Nova Scotia, New Brunswick and Prince Edward Island of cattle coming from the United States was prohibited; that on the 10th day of February of the same year, by an order of Her Majesty the Queen in Council, the provisions of the said Contagious Diseases (animals) Act of 1878 were made applicable to the American cattle on or after the 3rd day of March following; that by reason of the premises, and by law, the defendant was after the said respective order in Council relieved of said charter party. By a second plea the defendant says that owing to said orders in council, of the passing of which the plaintiffs were aware, he was prevented by *force majeure* to carry out the provisions of said charter party, having been unable to procure the necessary cattle for the wants of the trade for the purpose of which he had chartered the said vessel, and claims that owing to said prevention or *force majeure* the plaintiffs have no right of action.

The defendant has made no evidence of the agreement disclosed in the first plea; and as to the second, not only the plea of *force majeure*, under the circumstances of the case, could not be sustainable in law, but it has been proved by David Shaw, the agent above mentioned, and by John Price, a witness heard on the part of the defendant, that the exportation of American cattle to England, from the port of Montreal, was made as usual during the season of navigation of that year.

3rd. The defendant has also pleaded that under the provisions of the orders in Council above mentioned, it was ordered that the shipment of cattle from

Canadian ports, and the landing of foreign animals in Great Britain, should be subject to the condition that the vessel in which they were carried, and from which they were being so landed, had not, within three months before taking them on board, had on board animals exported from the United States of America; and that by reason of such regulations no cattle for sending to or landing in Great Britain, would be shipped or received at Montreal or any other Canadian port, on board any vessel which had, within three months previously, had on board American cattle or cattle carried from the United States; that the said vessel Cervin had had on board cattle shipped from American ports, within the three months previous to her arrival in the port of Montreal, on the 18th May, 1879, and that in consequence of said orders in Council the plaintiffs were incapacitated from receiving on board of said steamer any cattle in the port of Montreal to export or land the same in Great Britain; and that it became impossible for the defendant to carry on his said contract which, by the fact, became terminated and at an end.

This plea, as well as the two previous, has not been substantiated by any evidence; on the contrary, it has been proved that the steamer Cervin has been loaded with cattle in the port of Montreal on the 28th May, as aforesaid, for the city of London, and there is no evidence of any prohibition put on said cattle in London under said order in Council.

There remains the fourth plea to the action. The defendant says that, according to the agreement which he made with the plaintiffs and the other owners of the five steamships which he had chartered for the purpose of his trade, the first steamer was to arrive in the port of Montreal at the opening of navigation 1879, and the other four to arrive thereafter, so as to be loaded according to the custom of the port of Montreal, and to depart therefrom loaded at intervals of one week, the one after the other, and so to continue until the first of October of the same year; that the condition as to arrival of one of the plaintiffs' steamers in the port of Montreal at the opening of navigation, within a reasonable time, was a condition precedent to the charter party, and a warranty binding on the said plaintiffs, which, not being fulfilled, the defendant had a right to throw up the charter; that the season of navigation for the year 1879 opened on the first of May, vessels from sea having on that day arrived in the port of Montreal; that the vessel Cervin having arrived on the 18th only, when she could have been in said port on or before the sixth at least, the object of the defendant in making the agreement and charter party was frustrated, and he claims that the same has been broken, and is null and void.

The plaintiffs answer this plea by saying that whatever arrangements may have been made between the defendant and the owners of the three other vessels which he had chartered, such arrangements had no connection with the charter party in this case, which contains no specific time as to the date of the departure of the vessel, nor of her arrival in the port of Montreal, the said vessel having under said contract to sail with all convenient speed, so as to arrive in Montreal between the opening of navigation; that such terms are vague and general, referring to the usual time of arrival of the spring fleet of vessels of the

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same class as the Cervin; that the arrival of said vessel on the 18th of May took place within a reasonable and usual time after the opening of navigation, and in accordance with the terms and meaning of said charter party; and the plaintiffs claim that such terms do not constitute a condition precedent to the contract, but only a stipulation, the non performance of which in due time, would only result in a claim for damages; that the defendant not having asked any damages, nor offered by his plea to compensate the claim of the plaintiffs by any damages resulting from the said delay, the said plea was no defence to the action.

The first question, then, to be examined is whether the terms used in the charter party in this case, as to the departure and arrival of the steamer Cervin, are such as to be considered a condition precedent to the contract, for if a condition precedent, the plaintiff, in case of non-fulfillment of such condition, would have no claim under the charter party, whilst if it is only to be considered as an agreement to arrive in Montreal, in a reasonable time, the non-fulfillment of such agreement would only give right to damages.

We have first to look to the charter party to see if any specific time has been mentioned for the arrival of the vessels. The reading of it shows that there is none, neither for her departure nor for her arrival; it is only stated that the vessel will sail, with all convenient speed, to arrive in Montreal between the opening of the navigation.

What are we to understand by those terms, which are vague and indefinite, and what are the principles of law to be applied when no specific time is fixed?

The charter party has been made and signed in England, and we have to look to the law of that country, as it has been held in the case of Moore and Harris, p. 147, vol. 2, Quebec Law Reports. After a careful examination of the numerous authorities which have been cited on both sides, I come to the conclusion that the following rules and principles are those to be applied to the case: An intention, says Abbott, on the Law of Merchant Shipping, pages 187, 189, to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.....P. 200. The general rule is, that unless the non-performance alleged in breach of the contract, goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but a distinct covenant, for the breach of which the party may be compensated in damages.

The author says at page 207: It seems to result from the final judgment in the case of Bonn and Burness, and from the judgments in other cases to which it refers, that where stipulations as to time and place are couched in language of pliant and elastic character, such as to admit extensions according to circumstances and discretion, without departing from the purpose of the contract, they are not to be considered as conditions precedent.

In the case of MacAndrews vs. Chappell, in 1 Law Reports, Common Pleas, p. 643, it was decided that the clause in a charter party that the ship should, with all convenient speed, proceed to a port, and there receive a certain cargo, was a stipulation, and not a condition precedent, and the delay afforded no

justification for the freighter refusing to load a cargo, but that his remedy for damage that had accrued, by reason of the delay, was by cross action.

If such stipulation would be a condition precedent, says Byles, J., in that case, every actionable delay would avoid the contract, and a large number of charter parties would be defeated.

Amongst the cases cited by the plaintiff, I find that the case of Hudson and Hill, reported in 43 Law Journal Reports, Queen's Bench and Exchequer Common Pleas of 1873-1874, is in point: it has been held in that case that the mere failure of a vessel to arrive in time to carry out the charterer's intention, did not frustrate her owner's purpose in entering upon the contract of affreightment, and that the word *forthwith* mentioned in the charter party, as to the departure of the vessel for the port where she has to receive the cargo, does not mean any specific period of time, but must be taken to mean such time as is reasonable with reference to the adventure.

In the case of McAndrews vs. Adams, on an action for freight, against a merchant who had hired a ship upon a charter party, in which it was covenanted that the ship should take in its full load of timber, with all expedition possible, at Riga, and should then sail, with first favorable wind, direct to Portsmouth, the ship had not sailed direct from Riga to Portsmouth, but had put unnecessarily to Copenhagen. It was pretended that the contract was void. Lord Ellenborough said; I am of opinion that this covenant to sail, with the first favorable wind, to Portsmouth, was not a condition precedent, and that the defendant having accepted the cargo, must pay the stipulated freight. To hold that any short delay in setting sail, or trifling departure from direct course of the voyage, would entirely destroy the plaintiff's right to be remunerated, would be going *inter apices juris*; but here is a specific agreement for a specific freight, the defendant must bring his cross action for any loss he may have suffered from the default of the plaintiff.

A statement that a vessel shall be ready to receive a cargo on or before a given time shall be held to be a condition, while a stipulation that she shall sail, with all convenient speed, or within a reasonable time has been held to be only an agreement.

On general principles, the law implies, in all contracts by charter party, where there is no express agreement as to time, a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage; or, if it has been commenced, no deviation in the performance of it; but although breach of this gives the freighter a right to damages, it is no defence to an action for performance on his part of the contract, unless the plea also shows that the purposes of the charter party were altogether frustrated by the delay.

See Maclachland's Law of Merchant Shipping, pages 364, 370. Unless, says the author, the plea shows that the purposes of the charter party were altogether frustrated by the delay; it is not the case in this instance, the defendant not having proved that the purposes of his contract had been frustrated.

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Applying the above principles to the facts of the case, what do we find? 1st. That there is no specific time fixed in the charter party for the departure of the vessel Cervin, nor for her arrival in the port of her destination; 2nd. That the words used are vague and ambiguous, and do not possess that certainty and clearness which is required to constitute, as Abbott says, a condition precedent to the contract, and must only be taken to mean that the arrival of the vessel was to be at such time as reasonable with reference to the adventure. Then, if we consider the nature of the adventure in this case in connection with the dangers of navigation at the time of its opening in this country, the uncertainty as to the time of the opening itself, it is easy to give to the words *between the opening of navigation*, used in the charter party, their proper meaning.

The vessel Cervin arrived in the port of Montreal on the 18th of May, and it is pretended by the defendant that she could have arrived at the beginning of the month; that the season of navigation for the year 1879 opened on the first of May; that the terms "between opening of navigation" mean the opening of navigation, and the vessel should have been in the port at least during the first week of May.

On the one hand, the defendant claims that the stipulation as to the time of arrival in the charter party was a condition precedent, and that owing to non-fulfillment of that condition in the delay, the contract became null. On the other hand, he allows to the terms used a certain elasticity, and admits that though the navigation opened on the first of May, still the condition would have been complied with, if the vessel had arrived during the following six days. If it were allowed to the defendant to put his own construction to the meaning of the terms used in the charter party, surely the plaintiff would be entitled to the same right, and would give a different one. Then is it natural to suppose that they ever intended to make a condition precedent to their contract, of a stipulation upon which they do not agree?

But the defendant says the words between the opening of navigation mean the sixth day after the opening, and the plaintiff avers that the Cervin having arrived in the port on the 18th of May came in a reasonable time. Who shall decide between the two? If we look to our code, article 2426, we read that when there is no specific time fixed, the delay must be reasonable and according to the circumstances and usage. We must then refer to the evidence in the case as to usage, and if we are to believe Mr. Shaw, (and there is no reason not to believe him,) he has acted as agent for both parties in England, made and signed the contract himself, and supposed to know the meaning of the terms of the charter party; and, moreover, his testimony has in no way been contradicted. What does Mr. Shaw say when he is questioned as to the meaning of the terms between the opening of navigation? His answer is, it means that the vessel should have arrived within the first half of May.

The Cervin arrived in the Harbor at 1 p.m. on the 18th of May, and the defendant had been notified, in accordance with the charter party, of her departure on the first of May. Am I to declare now that because she had not

arrived on the 15th, the charter party must be declared absolutely null? I do not think that the law nor the circumstances of the case would warrant such a course. It seems to me evident that the defendant did not intend to carry out his contract with the plaintiffs. As far back as the 19th of April previous, he wrote to the plaintiffs' agent, a letter in which he says: "As already having "notified your manager verbally some two months ago that I would nor could "not load any of the steamers chartered from you, on the Prohibition Act, passed "in England, and also the prevention of our Canadian Government in allowing "the cattle which I had arranged for in Chicago to load the steamers coming "in Canadian ports, it is impossible for me to carry out the contract made with "you." This letter was sent and received a few days only before the opening of navigation. Since that time the defendant has shown in no way that he had altered his mind in this respect. Far from that, Mr. Shaw says, that after having received on the first of May a notice that the vessel was on her way to the port of Montreal, the defendant persisted in his refusal to carry out the contract. If it is true, as the defendant claims it to be, that he had in the port of Montreal cattle ready to be shipped, and which he says were shipped on the 11th of May, by another vessel, how is it that he gave the plaintiffs no notice of that fact at the time, nor served any protest on them? I cannot help believing that the defendant at the time, relied more on the facts which he has pleaded in the first and the second plea, than on his last one. The defendant thought at one time that, owing to the prohibition put upon exportation of American cattle, he could be relieved of his contract, and warned the plaintiffs in consequence. It having turned out subsequently that the prohibition did not interrupt that trade, the defendant saw that his case was groundless on this point, and he resorted, as a means of getting freed from his contract, to his last plea. It was incumbent upon the defendant, if he had had any intention to carry out his contract, to withdraw the letter of refusal which he had sent on the 19th of April; and if, in reality, the vessel had to be in the port of Montreal on the sixth of May, as the defendant says, it was for him, when he was notified on the first of May that she had left Newcastle for Montreal, to protest against such a late departure, as it was impossible that she could arrive here in so short a delay. He did not think it advisable to do it then or at any subsequent period, nor did he complain at any time of the delay in the arrival of the said vessel,—it is only when the action was taken that he raised this last objection, of which the plaintiffs had never been informed before.

The defendant not having protested on the first of May, when he received, as already stated, the notification of the departure of the vessel for Montreal, has, by the fact, recognized that she had sailed with that convenient speed as mentioned in the charter party, so as to arrive within a reasonable time at the opening of navigation. Granting the necessary allowance, owing to the speed of vessels of that class, the perils of the sea at that time of the year in our navigation, it is natural to believe that the statement of the witness Shaw is correct.

In a case of a similar description against the present defendant, who had been

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sued by M.M. Thomas Henderson and other proprietors of the steamer Emblehope, one of the five vessels chartered by said defendant, under a charter party exactly similar to the one in this case, his Honor Mr. Justice Johnson has ruled that the said vessel Emblehope having arrived in the port of Montreal on the fifth of June, had arrived in sufficient time according to the meaning and intent of the parties.

On the whole, I am of opinion that the plea of the defendant must be dismissed, and the plaintiff is entitled to his judgment according to evidence.

Abbott, Tait & Abbotts, for plaintiffs.

Kerr & Carter, for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 20TH JANUARY, 1883.

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

No. 298.

LA FONDERIE DE JOLIETTE,

(*Plaintiffs in Court below,*)

APPELLANTS;

AND

LA CIE. D'ASSURANCE DE STADACONA CONTRE LE FEU ET SUR LA VIE,

(*Defendants in Court below,*)

RESPONDENTS.

HELD:—That where after a fire the insured notified the company of other insurances upon the same property, and the agent of the company thereupon furnished the insured with a printed form upon which to make a claim for loss, and appointed valuators to value the same, and submitted the estimation of the damage caused by the fire to the arbitration of persons named by themselves and the insured, the company thereby acknowledged the existence and validity of their policy as a valid and binding contract, and waived any and all objections which they might otherwise have urged founded on the want of notice of the other insurances effected in other companies.

On the 23rd of January, 1877, the defendants issued a policy of assurance in favor of the plaintiffs for $2000, against loss by fire, covering buildings, machinery and manufactured stock.

The fourth condition of the policy provided that persons insuring should give notice of all insurances already effected, or thereafter to be effected, by them upon the same property, and should have an endorsement made upon their policy of such other assurance, and, unless such notice should have been given, that the assured should have no right to any benefit under the policy.

On the 28th of June, 1877, the defendants, having met with great losses, sent the following telegraphic dispatch to their agent:—

"28th June, 1877.

"By telegraph from Quebec.

"To P. E. MCCONVILLE.

"No new business and no renewals to be taken. Notify policyholders

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to insure elsewhere, and the unearned premium will be returned hereafter. Steps are taken to meet all outstanding claims in full.

"By order,

"(Signed), CRAWFORD LINDSAY."

The defendants' agent, McConville, immediately informed the assured of this dispatch, and he consequently assured elsewhere: viz., in the North British, on the 3rd of July, for $2000, with the knowledge and consent of the agent McConville. On the 5th of July, the Staducona addressed to its agent at Jolietto the following letter:

"Head Office, QUEBEC, 5th July, 1877.

"P. E. MCCONVILLE, ESQ.

"Dear Sir,—To avoid any misunderstanding regarding my telegram of the 28th June, I have to advise you that no agent of the company is authorized to return to the insured any cash in acknowledgment of our unearned premium:—the telegram expressly leaves the time of such payment in the company's hands; I may, however, say that such monies will be repaid immediately after settlement of existing losses.

"Yours truly,

"CRAWFORD LINDSAY,

"*Secretary.*"

A circular, dated the 6th July, and signed by J. Pyke, agent general, contains the following passages: "The payment or redemption of these obligations for return premium will be subsequent to the payment of our fire losses."—"A general meeting of the shareholders has been called for the 19th July, at which will be submitted a statement of the company's affairs, and the question of resuming or finally closing up discussed and decided on."

N. B.—"Policyholders are of course not obliged to cancel, unless they choose to do so; they were only advised to do so by the directors, as the company is quite solvent."

"By telegraph from Quebec, 9 July, 1877.

"After this date, and until further notice, allow no unearned premium for cancellation of policies.

"By order,

"C. LINDSAY, *Secretary.*"

"QUEBEC, 10th July, 1877.

"To P. E. MCCONVILLE, ESQ., Agent.

"Sir,—We sent you last night the following telegram: 'After this date, and until further notice, allow no unearned premium for cancellation of policies.

'By order,

'CRAWFORD LINDSAY.'

"The directors, at the special meeting to-day, decided for the present to annul that portion of the telegram order sent on the 28th June last, with reference to return of premium on cancelled policies, and leave it optional with parties to continue with us, or re-insure elsewhere.

"I would add, that if you have promised any party payment of unearned pre-

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mium at any definite day, you have exceeded instructions as per our telegram of 28th June, and the company cannot make good such promise on your part.

"Yours truly,

"GEO. J. PYKE, *General Manager.*"

A circular of the 20th July contains the following passage: "The company intend to return (after losses are paid) the unearned premium due on the policies surrendered and cancelled only up to the date of this last telegram (of the 10th July), desiring generally to hold existing contracts until expiry, being in a position to do this."

The respondents never returned to the appellants any portion of the unearned premium.

On the 25th January the appellants' establishment was destroyed by fire.

The agent of the Stadacona at Joliette immediately sent the following telegram to the general manager:—

"JOLIETTE, 25th January, 1878.

"Joliette foundry burned this morning at four a.m. Shareholders called on me to establish damages. Nothing had been settled with the company last summer. Answer.

"P. E. MCCONVILLE."

The general manager, Mr. Pyke, replied immediately: "Will send our inspector to investigate. Will loss be total? what other companies on risk? Answer.

"G. J. PYKE."

The agent replied the same day: "Loss about four thousand, average. North British and Citizens have same risk as you."

On the 26th of January McConville telegraphed again to the manager: "Mr. Brazier is here to represent the North British and Citizens Insurance Company in the foundry affair, and wants to know when your inspector will be here. Answer."

The manager, Mr. Pyke, answered the same day: "I hope by Tuesday or Wednesday next."

On the 29th January the inspector of the respondents did go to Joliette, and proceeded, with a valuator named by the appellants, to appraise the loss.

Besides this, the inspector on the same day, 29th January, 1879, signed, in the name of the company, on one of its blank forms, an agreement with the appellants, represented by their president, by which they each named an arbitrator and *amiable compositeur*, with power to choose a third, to value the amount of loss; the decision of the arbitrators to be final and binding under a penalty of $500.

The two arbitrators chosen proceeded to make the valuation, and signed an award; subsequently the respondents refused to pay the award, upon the ground of violation of the 4th condition of the policy, referring to additional assurance.

The judgment of the Superior Court is as follows:—

"Considérant que par l'application faite par écrit par la demanderesse le 23 janvier 1878, aux fins d'obtenir de la défenderesse en cette cause la police d'assurance qui fait la base de l'action en cette cause, la demanderesse a requis une assurance de la défenderesse pour la somme de $2,000 aux termes et con-

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ditions ordinaires des polices de cette compagnie, consentant que toutes les déclarations contenues en icelle, serviraient de base à l'obligation contractée par la défenderesse ;

"Considérant que la dite application est une partie intégrante et essentielle du contrat d'assurance intervenu entre la défenderesse et la demanderesse ;

"Considérant que les conditions écrites au dos de la police émise par la défenderesse en faveur de la demanderesse en conformité à la dite application, et auxquelles il est spécialement référé dans et par la dite police, étaient obligatoires pour la demanderesse ;

"Considérant qu'une des conditions du dit contrat d'assurance écrites au dos de la dite police d'assurance, étaient que *les personnes qui assurent des propriétés à ce bureau* (au bureau de la défenderesse) *doivent donner avis de toute assurance déjà effectuée ou qui pourrait par la suite être effectuée ailleurs sur la même propriété, de leur part, faire endosser sur leur police un mémoire de telle autre assurance, dans lequel cas cette compagnie ne sera tenue qu'au paiement d'une partie proportionnelle de toute perte ou dommage éprouvé, et, à moins que tel avis soit donné, l'assuré n'aura droit à aucun bénéfice en vertu de cette police* ;

"Considérant que pendant que la dite police était encore en force, et longtemps avant l'incendie allégué par la demanderesse, savoir, vers le trois juillet et vingt-trois août 1877, la demanderesse a effectué avec deux autres compagnies d'assurance, savoir : la "North British and Mercantile Insurance Company" et la "Citizens Insurance and Investment Company" deux autres assurances sur les mêmes bâtisses, et choses mobilières déjà assurées par la dite défenderesse au moyen de la police susdite, et ce, sans donner à cette dernière l'avis requis dans et par la dite police et les conditions au dos d'icelle et en formant partie ;

"Considérant qu'en agissant ainsi la demanderesse a forfait aux conditions de la dite police d'assurance, à de ce moment perdu tout droit à aucun bénéfice en vertu de sa dite police, et partant tout recours qu'il pouvait ou pourrait, sans cela, avoir contre la dite défenderesse pour les dommages lui résultant de l'incendie des dites bâtisses et autres choses ainsi assurées ;

"Déboute la dite action de la demanderesse avec dépens, distraits, etc."

CROSS, J.—The Foundry was insured at the Stadacona and the Citizens'. The Stadacona, having suffered heavy losses, contemplated the possibility of going into liquidation, and notified McConville, their agent at Joliette, to tell their policy-holders to re-insure, and the unearned premiums would be returned to them. The Foundry thereupon resolved, at a meeting of shareholders held at McConville's office, to effect an equal amount of insurance with the North British, which they did, but afterwards were informed by McConville, pursuant to instructions from head office, that they would not cancel but continue their risks. They gave no written or other formal notice to the Stadacona of the insurance at the North British, relying upon the fact of its being known by McConville. The policy of the Stadacona was mislaid, the Foundry did not ask the return of the premium, nor did the Stadacona ask for the cancellation of their policy.

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A fire occurred; the Stadacona sent an inspector to enquire concerning the loss. He signed a submission to experts. The loss was estimated and by the Foundry apportioned among the three companies. The Stadacona did not repudiate while all this was being done, but ultimately refused to pay because of the insurance with the North British without notice to them.

I think the notice was insufficient. Was the objection waived, is the only question. I lean to the belief that it was; if so, the judgment should be reversed, and the Foundry should recover. The Stadacona Company committed the first wrong by inducing the Foundry to re-insure.

RAMSAY, J.:—This was an action for contribution on loss by fire. Respondents pleaded that in contravention of the conditions of the policy there was double insurance. It was also pleaded that there was an abandonment of the policy by mutual consent. It is said that this second plea was dismissed on demurrer, and that from that judgment there was no appeal.

There is a special answer to the first plea, under which it was proved that the company respondents was on the verge of insolvency owing to great losses, and that this company telegraphed to its agent on the 28th June, 1877, to the following effect:

"To P. E. MCCONVILLE,

"No new business and no renewals to be taken. Notify policyholders to "insure elsewhere, and the unearned premium will be returned hereafter. Steps "are taken to meet all outstanding claims in full.

"By order,

"CRAWFORD LINDSAY."

That thereupon the company appellants called a meeting of its board of direction and agreed to re-insure with the North British. The agent of the respondents was a shareholder of the company appellants, and was present at the meeting of the directors, in what capacity it does not clearly appear. He did not, however, notify the company before the fire. The appellants re-insured on the 3rd July, but gave no further notice to respondents till after the fire in January. From the 5th of July forward till the 20th the company respondents despatched no less than six messages and letters to their agent explaining, varying, and finally abandoning, their telegram of the 28th June. In fact, they declined to carry out their promise to return the unearned premium, but they definitely agreed to leave it to the option of the insured to cancel the obligation of the company to insure, while the insurer was to hold the unearned premium as long as it was convenient to do so. Naturally this state of facts disproves the allegations of the second plea whether it was dismissed on demurrer or not.

The first question that presents itself is this, whether, under these circumstances, the appellants were obliged to give notice under pain of nullity of the policy.

The object of the stipulation as to notice is to prevent fraud, and to serve as a means of allowing the company to see that the loss is properly distributed. There can be no question of fraud when it is at the suggestion of the company that the re-insurance takes place, nor, under the circumstances contemplated at the

time the re-insurance was effected, could there be any idea as to adjustment, for both parties then intended that those who re-insured would cancel the insurance with respondents. But it is argued, you never put the company respondents *en demeure* to cancel the policy, and therefore if it was the intention of both parties to cancel the cancellation was complete. The answer to this appears to me to be complete. The company respondent notified its agent afterwards that it would not pay back the unearned premium. Now after the appellants had effected a re-insurance intended to cancel the former insurance, all notice to the respondent company was unnecessary by the insurers' own act, and being unnecessary there was an end to the obligation. The failure of the respondent company to carry out its undertaking could not be a reason for creating a new obligation to give notice. I should therefore reverse the judgment on the ground that the company respondent by its own act discharged appellants of the necessity of giving notice. It seems that in an Ontario case of Parsons and The Standard, noted at p. 335, Leg. News, Vol. 3, it was decided that where the insured had a right to insure by his policy up to a certain amount, it was not necessary to give notice of double insurance within that amount.

But there is also the question of waiver. In this case it is not equivocal. After enquiring as to the other companies interested, respondents agreed to send an agent, which they did. He entered into an agreement to arbitrate as to amount of loss. This has always been held as a waiver in every system of law.

Converse and Provincial is distinctly in point, 21 J., p. 276; also Canada and Donovan, 2 Leg. News, 229. And in Black and The National, joining in adjustment of loss, was held to be waiver. In Canada Landed Credit Co. and Canada Agricultural Insurance Co. it was held that going into proofs of loss was waiver, 17 Grant, Ch. Rep. 418.

The general principle is that any act acknowledging the validity of the insurance after double insurance is known is waiver, May, 372. The same principle is found in Agnel de l'assurance, 147. Under our system of law there never could be any reasonable doubt as to the principle on which waiver is founded. Unless a stipulation be of the essence of the contract it can always be waived by the party in whose favor it is stipulated. It was urged by respondents' counsel that the company's agent had exceeded his powers, for that the secretary had warned him to make no admissions, and to be discreet, as perhaps the company was not liable. These private instructions establish that the company knew the difficulty before they entered into the negotiation to settle. They establish nothing else of any importance in the case.

I am to reverse on both considerations.

The following are the *considérants* of the judgment in appeal:—

"Considering that by the policy of insurance executed and issued by the respondents in favor of the appellants, the respondents insured the appellants for one year, commencing on 25th January, 1877, at mid-day, and continuing until the 25th January, 1878, at mid-day, against loss and damage by fire, to the extent of $2000, upon the foundry, buildings, forge, machinery and stock of the said Fonderie de Joliette;

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"Considering that among other conditions of the assurance effected by said policy, was the condition that persons insuring with the said company respondents should give notice of all other insurances effected on the same property, and should cause a memorandum thereof to be endorsed on the policy, in which case the company respondents should not be responsible for more than their proportionate share of any loss or damage that might be suffered, and unless such notice were given the assured should derive no benefit in virtue of said policy;

"Considering that the appellants effected an additional insurance for $2000 on the same property with the Citizens Insurance Co., which existed concurrently with the insurance under the said policy so issued by the respondents, whereof the respondents had due notice, and the existence whereof was in fact acknowledged by their policy;

"Considering that at the instance of the respondents, the appellants, on the 6th July, 1877, effected a further insurance to the amount of $2000 for one year on the same property with the North British and Mercantile Insurance Company, intended to replace the insurance with the respondents, on the understanding that the then unearned part of respondents' premium should be returned to the appellants, which the respondents several times afterwards, more particularly on the 5th, 6th, 10th and 20th days of July, 1877, refused to do, and the appellants in consequence adhered to and continued to hold the policy effected with the said North British and Mercantile Insurance Company as an independent and additional insurance;

"Considering that a fire occurred on the morning of the 25th January, 1878, whereby the said foundry, building, forge, machinery and stock of the said "Fonderie de Joliette" were destroyed, to the damage and loss of the appellants of $6,312.53, for the appellant's proportion of which the present action has been instituted;

"Considering that the respondents have in effect pleaded to the present action that they received no notice of said insurance so effected with the said North British and Mercantile Insurance Company as required by the above recited condition of their policy, and that in consequence the appellants had forfeited all benefit thereunder;

"Considering that on the occurrence of said fire the respondents were duly notified thereof by the appellants, and of the existence of the said two other insurances with the said Citizens Insurance Company and said North British and Mercantile Insurance Company respectively, and said appellants made and furnished their claim upon the respondents in due course and with due diligence, for which purpose the appellants furnished claim paper, the forms used for their own office, and requested the appellants in making their claim to deduct the proportion for which the other two companies would be responsible, and did also, by a submission to the arbitration of persons named by themselves and the appellants, submit the estimation of the damage caused by fire, and joined in having the same estimated and ascertained, and by such means, and otherwise, acknowledged the existence and validity of their said policy as a valid and binding contract, and waived any and all objections which they might have otherwise

urged, founded on the want of notice of the insurance effected under the other two policies, especially that of the North British and Mercantile Insurance Company, and became and were liable to make good to the appellants the proportion of said loss falling to be paid by them in the proportion of an existing insurance by them to the extent of $2,000, which proportion the appellants consented to reduce to the sum of $1,400;

La Fonderie de Jollette and La Compagnie d'Assurance contre le Feu et sur la Vie.

"And considering that in the judgment rendered by the Superior Court in this cause on the 11th December, 1880, there is error, the Court here doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth condemn the respondents to pay and satisfy to the appellants the sum of $1,400, with interest thereon, from the 21st June, 1878, date of service of the action, and with costs as well in this Court as in the said Superior Court."

Judgment reversed.

Pagnuelo & St. Jean, for appellants.
Trudel, Charbonneau, Trudel & Lamothe, for respondents.
(J.L.M.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 25TH JANUARY, 1883.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., and BABY, J.

No. 11.

Regina vs. *John Dwyer alias McGuire.*

HELD:—On a trial for bigamy, the Crown having proved the second marriage of the prisoner while his first wife was living, it is for the prisoner to prove the absence of the first wife during seven years preceding the second marriage; and where such absence is not established it is not incumbent on the prosecution to prove the prisoner's knowledge that the first wife was living at the time of the second marriage.

The case came up on the following Reserved Case:—

"On an indictment for bigamy.

"District of Ottawa—Court of Queen's Bench (Crown side), 23rd December, 1882. Present: The Hon. Wm. McDougall, J. S. C.

"The trial in this matter took place at Aylmer, on the 22nd December instant, and resulted in the conviction of the prisoner.

"The Crown proved the two marriages, the first to Mary Brophy, at St. Columban, District of Terrebonne, in 1855; and the second at Allumette Island, District of Ottawa, to Marie Fleurey, in 1878, and that the first wife was living up till three months ago at St. Columban, where the marriage in 1855 took place. Also, that the prisoner had been seen at Ste. Scholastique about eight years ago. There was no other proof of the presence or absence of either of the parties in the interval between the two marriages.

"When the Crown evidence was closed, the counsel for the prisoner asked the Court to charge the Jury that the evidence was insufficient, because:—

"1. There was no evidence to show how long the prisoner and his first wife

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had lived together as man and wife, after their marriage, or, in fact, that they had ever so lived; and

"2. There was no evidence that the prisoner knew, at the time of his second marriage, that his first wife was living.

"On the first point, the Court charged that the marriage was complete by the marriage ceremony, and did not require consummation, and it was not incumbent on the Crown to prove the presence of the first wife with the prisoner.

"On the second point, the charge was that the continuous absence of the first wife during seven years immediately preceding the second marriage not being proved, it was not incumbent on the Crown to prove the prisoner's knowledge that the first wife was living.

"The Court also added that under the above circumstances, it was incumbent on the prisoner to show that he had made reasonable inquiries.

"In the first marriage he used the name of "Dwyer," and in the second, the name of "McGuire;" but his identity was clearly established.

"At the prisoner's request, the case was reserved for the consideration of the Court of Queen's Bench, sitting at Montreal.

"WM. McDOUGALL, J. S. C."

RAMSAY, J. This is a reserved case from the District of Aylmer. The prisoner was convicted of bigamy. The two marriages were proved, the first to Mary Brophy at St. Columban, in the District of Terrebonne, in 1855, the second to Marie Fleury at Allumette Island, in the District of Ottawa, in 1878. It was also proved that the first wife was living at the time of the second marriage, at St. Columban, where the marriage of 1855 took place.

The Court charged the jury: 1st—"That the marriage was complete by the marriage ceremony, and did not require consummation, and that it was not incumbent on the Crown to prove the presence of the first wife with the prisoner." 2nd—"That the continuous absence of the first wife during seven years immediately preceding the second marriage *not* being proved, it was not incumbent on the Crown to prove the prisoner's knowledge that the first wife was living. The Court also added that under the above circumstances it was incumbent on the prisoner to show that he had made reasonable inquiries."

I take it that the Court in effect held, that the marriage being established, it was for the prisoner to show the *absence* of seven years; that this absence not being proved, there was no question of the prisoner's ignorance. At the argument it was contended that the absence of the prisoner from his wife was the presumption of the law, and that the Crown should prove presence. In support of this novel pretension we were referred to the case of *Regina* v. *Heaton*, (3 F. & F., p. 819) where it was contended that Mr. Justice Wightman had held that the proof of presence was on the Crown, and that this holding had been maintained by the Court of Crown Cases Reserved in *Reg.* v. *Curgerwen*. (L.R., 1 C.C.R. p. 1.) On reference to the case of *Heaton* it will be seen that Mr. Justice Wightman did not hold that the proof of presence was on the Crown. In that case there was evidence that the husband only stayed with his

wife perhaps four years at most. It then became necessary for the Crown to show knowledge on the part of the prisoner, who could not be expected to prove the negative—non-knowledge. It was this decision of Mr. Justice Wightman that was approved of in *R.* v. *Curgerwen*. The case before us differs in this, that Mr. Justice Macdougall returns the fact that absence was not proved. I therefore think that the conviction should be maintained.

Regina vs. John Dwyer alias McGuire.

Conviction maintained.

Fleming, Q. C., for the Crown.
Foran, for the prisoner.
(J. K.)

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 24TH MARCH, 1882.

Coram DORION, C. J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

No. 321.

JAMES BAYLIS ET AL.,

(*Defendants in Court below,*)

APPELLANTS;

AND

O. W. STANTON ES QUAL.,

(*Plaintiff in Court below,*)

RESPONDENT.

McKeand sold an immoveable to Baylis, subject to the existing leases, and with subrogation of all his rights in all rents due or to become due. This deed was not registered. A creditor of McKeand's instituted a hypothecary action, and pending the suit had a sequestrator appointed to administer the property and collect the rents. This sequestrator took an action *saisie-gagerie en expulsion* against the tenants:

HELD:—That to give Baylis a perfect title to the leases and rents the deed of sale to him did not require to be registered, and the rents were therefore due to Baylis and not to McKeand.

2.—That the *saisie-gagerie* against the tenants by McKeand's sequestrator was bad, because McKeand had no right to collect the rents, and his sequestrator could have no greater rights than he, McKeand, had.

3.—That as a general principle a sequestrator to real estate has the right to institute a *saisie gagerie* or *saisie gagerie en expulsion* against tenants of the property.

4.—That private receipts for rent or otherwise make *prima facie* evidence of their contents, and the burden of proof is upon the opposite party to disprove them.

Semble.—That a hypothecary creditor has no privilege on fruits and revenues, and consequently no right to have a sequestrator, pending his action, to administer the same.

The facts are as follows:

Cause No. 1278 of this Court, wherein John Crossley et al., were plaintiffs, and Anthony McKeand was defendant, being a hypothecary action, was pending at the time of the issue of the *saisie gagerie* in this cause.

In that cause, No. 1278, the plaintiff, O. W. Stanton, was, on the 31st July, 1880, appointed sequestrator of McKeand's property, No. 175 West Ward, Montreal, to "manage the same, and collect and receive the rents and revenues "thereof accrued, and to accrue, with all taxes and insurance payable by the "tenants."

Baylis and Stanton.

McKeand was proprietor of the property in question, under deed of 31st December, 1874, from A. B. Stewart, assignee of Baylis, registered the 26th of March, 1879, and by which McKeand received the property subject to all hypothecary claims existing upon it.

By lease before Lighthall, N. P., the 12th February, 1877, registered the 26th of November, 1877, McKeand leased the premises in question to the firm of James Baylis & Son, composed of James Baylis and his son Samuel M. Baylis, for 6 years from the 1st of May, 1877, for an annual rental of $1000 and taxes, payable quarterly.

This lease and the registration thereof were never cancelled.

Under these circumstances the plaintiff (respondent), as being vested by virtue of his appointment as sequestrator, in the rights of said McKeand, under said lease, issued on the 7th of October, 1880, a *saisie gagerie* in the hands of James Baylis and Son, the lessees, for the sum of $3250.00, being for rent of said premises from the 1st of May, 1877, up to the 1st of August, 1880.

Defendants pleaded two *défenses au fond en droit*, by which they in effect alleged that respondent, in his alleged quality of sequestrator, had no right in law to collect the rents or demand the rescission of the lease, or bring or maintain this action.

They further pleaded that they were indebted neither to respondent in his said quality nor to McKeand, because that on the 8th of November, 1878, by deed of sale before Lighthall, N. P., McKeand sold the said premises to James Baylis for one dollar, and other causes, subject to the leases of said premises, with subrogation of all his rights in all rents due or to become due.

That McKeand never possessed the property *animo domini*.

That no rent was due at the time of the seizure.

The respondent answered specially, that he was appointed sequestrator during the pendency of the said hypothecary action against McKeand, No. 1278.

That by an intervention fyled in said cause by James Baylis before the appointment of the respondent as sequestrator, he alleged, as he and the defendants do by said plea to this action, that he and not McKeand is the proprietor of said land and premises, and having without avail opposed the appointment of the said sequestrator, prayed by his intervention that said James Baylis alone be declared to be the owner of said property, and alone entitled to collect the rents thereof.

Respondent further answered that the pretended sale and transfer deed, of date the 8th of November, 1878, set up by the appellants, was only registered after the institution of said hypothecary action No. 1278, and had by law no effect as against the right of the respondent so appointed as sequestrator in said hypothecary action, to administer said property and collect the rents and revenues thereof.

Defendants answered in law to respondent's answer to defendants' third plea, that all the allegations thereof relating to the proceedings in the hypothecary action No. 1278, wherein respondent was appointed sequestrator, and to the intervention of James Baylis, were illegal and irrelevant, and should have been set forth in the respondent's, plaintiff's, declaration.

Hayle and Stanton.

Robertson, Q.C., for defendants. Although defendants cannot urge the illegality of the appointment of said plaintiff as sequestrator, or shew that it was not made upon any sufficient cause, and should not have been made, inasmuch as the judgment granting the order has not been appealed from, yet they are entitled to urge that the action and conduct of the plaintiff under such appointment must strictly conform to the requirements of law applying to such appointment, and his duties as limited by law, when his appointment does not confer special powers to those imposed upon a guardian or *prudent* administrator; and that his additional powers extend no further than are required for the conservation of the property given him in charge, and they refer to the following authorities.

As to appointment and powers of sequestrators (*séquestres judiciäires*).

" Troplong on Séquestre, Nos. 293, 295.

" Laurent, Principes de Droit Civil, Liv. 27, Nos. 177, 183.

" Zachariæ, Droit Civil Francais, Verbo Séquestre, No. 740.

" Sirey, Codes annotés, Verbo Séquestre, No. 1914.

" Sirey, Recueil Général, Verbo Séquestre, p. 191, *arrêts* referred to therein.

" Sirey, Table Générale, p. 191, No. 26, reference to an arrêt of Cour de Bruxelles, of 11 Nov., 1819, C. N. 6-2.

" Also, C. C. P. articles 876 et suiv., C. C. art. 1823 and 1824.

Under these authorities and the law governing the duties and obligations of a judicial *séquestre*, was the action, as brought to rescind the lease and to eject the defendants from the premises, a legal and prudent use of his powers under his appointment, or necessary to protect the rights of the parties?

The right by law given to annul a lease and to eject a tenant is given to a proprietor or lessor as a special conservation of his rights, and not to a guardian or administrator, and if such power could be exercised by him, it could only be on special cause shown in the action, such as an absence of sufficient security, or an immediate danger of loss to the parties.

In this case there is nothing of the kind shown, and even if the amount demanded by the action had been due, it will be seen on reference to the *procès-verbal* that there is five times that amount seized, where then is the necessity of such action, even if he had the power to exercise it? The sequestrator in this matter is not named to represent the proprietor or lessor, and entitled to the exercise of all their legal privileges, but only to represent creditors who in ordinary cases are not entitled to the rights given to the proprietorship and possession.

The authorities quoted above go far to show that a sequestrator has no authority alone either to annul or to make or to revive leases, but that this must be done upon the joint action or consent of all the parties interested, and the arrêt above cited goes so far as to declare that the sequestrator has no power to confirm and continue a lease, entered into by one of the parties interested against the will of the other, and that too in a case where there was litigation as to right of property, and not the mere conservatory right of a creditor exercised at the last moment on revenues realized before any demand or action.

Baylis and Stanton.

PAGNUAT, J., rendered judgment as follows:

"Le demandeur, séquestre nommé par jugement de l'Honorable Juge Torrance, en vertu d'un jugement interlocutoire en date [illegible] de juillet 1880, pour prendre possession des biens d'Anthony McKeand et les administrer, poursuit les défendeurs en recouvrement de la somme de $3250 pour les loyers échus jusqu'au 1er août, 1880, en vertu d'un bail consenti le 12 de février 1877, par McKeand aux défendeurs devant Lighthall, Notaire Public, pour six ans à compter du 1er mai 1877, à raison de $1000 par année payables par quartier, outre les taxes.

L'action est accompagnée de saisie-gagerie et de demande en résiliation et en éviction de bail.

Les défendeurs plaident par une défense en droit que le demandeur en sa qualité de séquestre n'a pas pouvoir de faire résilier un bail de la nature du bail en question, et que la résiliation est le but principal de son action pendant que la demande du loyer n'est qu'une demande secondaire et subsidiaire.

Par une seconde défense en droit les défendeurs s'attaquent, pour la raison donnée dans sa première défense en droit, à cette partie de l'action qui demande la résiliation, parce que telle demande dépasse le pouvoir allégué par lui qui n'est que le pouvoir d'administrer et de collecter les loyers.

Par un 3e plaidoyer les défendeurs, niant d'abord la régularité et la légalité de la nomination du demandeur comme séquestre, et la suffisance de son pouvoir pour porter l'action par lui prise, disent qu'ils ne doivent pas au demandeur ni à McKeand le loyer réclamé.

Faillite de James Baylis, un des défendeurs le 13 août 1874; nomination de Stewart comme syndic à cette faillite; 14 décembre, 1874, acte de composition et décharge entre Baylis et ses créanciers à raison de 20c dans la $, payables à 6, 12, et 18 mois, par billets endossés par McKeand, avec convention que la propriété du failli serait rétrocédée ou à McKeand ou à toute autre personne indiquée par Baylis et McKeand; confirmation par la Cour de cet acte à la demande subséquente de Baylis; cession le 31 décembre 1874, par Stewart à McKeand de tous les biens du failli et spécialement de l'immeuble en question à la charge des hypothèques et priviléges existant sur l'immeuble.

Les défendeurs allèguent que McKeand n'a eu cette cession de la propriété que pour lui assurer le paiement des billets de composition.

Que plus tard, le 8 novembre 1878, par acte de vente devant Lighthall, McKeand a vendu cet immeuble au défendeur Baylis pour $1, et les autres considérations énoncées à l'acte.

Cette vente fut faite à la charge par l'acquéreur James Baylis d'entretenir les baux qui avait été faits de la propriété en question, et avec l'avantage d'en percevoir les loyer. Cet acte a été enregistré.

Que McKeand n'a jamais possédé la propriété en question, *animo domini*, mais seulement comme garantie de l'exécution de la composition, et que lui-même était tenu [illegible] sous l'acte de 1875, et avait fait le 3 d'avril un acte d'atermoiement [illegible] créanciers qui lui avaient donné décharge confirmée subséquemment [illegible] du 30 novembre, 1878.

Baylis and Stanton.

Que McKeand et ses créanciers n'ont jamais considéré ni traité cet immeuble comme faisant partie de ses biens à lui et n'ont jamais eu la prétention d'en percevoir les revenus.

Que le bail en question du 12 février, 1877, a été fait durant l'absence du pays de McKeand, en vertu d'une procuration que tenait de lui le dit James Baylis, et ce bail était fait dans le but de régler l'intérêt du vrai propriétaire Baylis dans ses rapports avec la maison James Baylis & Son, composée des deux défendeurs. Ce qui fut plus tard ratifié par McKeand.

Que les défendeurs ne doivent aucun loyer ni à McKeand ni à James Baylis, à qui ils ont payé tout le loyer échu avant l'action.

Ce plaidoyer est suivi d'un autre qui est une dénégation générale des allégations de la demande.

Les réponses aux deux défenses en droit sont générales.

Le demandeur répond spécialement au 3e plaidoyer des défendeurs en disant qu'il a été nommé séquestre à la propriété en question dans une cause en déclaration d'hypothèque, intentée sous le No. 1278 des causes de cette Cour, par John Crossley *et al.*, le dit Anthony McKeand comme propriétaire et détenteur de l'immeuble en question.

Que James Baylis a produit une intervention dans la dite cause, et s'est opposé à la nomination du demandeur comme séquestre à la dite propriété, alléguant qu'elle lui appartenait en vertu de l'acte de cession que lui en avait consenti McKeand le 8 novembre, 1878; mais que cela n'a pas empêché la nomination du demandeur.

Que l'acte que James Baylis et les défendeurs invoquent comme étant le titre de propriété de James Baylis, n'a été enregistré qu'après l'institution de l'action hypothécaire dans laquelle le demandeur a été nommé séquestre.

Réplique spéciale des défendeurs, que le demandeur aurait dû alléguer dans sa demande, et non dans sa réponse au plaidoyer, les faits invoqués dans la dite réponse.

Les défendeurs à l'appui de leurs défenses en droit ont cité des autorités tendant à faire voir que le demandeur, en sa qualité de séquestre ne peut pas demander la résiliation d'un bail existant.

D'après notre loi, et d'après le jugement nommant le séquestre en cette cause, celui-ci, le séquestre, est tenu de voir non seulement à ce que les loyers soient payés en vertu du bail existant, mais encore de gérer et administrer la propriété en question, et d'en collecter et recevoir les revenus. Pour remplir ce but, dans le cas de résistance ou refus, il peut et doit intenter les actions nécessaires pour recouvrer le loyer; la demande en résiliation dans le cas de non-paiement du loyer n'est qu'un moyen d'arriver à percevoir les revenus de la propriété séquestrée, en la retirant des mains d'un locataire qui ne paie pas, pour la louer ensuite, sous l'autorité de la justice, à un autre de meilleure volonté ou capacité.

Ce n'est pas aux défendeurs locataires à voir si le séquestre est revêtu des pouvoirs nécessaires pour louer de nouveau la propriété. Ils n'ont qu'une chose à voir, son autorité de leur en demander le loyer et de leur en donner bonne quittance. Cette autorité ils la trouvent dans le jugement nommant la demanderesse avec les pouvoirs nécessaires.

Baylis and Stanton.

La résiliation du bail n'est que la sanction de ce droit, et c'est la loi qui donne cette sanction contre celui qui ne paie pas suivant son bail.

Que le demandeur ait mis, dans ses conclusions, la demande en résiliation avant la demande du paiement de la somme, ne change rien à la nature de cette demande qui n'est que la conséquence de la seconde.

Les deux défenses en droit sont renvoyées comme mal fondées.

Quant au mérite de la demande même, elle est fondée sur un bail accepté par les défendeurs de McKeand lorsque le droit de propriété était en son nom; elle est faite par un séquestre nommé dans une demande hypothécaire, contradictoirement avec James Baylis l'un des défendeurs, et celui de qui ils s'autorisent pour prétendre que ce n'est plus à titre de locataires de McKeand qu'ils jouissent de la propriété, mais à titre de locataires de James Baylis. Non-seulement l'action hypothécaire, mais la nomination même du séquestre, qui est un incident de cette action, est antérieure à l'enregistrement du titre en vertu duquel, les défendeurs prétendent que leur locateur nouveau serait propriétaire.

Ils prétendent avoir payé James Baylis—mais rien ne prouve que les reçus par eux produits aient été donnés avant l'institution de cette action.

Les défendeurs soutiennent que ce n'est pas par une réponse à leur plaidoyer, mais bien par la demande même que le demandeur aurait dû alléguer les faits contenus dans sa réponse relativement à la date de l'enregistrement du titre de James Baylis, et à sa nomination dans une action hypothécaire antérieure à leur titre.

Le demandeur n'avait qu'à produire le jugement l'autorisant à recevoir le loyer, et l'acte que les défendeurs eux-mêmes avaient consenti à McKeand. Il n'était pas obligé de prévoir que les défendeurs s'étaient fait à eux-mêmes, par le fait de l'un d'eux un autre titre à la jouissance de la propriété.

La réplique en droit à la réponse au 3e plaidoyer est donc renvoyée ainsi que les défenses des défendeurs comme mal fondées.

Et le jugement est en faveur du demandeur suivant ses conclusions."

The judgment was *motivé* as follows:

"La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure et les pièces produites, et la preuve, et délibéré:

Considérant que les parties ont consenti spécialement et expressément à soumettre à la Cour en même temps le mérite des défenses et répliques en droit et des défenses en faits;

Considérant qu'il est prouvé par les copies d'actes authentiques, et les admissions écrites des parties, produites en cette cause, que le demandeur a été nommé séquestre à la propriété en question louée aux défendeurs par le nommé Anthony McKeand le douze de février 1877, pour une période de six années à compter du premier de mai 1877 (enregistré le 26 de novembre 1877) à raison de $1,000 par année payable par quartiers, dont le premier est devenu exigible, le premier du mois d'août 1877;

Baylis and Stanton.

Considérant que le document nommant le demandeur séquestre, avec pouvoir de gérer et administrer la propriété en question et d'en percevoir les loyers et revenus échus et à échoir, accrus et devant accroître, et daté du trente et un de juillet 1880, et fait conformément au jugement interlocutoire prononcé le 28 du même mois de juillet, dans une cause ou action hypothécaire alors pendante devant cette Cour, relativement au dit immeuble, sous le No. 1278 dans laquelle John Crossley et al. sont demandeurs et le dit Anthony McKeand est défendeur;

Considérant que les défendeurs invoquent à l'encontre de leur bail précité fait et consenti entr'eux et le dit McKeand, un prétendu bail qu'ils disent tenir du dit James Baylis, l'un d'eux, comme propriétaire du dit immeuble, en vertu d'un titre ou acte de vente en date du huit de novembre, 1878, consenti par le dit Anthony McKeand au dit James Baylis, devant Mtre Lighthall, Notaire, et que ce dernier acte n'ayant été enregistré que le 29 de juillet 1880, ne peut pas être opposé au demandeur dans la présente cause;

Considérant que les défenses des défendeurs, et leur réplique à la réponse du demandeur au troisième plaidoyer des défendeurs, sont mal fondées en droit et en fait, et que la demande est bien fondée en droit comme en fait;

Renvoie la dite défense et la dite réplique en droit et condamne les défendeurs à payer au demandeur ès qualité la somme de $3,250, cours actuel, pour loyer échu depuis le 1er mai 1877 jusqu'au 1er d'août 1880, en date du dit bail du 12 février 1877, et pour l'usage et l'occupation pendant cette période, de l'immeuble décrit dans la déclaration comme suit:

"That certain four story cut stone store, being number 459 and 461 on "Notre Dame Street, as now occupied by said lessees and known as the south "half or portion of lot No. 175 on the official plan and book of reference for the "West Ward of said City of Montreal," avec intérêt sur la dite somme à compter du huit d'octobre 1880, jour de l'assignation, et les dépens distraits à Mr. John L. Morris, avocat du demandeur:

Et la Cour, déclarant la saisie gagerie pratiquée en cette cause bonne et valable, ordonne que les meubles et effets saisis en vertu d'icelle, ou autant d'iceux qu'il sera nécessaire, soient vendus suivant le cours ordinaire de la loi, pour sur le produit net de la vente être le demandeur ès-qualité payé du montant ci-dessus adjugé en capital, intérêt et frais;

Et la Cour déclare de plus la dite saisie gagerie tenante, pour le montant de loyer qui a pu échoir depuis la dite date du 1er août, 1880, et ordonne que les effets saisis et qui n'auront pas été vendus, demeurent saisis et affectés au paiement du dit loyer, jusqu'à nouvel ordre de cette Cour, et réserve au demandeur tout récours que de droit à cette fin.

Et la Cour annule et résilie le dit bail du 12 février 1877, et condamne les défendeurs à livrer au demandeur les lieux susdits, sous trois jours de la signification des présentes, en y faisant place nette, sinon, et ce délai expiré, seront les dits défendeurs expulsés des dits lieux par main de justice, les meubles et effets qui s'y trouveront, autres que ceux saisis, jétés sur le carreau et le demandeur ès-qualité mis en possession et jouissance paisible du dit immeuble."

RAMSAY, J.—This case has given me much difficulty, I might almost say uneasiness. It is very evident that the judgment could not be confirmed

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absolutely. Baylis & Son, who had paid by error, if it were so, could not be turned out of the premises without an opportunity of paying to the right person. But the real difficulty was as to the rights of the sequestrator. I am not prepared to say that a sequestrator might not in some extreme case be named to hold the rents of a property as between the hypothecary creditor and the owner, but I hardly think this is such a case. The curtain has been sufficiently lifted by the deeds filed to suggest an exception to the action of the Crossleys, which they might find it difficult to get over, but with that we have nothing to do. The sequestrator was named, and the appellants have acquiesced in the appointment, and it only becomes our duty to see whether the sequestrator is entitled to recover. The appellants have done what they could to help the action. The action was on a lease for rent, and they have filed a receipt. In reality there was no such lease in existence. So far as McKeand was concerned the lease to Baylis & Son was at an end the moment McKeand re-sold to Baylis. It is quite possible that a third party, and Crossley & Sons, if they are a third party, may have a better title to the store than Baylis whose title is not enregistered, but certainly they cannot hope to disturb the arrangements between McKeand and Baylis until this title is made good. The sequestrator, as against Baylis, could have no greater rights than McKeand had, at all events until the sequestration was signified to him.

I am therefore to reverse.

DORION, CH. J.—It is difficult to understand how mere hypothecary creditors as Crossley & Sons, who were suing their hypothecary action against McKeand, as *tiers détenteur*, could, pending their action, have shown that they had such an interest in the rents of the property hypothecated as to entitle them to obtain the appointment of a sequestrator to collect those rents, not only since the institution of their action, but also those which had accrued long before. Article 2076 C. C. merely gives to hypothecary creditors the right to recover from the *tiers détenteur* the rents and profits which the latter has received since he has been summoned to give up the property (délaisser). This necessarily supposes that the *tiers détenteur* has been condemned to délaisser, until then there can be no claim against a *tiers détenteur* for rents, issues and profits, and still less to collect from his tenants the rents of the property hypothecated. Under art. 645 C. C. a sequestrator can be appointed at the request of a seizing creditor after an opposition has been made, and not before. There seems to be no reason why an hypothecary creditor should, in the absence of any text of law, have any more rights in this respect than a judgment creditor.

The propriety or impropriety of appointing a sequestrator is not, however, the question we have to decide in the present case. The appellants, as lessees of the premises, have no right, as such, to question an appointment which has been made in another case, wherein James Baylis, one of them, was an intervening party, and is bound by the judgment rendered against his pretensions; and in fact they have not done so: they merely challenge the extent of the authority of the sequestrator, 1st, as to his demand for the cancellation of their lease, and 2nd, as to his right to claim rent which, as they allege, was not due to

McKeand, but to James Baylis, his representative, to whom, they contend, they have paid it. On the first point we are disposed to agree with the Court below, that the authority given to the respondent to administer the property and to collect the rents, involves the right to cancel existing leases for adequate causes, such as the non-payment of the rent—(Articles 1624 and 1625 C. C.) To determine the second point intelligently, we must examine the object for which the respondent was appointed sequestrator. The appointment took place at the request of the plaintiff in a case of Crossley & Sons against McKeand. The rents that the sequestrator was authorized to collect were those due or supposed to be due to McKeand; they could not be those due to James Baylis, who was not a defendant in the cause, and against whom Crossley & Sons had made no demand. Baylis was not in the case to answer to any claim which was made against him, but to protect his right to the property he had purchased from McKeand, and on account of which McKeand was sued hypothecarily. The Court, in appointing a sequestrator, acted no doubt under the apprehension that the title of Baylis to the property, not having been registered till after the hypothecary action had been brought, was not available as against the action of Crossley & Sons, which was then pending. This assumption seems to be in conflict with two decisions of the chief justice of the Superior Court who held, in Drouin vs. Hallé, 7 Quebec L. R. 148, and in Dorval vs. Bourassa & Bourassa, opposant, same vol. p. 303, that a purchaser could oppose a seizure of real estate made on his vendor, although his deed of purchase had only been registered after the seizure. It is not necessary to decide in the present case the important question as to the effect of a deed of sale not registered till after an hypothecary action has been brought, and therefore supposing that Baylis could not invoke, as against Crossley & Sons, the sale made to him by McKeand, on the 8th of November, 1878, because he had not registered his title till after the institution of their hypothecary action, this could only apply to that portion of the deed conveying a title to the realty, and could not affect the transfer by McKeand to Baylis of existing leases and of the rent accruing under such leases. Such a transfer does not require to be registered except to preserve the rights of the transferee as regards subsequent transferees. (Art. 2127 C. C.) Crossley & Sons were not the transferees of either the leases or the rents of the property leased to the appellants, and therefore there was no necessity for Baylis to enregister his transfer as against them. James Baylis, as being in the rights of McKeand, was, therefore, alone entitled to claim the rents due by the appellants, and the receipts given by him were good and valid discharges. These receipts, three in number, show that the rent was paid up to the first of August, 1880, the appointment of the respondent as sequestrator having taken place on the 31st of July, 1880. There was then no rent due, the last quarter having been paid on the 29th of July preceding. The Court below has, however, set aside these payments, on the ground that it was not proved that the receipts had been given prior to the institution of the action. The receipts are all dated prior to the institution of the action, the respondent has raised no issue as to their having been given at the time they respectively bear date. It was for the respondent to allege and to prove that the receipts were antedated, and were

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only given after his appointment as curator. Private writings are legal proof between the parties, their heirs and legal representatives (Art. 1322 C. C.) The respondent is the representative of the parties to the cause in which he was appointed sequestrator, that is of Crossley & Sons who were plaintiffs, of McKeand the defendant, and of James Baylis the intervening party. As representing Baylis, the dates of the receipts are established by the receipts themselves; these dates are also established as against McKeand who is the cédant of Baylis, and who, by his transfer, has authorised Baylis to collect these rents. As to Crossley & Sons, if they have any interest in contesting the date of the receipts, it is as being the hypothecary creditors of McKeand, and as such they are to be considered as the representatives of McKeand, against whom the dates of the receipts are primâ facie evidence. These propositions are clearly established by numerous decisions cited by Sirey in his Code Civil Annoté, under Art. 1528, Nos. 11, 31, 35, 37, 38 and 39, and by the concurrent opinion of the authors which this writer cites. It is principally with reference to receipts for rents that their date has been held to be primâ facie evidence against parties connected with the signers of such receipts, either as cédants or mandants or creditors; to hold otherwise would be to oblige a tenant to take a notarial discharge for each payment of rent he would make, which is an impossibility. The respondent himself felt that it was for him to destroy the effect of the receipts produced by the appellants, and although he had raised no contestation on this point, he has attempted to prove, by the appellants, and by compelling them to produce their books, that the receipts were fictitious. In this he has completely failed, as the entries in the books show that the rent has been paid at the dates and in the manner indicated in the receipts. This Court, holding that the transfer of rent made by McKeand to Baylis did not require to be enregistered in order to entitle the latter to receive the rent due by the appellants, and that the unimpeached receipts produced by the appellants show that before the respondent was sequestrator they had paid to James Baylis, who alone was entitled to receive the same, all the rents then due and now claimed by the respondent, is of opinion to reverse the judgment of the Court below, and to dismiss the action of the respondent.

The judgment was *motivé* as follows:

"Considering that appellants have paid to James Baylis before the appointment of the respondent as sequestrator all the rents which they owed up to the first of August, 1880, and that the said James Baylis was entitled to receive the said rents;

And considering that there was no rent due by the said appellants to the respondent when he brought this action;

And considering that there is error in the judgment rendered by the Superior Court, sitting at Montreal, the 28th day of February, 1881;

This Court doth reverse the said judgment of the 28th day of February, 1881, with costs against the respondent in both Courts."

Judgment reversed.

Robertson & Fleet, for appellants.
John L. Morris, for respondent.
(J. L. M.)

SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1882.

Coram PAPINEAU, J.

No. 1587.

Levin et al. vs. *Traham es-qual.*

HELD :—1. That a tutor has no right to carry on trade for and in the name of the minor.

2. That a minor may be freed from all responsibility for such trading by simply pleading the nullity thereof, without alleging or proving *lésion*.

The defendant was tutor to a minor child, who inherited the stock in trade of his mother who in her lifetime carried on business at Nicolet, under the name of "Traham & Co." The defendant continued this business for and in the name of this minor child, buying goods for cash and on credit, and settling therefor by giving notes signed "H. Traham, tutor."

The present action was brought against defendant as tutor, to recover the amount of one of the notes so signed.

The defendant pleaded that he only possessed powers of administration, and that the purchase of goods for which the note was given was an act beyond his authority.

The judgment of the Court was as follows :—

"Considérant qu'il est prouvé que le montant du billot en question en cette cause a été donné pour la balance du prix de certaines marchandises vendues et livrées par les demandeurs au défendeur ès-qualité de tuteur à son enfant mineur âgé de moins de quatre ans, lorsqu'elles ont été ainsi vendues ;

"Considérant que le tuteur n'a en vertu de la loi qu'un pouvoir d'administration sur les biens du mineur, et qu'il n'a pas le droit de faire le commerce pour son enfant mineur et au nom de ce dernier ;

"Considérant que le défendeur ès-qualité en achetant des demandeurs les marchandises en question dans cette cause à crédit, pour les revendre ensuite, non-seulement a fait un acte dépassant les bornes de l'administration d'un tuteur, mais qu'il a contrevenu indirectement à l'article 279 du Code Civil ;

"Considérant que la vente faite par les demandeurs au défendeur ès-qualité, sous les circonstances, n'est pas légalement une vente faite au mineur qu'il ne représentait pas, et qu'elle est nulle quant à ce dernier, et qu'en pareil cas le mineur n'a pas besoin de prouver lésion ;

"Considérant que le tuteur agissant en dehors des limites de l'autorité que lui donne la loi, ne lie pas son pupille, mais n'oblige que lui-même en sa qualité personnelle ;

"Considérant que le défendeur ès-qualité n'avait pas le droit d'acheter les marchandises en question à crédit, sans autorisation, même pour aider l'écoulement du fonds de commerce dont son pupille a hérité, et que d'ailleurs, eût-il eu ce droit, il n'est pas prouvé que ces marchandises aient actuellement servi à l'écoulement du dit fonds de commerce ;

"Considérant que les demandeurs ne peuvent pas même prétendre qu'ils ont droit de se faire payer la valeur des dites marchandises, en autant que le mineur

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en aurait profité, attendu qu'il n'est pas prouvé que de fait elles aient profité au dit mineur;

"Considérant que la preuve faite par les demandeurs que les marchandises en question ont été vendues aux prix ordinaires du marché en gros, n'est pas la preuve que le mineur soit devenu par là plus riche d'une somme égale au montant du prix d'achat de ces marchandises, qui ont pu ou peuvent être encore une cause de perte pour le mineur.

"Considérant que les demandeurs n'ont pas établi leur droit d'action contre le défendeur ès-qualité et que la défense est bien fondée et suffisamment prouvée, renvoie l'action des demandeurs avec dépens."

T. & C. C. de Lorimier, for plaintiffs.

Mercier, Beausoleil & Martineau, for defendant.

(J. K.)

SUPERIOR COURT, 1883.

MONTREAL, 7TH SEPTEMBER, 1883.

Coram TASCHEREAU, J.

No. 583.

Macdonald vs. *Dillon.*

HELD:—1. That the prescription applicable to promissory notes does not apply to a loan which is a non-commercial matter.

2. That the giving of a *bon* in acknowledgment of a loan does not constitute a novation of the debt, and that the action may be brought upon the original debt instead of on the *bon*.

3. That such a *bon* is prescribed by five years, and cannot be used as evidence to prove the debt, which must be proved by other legal evidence such as the admission of the party.

The declaration alleged that on the 26th of November, 1867, the plaintiff, at defendant's request and out of friendship, loaned to defendant $100, which defendant promised to pay, with interest, when requested.

That since defendant frequently, both verbally and in writing, acknowledged the loan and promised to repay it with interest.

Two written acknowledgments were filed, the first being a *bon* dated the 26th November, 1867, for $100, payable on demand.

The second being a letter from defendant to plaintiff of 22nd February, 1868, in which he acknowledged the debt and asked for time to pay.

The defendant pleaded that the only debt due to plaintiff resulted from the *bon* and the acknowledgment contained in the letter of 22nd February, 1868, and that these were prescribed.

Morris, J. L., counsel for plaintiff:

This is a non-commercial matter, and the point has already been decided in Whishaw & Gilmour, 6 L. C. J. 319; do., 6 L. C. J. 321.

Judge Monk there remarked that the transaction must "be of a mercantile character only, that is, purely so, and as regards both plaintiff and defendant."

Vide Darling & Brown, 21 L. C. J. 92, and same case in Supreme Court, 21 L. C. J. 169, and p. 175, remarks of Richards, C. J.: "If the transaction

is non-commercial then it is conceded on all hands that the claim is not barred by prescription."

See remarks of Taschereau, J., p. 178, and Fournier, J., p. 179: "Contract civil, and removed under the rules relating to loans," p. 180; Gibeau vs. Chef dit Vadeboncœur, 14 L. C. J. 53. There, no proof having been made of the loan, it was held that a promissory note dated more than six years back could not be invoked, because upon its face it did not disclose a loan, and of course it was prescribed. If there had been evidence out of defendant's mouth, or otherwise, of the loan, and that the note had been given in acknowledgment of the loan, it would have been otherwise.

Bagg *et vir vs.* Wurtele, 6 L. C. J. 30, and the authorities there cited.—Held, that plaintiff has a right to examine defendant as to whether he had signed a note for a loan.

The plaintiff does not claim for more than the last three years' interest upon the loan.

TASCHEREAU, J., said:—This case presents an interesting question, which, however, does not come up now for the first time. The plaintiff sues to recover the amount of a loan made by him to the defendant, James T. Dillon, in 1867. The defendant was at the time teller in the Merchants Bank, and the plaintiff had business with the Bank. The defendant obtained a loan of $100 from the plaintiff, and he gave a *bon* for this amount. The action is not based on the *bon*, but on the loan. It was also alleged that by a letter written subsequently the defendant acknowledged himself to be indebted in the amount of the *bon*. The evidence is very short. The defendant was examined, and, after much hesitation, finished by admitting that $100 had been lent him in 1867 by Mr. Macdonald, but he pretended that this sum was given him on the discount of his note. He was then teller at the Merchants' Bank, and there were friendly relations between them. The question which arises is whether the prescription applicable to notes also applies to loans, for the action here does not rest upon the *bon*, but upon the loan, and although the *bon* is prescribed, the original debt may still exist, as novation has not taken place. In the case of Bagg vs. Wurtele, Judge Badgley, in the Superior Court, held that in an action of *assumpsit* the plaintiff has a right to examine the defendant on the fact that he signed a promissory note in his favor for money lent, although the note was prescribed before the action was brought. Then, in Gibeau vs. Chef, 14 L. C. Jurist, p. 53, the Court of Review held that in an action based on a loan, a prescribed note does not make any proof of the loan; but in that case the only proof of the loan was the note, and it had no value. The next case was Whishaw *vs.* Gilmour, 6 L. C. Jurist, p. 319, in which it was held that in an action for the recovery of a loan, as such, the prescription of five years cannot be invoked; and, further, that a loan by a non-trader to a commercial firm is not subject to the limitation of six years. That case is directly in point. Three days afterwards Judge Monk decided in the same case that an action by a non-trader for the recovery of a sum of money alleged to have been loaned to a commercial firm, is not susceptible of trial by jury. In Darling *vs.* Brown,

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which went to the Supreme Court (21st L. C. Jurist), the precedent of Whishaw and Gilmour was followed. The Court, therefore, comes to the conclusion that the loan in this case being proved by the admission of the defendant, apart from the production of the *bon*, the action must be maintained. The claim for interest, however, cannot be allowed.

Judgment for plaintiff.

D. E. Bowie, for plaintiff.
John L. Morris, counsel.
Duhamel & Rainville, for defendant.
(J. L. M.)

SUPERIOR COURT, 1883.

MONTREAL, 5TH JULY, 1883.

Coram TORRANCE, J.

No. 133.

Ex parte Pillow et al., Petitioners for Writ of *Certiorari*, and *The City of Montreal*, Respondent.

HELD:—That the power of the Parliament of Canada to enact a general law of nuisance, as incidental to its right to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to authorize municipal corporations to pass by-laws against nuisances hurtful to public health, as incidental to municipal institutions.

This was the merits of a motion to quash a conviction made on the 29th November last.

The petitioners were occupants of a manufactory of cut nails, and it was complained that the chimney sent forth smoke in such quantity as to be a nuisance hurtful to public health and safety, and that they refused to remove and abate the nuisance, contrary to the by-law of the City of Montreal No. 130.

The defendants pleaded that the city had no jurisdiction to enact the by-law, and did not enact it in virtue of any competent legislative authority. The defendants were convicted.

PER CURIAM.—The main question as put by the petitioners is,—Had the Legislature of Quebec power to authorize the city of Montreal to pass the by-law? Such power, if it exists, must be derived from the sections 91 and 92 of the Confederation Act, 1867. Sec. 91 enacts that the exclusive legislative authority of the Parliament of Canada extends to the criminal law. And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces. Section 92 says that in each province the Legislature may exclusively make laws in relation to municipal institutions in the province.

The petitioner contends that among the subjects assigned exclusively to the

Parliament of Canada is the criminal law, and that the subject matter of the by-law—a nuisance—is a matter of criminal law,—referring to the text-books on the subject. The city, on the other hand, contends that though the Federal Parliament has jurisdiction over nuisances in general, it does not follow that the Local Legislatures cannot prohibit insalubrious or dangerous establishments in a province, or that they cannot confer upon municipalities the right of self-protection and of protecting the citizens of a locality against the dangers of similar industries.

The by-law was made under 37 Vict. c. 51, s. 123, ss. 2, Quebec (Charter of Montreal), and 42-43 Vict. c. 53, s. 34, ss. 8. The counsel for the city says that this power is comprised in the words "municipal institutions." If the city could not deal with these matters under its charter, the greater part of the municipal regulations would be *ultra vires*, and the municipalities would be incapable of repressing abuses affecting health or the security of citizens, and the words "municipal institutions" would have no meaning. The discussions which have already taken place in our Courts respecting the liquor laws throw a good deal of light on the respective powers of the Dominion and Provincial Legislatures. In *Sulte & The City of Three Rivers* it was held that the power of the Dominion Legislature to pass a general prohibitory liquor law, as incident to its right to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to pass prohibitory liquor laws as incident to municipal institutions (5 Legal News, p. 330); and in the case of *Poulin & The City of Quebec* (7 Q.L.R. 337), Mr. Justice Tessier very pertinently asks the question, is it not part of the municipal institutions to make disciplinary and police regulations to prevent disorder on Sunday and at night, by compelling tavern and saloon-keepers to keep their drinking places closed during that time? Can there be any question as to the power of our Local Legislature, or even our municipal corporation, to prevent the sale and storage of powder, except in certain places, and with certain precautions for the safety of the public? And yet this is a matter of trade, like any other.

I am justified in concluding that the power of the Dominion Parliament to pass a general law of nuisances as incident to its rights to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to pass the clause authorizing by-law 130 as incidental to municipal institutions.

Certiorari quashed.

Macmaster, Hutchinson & Weir, for petitioners.
R. Roy, Q. C., for the respondent.
(J.K.)

CIRCUIT COURT, 1882.

MONTREAL, 6TH SEPTEMBER, 1884.

Coram TORRANCE, J.

No. 254.

Moncatel es qual. vs. *Ross*, and *Trudel*, intervening.

HELD:—That the functions of a curator to a *délaissement* cease by the payment of the hypothecary debt, *ipso facto*.

This was an action in ejectment for non-payment of rent brought by one Moncatel who had formerly been appointed curator to a *délaissement* of an immoveable property.

The hypothecary debt had long since been paid and the curator notified of the fact, nevertheless the curator persisted in collecting the rents.

The proprietor, the intervening party, notified the defendant not to pay to the curator, who took a *saisie-gagerie* with ejectment against the defendant. The latter did not plead but fyled a declaration s'en rapportant à justice.

The intervening party intervened, setting forth the facts, and praying that it be declared that the plaintiff had ceased to be curator and that his functions as such had ceased, etc., etc.

Plaintiff claimed that because there was no judgment removing him from office, therefore he had the right to collect the rents, and was still in office.

Action dismissed.
Intervention maintained.

Robidoux & Fortin, for plaintiff.

John L. Morris, for defendant and intervening party.

(J. L. M.)

SUPERIOR COURT, 1883.

MONTREAL, 5TH SEPTEMBER, 1883.

Coram JETTE, J.

No. 1492.

Trudel vs. *Bouchard*.

HELD:—1. That the action *en reméré* need not be returned into court before the expiration of the stipulated delay.

2. That the action *en reméré* is properly directed against the purchaser, notwithstanding that he may have abandoned the property in a hypothecary action against him, and that a curator to the *délaissement* has been appointed, because such a *délaissement* does not divest the proprietor of his property, but simply of the possession of it.

3. That the functions of a curator to a *delaissement* cease *ipso facto* by the payment of the debt in the suit in which he was appointed curator.

4. That a *dépôt* or consignation of the monies offered to redeem property, is not necessary.

In this case the plaintiff brought an action against the defendant for the enforcement of his right of redemption stipulated to be exercised within two years

from the 27th January, 1880, and made a legal tender by a notary of $9500.00 to defendant, which defendant refused, being the amount payable under the deed of redemption. The action was served upon the day before the two years would have expired.

The defendant pleaded that not only should the action have been served within the two years but that it should also have been returned.

Défendant cited 19 L. C. J. 104, Walker & Sheppard. Plaintiff relied upon C. C. L. C. Art. 1550.

Defendant also pleaded that he had abandoned the immoveable property in question in a hypothecary action No. 1462 wherein Raymond Préfontaine was plaintiff;

That this hypothecary action was based upon a debt registered against the property, but not mentioned in the deed of sale from the plaintiff to defendant as one of the claims which defendant was to assume and pay;

That Jules Aimé Moncatel had been named curator to the *délaissement* made *en justice* of the said property by the defendant;

That the action *en reméré* should have been directed against the *curator* to the *délaissement* and not against defendant.

Plaintiff answered and proved that the hypothecary claim mentioned had long since been paid and extinguished, and *main-levée* of the hypotheque duly granted and registered.

The judgment, after reciting the allegations of the declaration and the tender, was as follows:

" Considérant que le défendeur Bouchard a contesté cette demande:

1o. Par une première exception invoquant des moyens insuffisants et qui a été en conséquence renvoyée par cette Cour sur défense en droit;

2o. Par une seconde exception alléguant que lors de l'institution de cette seconde action le délai pour l'exercice de la faculté de réméré susdite était expiré;

3o. Par une troisième exception disant que sur une action hypothécaire intentée contre lui par Préfontaine dans une cause No. 1462 des dossiers de cette Cour, il avait délaissé les immeubles en question; que par suite un nommé Moncatel a été nommé curateur à ce délaissement, et que c'est contre lui seul et non contre le défendeur que Trudel peut se pourvoir;

4o. Par une quatrième exception disant que les offres du demandeur Trudel ne sont pas suffisantes, notamment quant à la somme payée par Bouchard au Crédit Foncier, laquelle est de $1025 en capital, tandis que la somme mentionnée dans l'action comme offerte est de $125 seulement; que d'ailleurs l'action est vexatoire, le demandeur étant insolvable et n'ayant ni les moyens, ni l'intention de racheter les dits immeubles, n'ayant fait ses offres qu'au moyen de deniers empruntés pour quelques heures seulement, et n'ayant rien consigné en Cour du montant ainsi offert;

" Considérant qu'il appert aux pièces produites que le demandeur a exercé en temps utile, savoir le trente-et-un octobre 1881, avant l'expiration du délai

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à lui accordé, le droit de rachat par lui invoqué, et que la seconde exception du dit défendeur est en conséquence mal fondée.

"Considérant en second lieu que le délaissement allégué par le défendeur n'a pas dépouillé ce dernier de la propriété des immeubles revendiqués, mais simplement de la possession d'iceux; que cette possession n'a été confiée au curateur que temporairement, et que ce curateur ne pouvant élever aucune prétention à la propriété des immeubles délaissés, la revendication d'iceux par la présente action ne pouvait être portée que contre le défendeur avec qui seul la question du domaine de propriété du dit immeuble pouvait être jugée;

"Considérant en outre qu'il est établi en preuve que la demande sur laquelle a été fait le délaissement allégué par le défendeur est actuellement éteinte, la créance pour laquelle elle était portée ayant été payée et acquittée, et qu'en conséquence la troisième exception plaidée par le défendeur est aussi mal fondée.

"Considérant enfin qu'il est aussi prouvé que les offres faites par le demandeur au défendeur le 31 octobre 1881, étaient amplement suffisantes pour indemniser et rembourser ce dernier de tout ce qu'il avait droit de réclamer; que par suite le demandeur a par là, valablement exercé son droit de rémérer les immeubles vendus, lequel ne peut plus lui être maintenant dénié, que les offres par lui renouvelées par son action sont aussi suffisantes, et que la consignation des deniers offerts n'était pas nécessaire pour l'exercice de son droit, qu'en conséquence les moyens invoqués par le défendeur en sa dernière exception sont aussi mal fondés;

"Renvoie les exceptions et défenses du défendeur Bouchard," etc.

Judgment for Plaintiff.

John L. Morris, for plaintiff.
J. E. Robidoux, for defendant.
(J. L. M.)

SUPERIOR COURT, 1883.

MONTREAL, 16TH JUNE, 1883.

Coram RAINVILLE, J.

No. 1916.

Ross et al, vs. *O'Leary*, and *O'Leary*, petitioner.

HELD:—That a person over seventy years of age is not exempt from imprisonment for contempt of Court.

The judgment of the Court fully explains the point decided:

"La Cour après avoir entendu les parties par leurs avocats contradictoirement sur la requête produite le 4 juin courant par le défendeur pour le faire mettre en liberté, examiné la procédure et les pièces produites, et la preuve, et délibéré;

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"Attendu que par sa requête le dit requérant allègue que le 20 août 1882, il aurait été arrêté en vertu d'un bref de capias émis en cette cause, lequel capias a été contesté par le dit défendeur requérant, et maintenu par jugement de cette Cour rendu le 30 novembre dernier, que quelques jours après un bref de saisie-arrêt après jugement aurait été émis contre le dit défendeur à la poursuite du demandeur, que sur une règle émise en cette même cause et déclarée absolue, le dit requérant a été condamné à être emprisonné dans la prison commune de ce district jusqu'à ce qu'il ait payé la somme de $255.16, et qu'en vertu d'un mandat d'arrestation émis sur la dite règle le dit requérant aurait été incarcéré;

"Attendu que le dit requérant allègue qu'il est âgé de plus de soixante-dix ans, savoir de soixante-treize ans, et qu'il a droit en conséquence d'obtenir sa libération;

"Attendu qu'il allègue en outre que le dit mandat d'arrestation est irrégulier et illégal en autant qu'il a été émis pour un montant plus considérable que celui pour lequel il a été condamné;

"Considérant que le dit requérant a prouvé qu'il est âgé de plus de soixante-dix ans, mais considérant que la dite règle a été émise parce que le dit requérant s'était rendu coupable de mépris de Cour en divertissant et cachant ses effets pour en empêcher la saisie;

"Considérant que les dispositions de l'article 793 du Code de Procédure Civile sont tirées du chapitre 87 des Statuts Refondus du Bas-Canada, lequel ne s'applique qu'à l'incarcération en vertu d'un capias, et qu'interpréter le dit article de manière à donner droit à toutes personnes âgés de plus de soixante-dix ans de se libérer, même quand elles auraient été emprisonnées pour mépris de Cour, serait contraire à la justice et mettrait les tribunaux dans l'impossibilité de faire exécuter leurs ordres;

"Considérant que le requérant n'a pas prouvé les autres allégations de sa dite requête;

"Rejette la dite requête avec dépens distraits à Maître J. P. Cooke, avocat des demandeurs."

P. B. Laviolette, for petitioner.
J. P. Cooke, for plaintiffs.
(J. K.)

SUPERIOR COURT, 1882.

(In Chambers.)

MONTREAL, 30th SEPTEMBER, 1882.

Coram Jetté, J.

[No. 24.

The North British and Mercantile Fire and Life Insurance Co. et al., vs. Lambe ès-qual.

HELD:—Where several plaintiffs are each claiming a right against the same defendant, or where several defendants are sued separately by the same plaintiff, and it appears that there is but a single question on the determination of which all the suits must depend, that the Court may in its discretion grant an injunction to stay proceedings upon the several contestations until the question involved therein shall be determined in an action brought specially for the purpose of testing it.

Jetté, J. La demande qui m'a été soumise en cette cause, soulève une question de procédure d'un intérêt considérable. Les diverses Compagnies d'Assurance demanderesses, requièrent un ordre provisoire enjoignant au défendeur, Inspecteur du Revenu pour le district de Montréal, d'avoir à suspendre toutes procédures dans 40 actions par lui intentées contre elles, pour le recouvrement de la nouvelle taxe imposée sur ces compagnies. Les faits qui ont donné lieu à cette demande peuvent se résumer comme suit :

La Législature de Québec, à sa dernière session, a voté une loi intitulée : "*Acte pour imposer certaines taxes directes sur certaines corporations commerciales*," (45 Victoria, chap. 22). Par l'article 3, § 2 de ce Statut, les taxes annuelles suivantes sont imposées aux Compagnies d'Assurance : Celles faisant affaires sur la vie seulement, $500; celles faisant affaires d'assurance de toute autre espèce, $400 pour une seule branche d'affaires, et $50 pour chaque branche d'affaires additionnelle ; enfin chaque compagnie, établie à Montréal ou à Québec, une somme annuelle de $100 pour son bureau ; et de $5 seulement dans tout autre endroit que Québec et Montréal.

Par l'article 5 de la loi, il est déclaré que cette taxe sera payée, chaque année, à l'Inspecteur des licences du district de Revenu dans lequel la compagnie a son bureau principal ; et qu'à défaut de payement cette taxe pourra être recouvrée par action portée par l'Inspecteur en son nom (art. 6) ; mais il ne sera pas accordé de frais contre l'Inspecteur dans aucune telle action par lui instituée, en vertu de cet acte. (art. 8.) Néanmoins, sur la recommandation du tribunal, le Trésorier de la province pourra, à sa discrétion, payer à la compagnie en faveur de qui jugement aura été rendu, les frais auxquels lui, le Trésorier, pourra juger que cette compagnie a équitablement droit.

Les diverses Compagnies d'Assurance faisant affaires à Montréal, mettant en question le pouvoir de la Législature provinciale de passer telle loi, ont refusé de payer la taxe. En conséquence l'Inspecteur du Revenu a intenté contre chacune d'elles une action pour la somme imposée. Comme ces compagnies sont au nombre de quarante, autant d'actions en Cour Supérieure ont été intentées et sont maintenant pendantes.

Toutes ces demandes, on le comprend, découlent de la même source, reposent

sur le même droit,—la loi provinciale;—si cette loi n'est pas constitutionnelle, aucune de ces actions ne peut réussir. Or c'est précisément la question que les diverses Compagnies d'Assurance veulent soulever, et faire décider par les tribunaux. Mais si chacune d'elles plaide séparément la même chose, dans l'action intentée contre elle, on voit de suite quelle somme énorme de frais entraîneront ces divers litiges pour n'arriver finalement qu'au même résultat, la décision d'une seule et unique question. Et comme le Trésorier de la Province pourra ne payer ces frais qu'à sa propre discrétion, si la décision finale lui est défavorable, les compagnies ont un intérêt considérable à tenter de réduire le chiffre de ces frais en demandant une seule adjudication sur la seule et unique question à soulever.

Dans ce but, ces diverses compagnies se sont réunies et dans une action intentée aux noms d'elles toutes, contre l'Inspecteur du Revenu, elles allèguent les diverses poursuites intentées contre elles, le fait que ces poursuites reposent toutes sur le même droit d'action, puis elles ajoutent que la loi que l'on invoque contre elles est inconstitutionnelle, et elles concluent en conséquence à ce qu'elle soit déclarée telle, et qu'en même temps il soit enjoint à l'Inspecteur du Revenu de suspendre toutes procédures dans les 40 actions par lui intentées jusqu'à ce que jugement soit intervenu sur leur demande.

Cette action étant pendante devant la Cour, les Compagnies demanderesses en icelle, s'adressent maintenant au Juge en Chambre, par requête appuyée d'affidavits, pour demander un ordre provisoire enjoignant à l'Inspecteur du Revenu d'avoir à discontinuer, dès maintenant, ses procédures contres elles.

Le procédé adopté dans l'espèce, de la part des dites Compagnies, est connu en Angleterre, sous le nom de *Bill of Peace;* voici ce qu'en dit *Kerr* dans son Traité des Injonctions, p. 134:

"In many cases the Courts of ordinary jurisdiction admit, at least for a cer-
"tain time, of repeated attempts to litigate the same question. To put an end
"to the oppression occasioned by the abuse of this privilege, Courts of Equity
"have assumed jurisdiction by perpetual injunction.

* * * * * * * * * * *

"In cases where there is one general common right to be established against
"several or a number of distinct persons, whether one person claims or defends a
"right against many, or *many claim or defend a right against one*, a Court of
"Equity will interpose in order to prevent multiplicity of suits, and instead of
"suffering parties to be harassed by a number of separate suits, each of which
"only decides the particular right in question between the plaintiff and the
"defendant to it, *it will at once determine the right* by a decree, having previ-
"ously, if necessary, directed an issue for its information. It is no objection to
"the bill that the plaintiffs may each claim a right against one defendant, or
"several defendants may each have a right to make a separate defence against
"the claim of one plaintiff, *provided there be only one general question to be*
"*settled which pervades the whole.* It is enough that there is one general ques-
"tion as between the one plaintiff and the several defendants, or the one defen-
"dant and the several plaintiffs. If the parties are so numerous that it is im-

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"practicable to bring them all before the Court, a bill may be filed against "some of the parties, provided so many persons are made parties that their "interests shall be such as to lead to a fair and honest support of the common "interest; and when a decree has been obtained with respect to the individual "whose interest is fully and fairly established, the Court on the footing of the "former decree will carry the benefit of it into execution against other indivi- "duals who were not parties."

Comme on le voit, le remède est ici indiqué de la manière la plus claire et la plus complète, et la jurisprudence en Angleterre est conforme à ces principes. Aussi le défendeur ne conteste-t-il pas la doctrine énoncée par l'auteur que je viens de citer, mais il soutient que cette procédure introduite en Angleterre, à raison de l'organisation particulière, et de la jurisdiction toute spéciale des tribunaux qui l'autorisent, est non-seulement inapplicable, mais encore tout-à-fait antipathique à notre système de procédure, tiré surtout du droit français.

Cette objection est-elle fondée? Il me paraît évident qu'elle ne l'est pas. Deux principes fondamentaux forment en effet, la bâse do notre système de procédure : le premier, c'est qu'il n'y a pas de mal sans remède, et le second, c'est qu'il n'y a plus, pour l'exercice d'un droit, de ces formules rigoureuses qui équivalent si souvent à un deni de justice. Ces deux principes si féconds, dominent toute la matière, et partant d'une bâse aussi large et aussi élastique, il me paraît impossible d'arriver à la conclusion que le remède si équitable, si pratique et si sensé que nous indique ici le droit Anglais, serait inadmissible dans notre système et répugnerait aux règles si sages et si complètes de l'ancienne procédure française. Il est vrai qu'on ne trouverait peut-être pas, en France, un mode aussi clairement indiqué pour le cas soumis, que celui que nous offre ici la procédure anglaise, mais le même principe se rencontre clairement dans les dispositions de l'Ordonnance de Louis XV, du mois d'août 1737, Titres 2 et 3, au sujet du *Règlement de Juges*. Et je trouve dans *Merlin* et *Pigeau* des applications de ces dispositions qui vont assez loin pour indiquer, qu'en semblable cas, on n'aurait pas hésité à accorder le remède demandé. Merlin, 6, Questions de Droit, p. 626, au mot : *Règlement de Juges*, examine la question suivante : "Lorsqu'après s'être pourvu devant deux tribunaux différents contre deux parties différentes, un demandeur essuie de la part de chacune de ces parties, une *exception qui rend le même objet litigieux* devant les deux tribunaux à la fois, ce demandeur peut-il par voie de règlement de juges, obtenir que les deux affaires soient renvoyées *à un seul et même tribunal ?*" et il conclut dans l'affirmative, citant à l'appui de son opinion un arrêt de la Cour de Cassation du 3 pluviôse, an 10.

Ainsi dans un cas où deux causes étaient pendantes devant *deux tribunaux différents*, et où le demandeur avait deux adversaires différents, on a trouvé moyen d'éviter un conflit de jurisdiction, en ordonnant de réunir ces deux causes devant *un seul et même tribunal*. Le cas traité par Merlin n'est sans doute pas le même que celui qui se présente dans l'espèce actuelle, mais il n'en indique pas moins que les tribunaux ont une latitude considérable pour venir au secours d'une partie que l'exercice simultané de divers droits d'action peut mettre dans une situation illogique et désavantageuse.

"Pigeau, 1er vol. p. 149, traitant : " Des exceptions qui se proposent, lorsque l'affaire est portée à une branche autre que celle où elle devait l'être," dit : " Nous avons fait voir, en exposant les raisons du partage de l'administration de " la justice en plusieurs branches, que l'intérêt public s'opposait à ce que l'on " portât à une branche une affaire départie à une autre, par le Souverain.

" Ainsi, cette incompétence, que l'on appelle incompétence *ratione materiæ*, " parcequ'elle procède de la matière, peut être proposée en tout état de cause, " après avoir défendu au fond, quand même les juges auraient rendu une sen- " tence interlocutoire ; parce que le silence et les conventions des particuliers ne " peuvent déroger à ce qui est de droit public.

" Cette incompétence s'oppose de deux manières, la première *en faisant révoquer* " *par la juridiction où l'on veut être renvoyé*, l'assignation qui a été donnée, par " exemple, si l'on a été assigné à l'Election et que l'on prétende devoir être " traduit au Châtelet, on présente requête à ce dernier tribunal qui, sur l'exposé " du fait, *révoque l'assignation et fait défense aux parties de procéder ailleurs* " *que par devant lui.*" Pigeau ajoute qu'il peut arriver sans doute, que les parties n'obéissent pas à cette injonction et continuent de procéder devant le premier tribunal, d'où conflit d'autorité, mais que l'on procède, en ce cas, par voie de règlement de juges, devant le Conseil du Roi, pour faire déterminer quel tribunal restera saisi.

Il n'y a pas encore là, sans doute, similitude exacte avec le cas soumis, mais on voit cependant qu'en France, les ressources de la procédure n'étaient pas aussi limitées qu'on paraît vouloir le soutenir ici. Si, dans l'espèce rapportée par Pigeau, un tribunal pouvait sur requête dans une cause pendante devant un autre tribunal, enjoindre aux parties litigantes d'avoir à ne procéder que devant lui et de cesser toutes poursuites devant l'autre juridiction, n'est-il pas évident qu'il n'y a ici, dans la demande faite par les Compagnies d'Assurance, rien d'antipathique à un système qui offrait de telles ressources au plaideur ? Et maintenant si l'on prend en considération les nombreuses règles qui, dans notre système, au sujet du *concours d'actions*, de la *connexité*, de la *litispendance*, tendent toutes à empêcher les conflits de juridiction, à protéger les parties contre le cumul des demandes, et à leur éviter des frais inutiles, il me paraît impossible de dire que nos tribunaux seraient impuissants à rendre justice aux parties dans un cas comme celui qui m'est maintenant soumis.

Reste une dernière objection que l'on a faite à la demande d'injonction des demanderesses, c'est qu'en procédant ainsi directement, par voie d'action, pour faire décider de la constitutionalité d'une loi, on bouleverse notre ordre politique et l'on enlève virtuellement au pouvoir fédéral le droit de désaveu pour l'attribuer aux tribunaux. Et l'on ajoute qu'il n'y a pas, en Angleterre, d'exemples d'une telle procédure, où l'on aurait, par voie d'action directe, mis en question la légalité d'un règlement ou d'une loi.

Il est évident que du moment que l'on entre sur ce terrain nouveau, ce n'est plus en Angleterre que l'on doit aller chercher des précédents. Le fonctionnement de notre système fédéral, tout différent du système politique de la mère patrie, crée nécessairement des situations nouvelles, des besoins nouveaux, qui

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ne peuvent pas exister là-bas, mais auxquels il nous faut pourvoir. Le droit des tribunaux d'apprécier ici la constitutionalité d'une loi, n'est plus mis en question et semble s'imposer par la force même des choses. Il n'est donc pas douteux que si cette question de la constitutionalité de la loi qu'invoque ici l'Inspecteur du Revenu, était soulevée par les Compagnies d'Assurance, par des plaidoyers dans les causes intentées contre elles, la Cour serait forcée d'en prendre connaissance et de prononcer. La demande actuelle n'attribue aucun pouvoir plus grand à ce tribunal et ne requiert rien de plus. Il n'est pas douteux, toutefois, que si cette demande avait été faite, avant toute action de la part de l'Inspecteur du Revenu, avant que lui-même ait invoqué devant la Cour, cette loi que l'on conteste, la procédure ainsi adoptée aurait été, avec raison, qualifiée d'empiètement sur les pouvoirs de la juridiction administrative. Mais il est je crois de principe que du moment qu'un officier public invoque lui-même une loi devant les tribunaux, il soumet par là même la constitutionalité de cette loi à l'autorité, dont il requiert le secours, et que le tribunal peut alors l'apprécier et la juger contradictoirement avec lui. Or, c'est ainsi que la question se présente aujourd'hui, dans la cause actuelle.

Pour ces motifs, je crois donc devoir accorder l'injonction demandée par les Compagnies d'Assurance, mais en même temps, comme les délais judiciaires pourraient mettre en péril le recouvrement de la taxe, par un changement possible dans la situation des compagnies, lors de la décision finale de la cause, j'ordonne que les sommes réclamées par l'Inspecteur du Revenu seront déposées dans une banque, par chacune des dites compagnies, pour être payées à qui de droit, lors de la décision finale du présent litige.

The order of the Judge is to the following effect:—

"Après avoir entendu les parties contradictoirement sur la requête des compagnies demanderesses, requérant pour les raisons mentionnées en la dite requête un ordre enjoignant au défendeur ès-qualité d'avoir à discontinuer et cesser tous procédés par lui commencés dans diverses actions intentées par lui devant la Cour Supérieure de ce district, contre les demanderesses, pour le recouvrement de certaines taxes réclamées en vertu de l'acte 45 Vic., ch. 22, jusqu'à ce que jugement soit rendu en la présente cause;

"Considérant que par leur présente demande les demanderesses mettent en question la constitutionalité de la loi provinciale, en vertu de laquelle les dites taxes sont réclamées, et qui forme la base du droit en vertu duquel le défendeur a procédé contre elles;

"Considérant que les demandes du défendeur contre les demanderesses sont au nombre de 40, et qu'il appert par la requête des demanderesses que la même question de constitutionalité de la dite loi provinciale doit être soulevée dans chacune de ces instances;

"Considérant que dans ces circonstances il importe à une bonne et saine administration de la justice que les diverses parties demanderesses en la présente cause ne soient pas exposées à une accumulation de frais inutiles, par des contestations multipliées au sujet de la même question, lorsqu'une seule

adjudication peut et doit suffire pour apporter le remède requis et déterminer les droits des parties ;

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"Considérant néanmoins que les délais judiciaires pourraient mettre en péril les réclamations du défendeur ès-qualité contre les demanderesses, par un changement possible dans la situation de celles-ci, ou de quelques-unes d'elles, au moment du payement des sommes réclamées, s'il y a lieu ;

"Nous, soussigné, l'un des juges de la Cour Supérieure, siégeant dans et pour le district de Montréal, accordons la dite requête des demanderesses, et en conséquence enjoignons au dit défendeur ès-qual. d'avoir à cesser et discontinuer tous procédés par lui adoptés contre les dites compagnies demanderesses dans les diverses actions par lui intentées contre elles, pour le recouvrement des sommes qui seraient par elles dues en vertu du dit acte 45 Vic., ch. 22, et ce jusqu'à nouvel ordre de cette cour ;

"Mais sous la condition du dépôt au bureau de la banque de Montréal, par chacune des dites compagnies, de la somme réclamée d'elle par le défendeur comme susdit, pour être la dite somme payée ou remise à qui de droit en temps et lieu ; chacune des dites compagnies ne pouvant avoir de bénéfice de la présente ordonnance que sur rapport et dépôt au greffe de cette cour, dans chacune des dites causes, d'un certificat du dépôt de telle dite somme.

"Mandons, etc., ordonnons, etc."

Kerr & Carter, for plaintiffs.
Carter, Q.C., & Laflamme, Q.C., counsel.
Lacoste, Globensky & Bisaillon, for defendant.
Church, Q.C., counsel.

(J. K.)

SUPERIOR COURT, 1881.

MONTREAL, 24TH DECEMBER, 1881.

Coram JOHNSON, J.

No. 86.

Ouimet vs. *Robillard.*

HELD :—That taxes which are made part of the rent by the lease are subject to the five years' prescription.

PER CURIAM. The question in this case is as to the amount due by the defendant for rent and taxes. He pleads that everything due before 1st May, 1876, is prescribed, and offers the balance, with costs.

The Court is of opinion that the defendant is right, and that his plea ought to be maintained. The rent is the price which the lessee agrees to pay for his occupation. (Art. 1601 C.C.) The taxes, when they are made a part of the rent by the lease, are subject to the five years' prescription. (See art. 2250 C. C.) There was a case cited from the 21st L. C. Jurist, p. 300—the case of

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Guy v. *Normandeau*—where the defendant's plea of prescription as to taxes was overruled by Mr. Justice Belanger. I sent for the record, and found that it was not as lessee, but as co-proprietor, *i.e.*, as a *grevée de substitution*, that the party was there held liable. I still hold to my opinion that, as between lessor and lessee, where it is agreed between them that the lessee is to pay so much, whatever the items—they all make up the rent which the landlord is to get from his tenant for the enjoyment of the thing leased. Judgment for $137:50, and costs as in an action for that amount not contested.

P. M. Durand, for plaintiff.

Robillard, defendant in person.

(J. K.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 19TH SEPTEMBER, 1883.

Coram DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 514.

HENRY JULIUS FISK,

(*Defendant in the Court below,*)

APPELLANT;

AND

VIRGINIA GERTRUDE STEVENS,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—1.—Where parties were married in the State of New York, and their matrimonial domicile was in that State, but the husband afterwards established himself permanently in Montreal, Province of Quebec, where divorce is not recognized by law, that a decree of divorce subsequently obtained by the wife in the State of New York (the husband appearing and not contesting the divorce suit) had no binding effect in the Province of Quebec.

2.—That the parties being still husband and wife, the latter was not entitled, without proper authorization, to bring an action against her husband, for an account of her separate estate which had been placed in his hands for administration.

3.—That the absence of authorisation might be pleaded by a plea to the merits.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), 25th February, 1882, maintaining the respondent's action.

The case for the plaintiff (respondent) was that on the 7th of May, 1871, the plaintiff and defendant, both being domiciled in New York, were duly married in that city without ante-nuptial contract. Before and at the time of the marriage the plaintiff had a fortune in her own right amounting to over $220,000, and by the law of the State of New York, applicable to this case, she retained the separate ownership and entire control of this fortune after her marriage. Very soon after her union with the defendant the plaintiff entrusted to him the management of her fortune, and put in his possession all her money, valuable securities and property of every kind. During several years the defendant had possession of this fortune and administered it, making occasional pay-

ments to plaintiff on account of the revenues. In 1876 the plaintiff, dissatisfied with defendant's management of her fortune, demanded the return of all her property, with an account of his administration. Thereupon the defendant handed back to plaintiff a very small portion of her valuable securities in the shape of bonds, but gave her no account, and has ever since refused to do so. In December, 1880, the plaintiff obtained from the Supreme Court of New York a divorce absolute in her favor on the ground of her husband's adultery. To this demand for an account the defendant pleaded first, by demurrer, on the ground that it appeared from the declaration that the divorce therein alleged had been obtained while the consorts were domiciled in Canada, and the divorce was in consequence null. This demurrer was dismissed by Mr. Justice Rainville, inasmuch as the alleged invalidity of this divorce could not prevent the plaintiff from claiming an account from the defendant, and as her action would lie even if she were still the wife of the defendant.

The defendant then raised the same point by a plea to the merits in which, while admitting the marriage, he alleged that immediately thereafter the consorts removed to Montreal, with the intention of making it the seat of their permanent and principal establishment; that at the time of the divorce they were domiciled in Montreal, and that the divorce is in consequence null and void.

The plaintiff contended,

1st. That by the laws of the State of New York no community of property is created between persons who are married without ante-nuptial contract.

2nd. That at the time of her marriage the plaintiff had the fortune stated in the declaration, amounting to about $224,000.

3rd. That shortly after the marriage the defendant obtained possession of the plaintiff's fortune as agent and trustee, and administered the same until 25th of September, 1876.

4th. That the defendant returned to the plaintiff on the date last mentioned only a small portion of her valuable securities, and has never rendered an account of his gestion of her fortune.

5th. That in the month of December, 1880, the plaintiff was duly divorced from the defendant, by decree of the Supreme Court of New York, on the ground of defendant's adultery.

6th. That the effect of the said divorce is as complete and extensive as a divorce granted by the Parliament of the Dominion of Canada.

Kerr, Q.C., for the defendant in the Court below, contended: 1st. That the decree of divorce pronounced by the Supreme Court of the State of New York is null and void and of no effect, inasmuch as at that time neither of the parties to the action were domiciled in the State of New York.

2nd. That no consent or appearance by the present defendant could give jurisdiction to that Court to pronounce such decree.

3rd. That defendant being domiciled in the Province of Quebec no Court had any jurisdiction to dissolve the marriage.

4th. That plaintiff not being authorized either by him or by this Court to institute this action, but bringing the same as if she were a spinster, the action

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could not be maintained in the event of the divorce being held null and void, for want of power to *ester en justice*.

TORRANCE, J., observed:—There is no question as to the facts of this case. The parties were domiciled in New York when they married, and did not change their domicile for some time. The chief question is one of law, whether the decree of the Supreme Court of New York was operative to dissolve the marriage at a time when the domicile of the husband was in Lower Canada. Bishop, Marriage and Divorce, Vol. 2 (728). "When the wife is plaintiff in a divorce suit, it is the burden of her allegation, that she is entitled, through the misconduct of her husband, to a separate domicile. If she fails to prove this, she fails in her cause; if she proves this, she establishes her cause. S. 125 (730). And the doctrine that for purposes of divorce, the wife may have a domicile separate from her husband, is well established in the American tribunals. § 156 (731).

* * * Having, therefore, arrived at this conclusion, we shall have no difficulty in settling, upon principle, that, as a question free from any statutory incumbrance, the Courts of the actual *bonâ fide* domicile of either may entertain the jurisdiction. If it were not so, then both States, where the domicile of the one was in the one State and that of the other was in the other State, would be deprived of the right to determine the status of their own subjects."

This appears to be a most reasonable doctrine, and should be followed by the Court in this case. The husband having committed adultery, the wife had a right to complain of it before the Court of her matrimonial domicile, which was then her actual domicile, and the husband acquiesced in the proceeding by his appearance therein and submission to the jurisdiction. It is unnecessary to discuss the ancillary questions started by the defendant. His plea is overruled and the order for the account made."

The text of the judgment in the Court below was as follows:—

"The Court, etc.

"Seeing that it is proved, that, by the laws of the State of New York, no community of property is created between parties marrying without ante-nuptial contract;

"Seeing that, at the time of her marriage with defendant, plaintiff had the fortune stated in the declaration amounting to $224,000, and that, shortly after the marriage, defendant obtained possession of plaintiff's fortune, as her agent and trustee, and administered the same until the 25th of September, 1876;

"Seeing that defendant returned to plaintiff at the date last-mentioned only a small portion of said fortune;

"Seeing that, in December, 1880, plaintiff was duly divorced from defendant by decree of the Supreme Court of New York, and the effect of said divorce, so far as plaintiff was concerned, was as complete and extensive as if they had never been married;

"Doth overrule defendant's pleas and grant the conclusions of the declaration.

"In consequence it is ordered and adjudged that defendant, within thirty days after service upon him of this judgment, render to said plaintiff a true, faithful and complete account of his administration and management of her property and valuable securities so placed in his possession and control, during the whole period of his said control and management thereof, saving plaintiff's right to contest the said account in due time and place; and, in default of said defendant tendering such account within the said delay, he is hereby condemned to pay and satisfy to plaintiff the sum of $220,000, the whole with costs *distraits, etc.*"

Kerr, Q. C., for the appellant:

There seems to be very little difference or difficulty with regard to the facts of the case, which, briefly stated, are as follows: In 1871 Mr. Fisk, the appellant, marries the respondent in New York, that place being, without a doubt, their domicile at that time. In 1872 Mr. Fisk and his wife leave New York and come on to Montreal, where they take up their residence, with the express intention of permanent settlement, as shown by the evidence of the appellant's witness Miller, who produces Mr. Fisk's own declaration in writing of such intention made by him (Fisk) when passing his goods duty free through our Custom House. (See a copy of this declaration in Appendix B.) Ever since that time (1872) the appellant has continued to reside and carry on business here, and still does so, as shewn by the evidence of the appellant's witnesses Whitehead and Chapman; and there can, therefore, be no doubt whatever that, during the last ten years, the appellant's domicile has been the Province of Quebec. Some time in 1876 Mrs. Fisk leaves her husband, departs from Canada, in fact, and takes up her residence, very shortly afterwards, in France, where she has resided ever since, with the exception of some short intervals of temporary residence with her own relatives in New York.

In October, 1879 (as shewn by the evidence of her own witness Shelburne), the respondent leaves France for New York, where in February, 1880, she institutes a suit against her husband for a divorce, which, in December, 1880, is granted to her by the New York Supreme Court.

On the strength of this pretended divorce the respondent now assumes the position of a single, unmarried woman, and, in her own name, without any authorization, she institutes in our Courts here, in the Province of Quebec, the present action against her husband to compel him to account for certain alleged private property of her own, which is said to have been delivered by her to her husband as her agent since their marriage.

In this case everything turns upon the question of the validity or invalidity of the divorce obtained by the respondent in the New York Supreme Court. If it were valid and effective in our Courts, then, of course, the respondent, being released from the matrimonial tie, would to all intents and purposes, be a single woman, competent to institute the present action against her former husband, in her own name and without any authorization. If, however, on the other hand, the divorce is invalid, as the appellant submits it is, the respondent is still a

married woman, and cannot, under the laws of this Province, sue in her own name without the authorization of her husband or of a judge.

In considering the question of the validity of the pretended divorce we have to keep in view the fact that, after marrying the respondent the appellant abandoned the New York domicile, and that, long before the institution of his wife's suit for divorce, he, accompanied by his wife, acquired in the Province of Quebec a new domicile, which he has ever since retained: C. C. L. C., Art. 80; Dicey on Dom. Rule 7, p. 5; Rules 16, 18, p. 8; Guthrie's Savigny, pp. 54, 59.

We have in the next place also to keep in view the well-established principle that a married woman cannot acquire a domicile of her own apart from and independently of her husband: C. C. L. C., 83; Dicey, p. 106; G.'s Savigny, p. 56; 1 Dem. No. 357.

And, thirdly, we must above all remember that in matters of divorce the domicile of the consorts is the test and only basis of the jurisdiction of the Court assuming to deal therewith; in other words, divorce can only be pronounced if the law of the State where the consorts are domiciled permits it, and only in accordance with the law of that State: Fiore D. Int. Privé, No. 131; Dicey's Rule 46, pp. 225, 227, 235, 240, 241; G.'s Savigny, 248.

The domicile of the present appellant, and, consequently, that of the respondent, being the Province of Quebec, at the time of and before and since the institution of the divorce suit in question, and the Court of their domicile being the only Court to which recourse could be had for a divorce, it is clear that no Court outside the Province of Quebec could legally decree a dissolution of marriage of these parties; and it is clear, moreover, that there being no law of divorce here in this Province, these parties, while so domiciled here, could not legally obtain any divorce at all, except by means of a special Act of the Dominion Parliament; and, therefore, any divorce granted by a foreign Court must undoubtedly be invalid and of no force or effect whatever in this Province.

It seems to be contended by the respondent that because the appellant appeared in the divorce suit by his attorneys without declining the jurisdiction of the Supreme Court of New York, he thereby rendered the decree, subsequently granted, good and valid. It seems also to be contended by the respondent that she acquired for herself a domicile in New York by a short temporary residence there, just before the institution of the divorce suit. Now, it is respectfully submitted that neither of these contentions has the slightest legal foundation. The respondent's only proper course, if she wished to obtain a valid dissolution of her marriage, was to have made an application to the Parliament of Canada. As the wife of a domiciled inhabitant of this Province she had no other course open to her. Persons domiciled in a State cannot be permitted, in order to evade the laws thereof, on the subject of divorce, to take advantage of the laws of another State, so as to obtain such divorce in that other State, whilst they remain domiciled in the first-mentioned State. Such a proceeding would be against *l'ordre public*, and could on no account be countenanced.

So long as persons are domiciled in Quebec they are governed by its laws, and cannot obtain a divorce from any *judicial* tribunal whatever.

It is submitted, therefore, that this pretended divorce is altogether invalid, and of no effect in this Province; and that the respondent can only be looked upon, by our Courts, as a married woman, subject, along with her husband, the appellant, to the laws of the Province of Quebec, their present domicile (C. C. L. C., Art. 6); that, therefore, she cannot sue any person whatever (and certainly not her husband) in her own name, without the authorization of her husband or of a Judge; and that, having, in the present action, sued in her own name, without any such authorization, the action is wrongly brought, and ought to have been dismissed in the Court below.

Under these circumstances the appellant trusts that the judgment appealed from will be reversed.

E. Lafleur, for the respondent:—

The appellant met the respondent's present demand for an account by three pleas: a demurrer, a peremptory exception, and a general denial. The demurrer asked that the action be dismissed, because it appears from the declaration that the divorce therein alleged had been obtained while the appellant was residing in Canada. This demurrer was dismissed by his honor Mr. Justice Rainville, inasmuch as, even if the divorce were invalid, the respondent would still have the right to claim an account of appellant's management of her fortune, and as her action would lie even if she were still the wife of the appellant.

By his second plea the appellant raises the same point, and says that the divorce set up in the declaration is null and void, inasmuch as it was obtained while the consorts were domiciled in Canada, and the respondent is not authorized to institute the present proceedings. The plea also alleges that immediately after their marriage the consorts removed to Canada, with the intention of making it their permanent and principal establishment, but this is not borne out by the testimony of the witnesses examined for the defence, and is disproved by the appellant's answers to interrogatories on *faits et articles*. The allegation was probably inserted with a view of showing that the matrimonial rights of the consorts were governed by the laws of Quebec, but the proof clearly shows that *it was fully eighteen months* after the marriage that they came to Canada. As the evidence sufficiently establishes that the intended domicile of the consorts at the time of the marriage was New York, it follows that their proprietary rights and status were and have ever since been governed by the laws of the State of New York. The respondent deems it almost superfluous to cite authorities for a doctrine so well established in our courts (See *e. g.* Rogers vs. Rogers, 3 L. C. J. 65); and indeed it was conceded at the trial by the appellant's counsel that the matrimonial rights and status of the parties were governed by the laws of New York, and that, consequently, no community of property had ever existed between them.

It will thus be seen that the only points raised by this plea, and the only reasons therein given for asking the dismissal of the action, are: 1st, that the

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respondent is still the wife of the appellant; and, 2nd, that she is not authorized to institute the present proceedings.

As regards the first point, the respondent submits that even if she were still the wife of the appellant, her action to force him to account would still be perfectly good, since her personal and matrimonial status must be regarded as governed by the laws of the State of New York, where she would enjoy all the rights and powers of a *feme sole* as regards her private property. This was expressly held by his honor Mr. Justice Rainville in dismissing the demurrer. Respondent submits that even under our law there would be nothing to prevent a wife separate as to property from claiming an account from her husband, who had been administering and in possession of her fortune.

As to the want of authorization (on the hypothesis that the divorce is not valid), respondent submits that the point has been improperly raised by a plea to the merits, instead of by preliminary exception. (Antaya et vir vs. Dorge et al., 6 R. L., p. 727.)

Besides, even if the Court should hold that the wife ought to have obtained an order to authorize her in this suit, the respondent feels confident that she would not be put *hors de cour* at this stage of the proceedings for want of this formality. Believing herself to be validly and absolutely divorced from her late husband, in virtue of a decree in which he acquiesced by appearing in the suit, and which he has never since questioned or attempted to set aside, the respondent took the quality and status given her by this solemn unattacked decree, and entered suit in the Court below as a *feme sole*. Under these circumstances the respondent feels sure that if the divorce should be deemed inoperative, this Court will unanimously authorize her *séance tenante*. A similar application was made at the hearing in the Court below by respondent's counsel, but as the honorable judge held that the divorce was perfectly good and valid, the application was of course superfluous.

And the respondent is convinced that a renewal of this application before this Court will be equally superfluous, inasmuch as the decree of divorce which she invokes in her declaration is perfectly valid, and has the force of *res adjudicata* against the *appellant* at all events.

In the first place, respondent submits that the appellant is estopped from setting up the invalidity of this divorce, inasmuch as he appeared in the suit by his attorneys, without declining the jurisdiction of the Supreme Court of New York. Under any system of law, such general appearance binds the defendant to the decree of the Court to which he has submitted.

Dicey, on Domicil (1879), p. 233, citing Zyclinski vs. Zyclinski (2 Swab. & Tr. 420), lays down the rule that the English Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the institution of proceedings for divorce, where the defendant has appeared absolutely and not under protest. In the case just cited (see the report of it in L. T. R., N. S., Vol. 5 (1861-2), p. 690), the defendant first appeared without protest, and then tried to file an answer objecting to the jurisdiction of the Court by reason of his want of English domicile, and it was held that he was too late to raise such objection.

Dr. Swabey, in reporting the case of Bond *vs.* Bond (2 Sw. & Tr. 94), has inserted a head note as inferential to the opinion of the Judges that: "*Semble*, "if a foreigner appears to a citation otherwise than under protest, he submits "himself to the jurisdiction of the Court."

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In Callwell *vs.* Callwell (3 Sw. & Tr. 259), the case was that of Irish parties, an Irish marriage, and both parties domiciled in Ireland. In the report of the decision in this case, it appears that "there was some discussion amongst the "learned judges as to the jurisdiction of the Court, to dissolve an Irish marriage "upon the facts admitted and proved, but they considered that, *as the wife had* "*submitted to the jurisdiction of the Court*, they might pronounce the decree "prayed."

Lord Justice Brett, in Niboyet *vs.* Niboyet (4 Law Reports, P. D. 18), referring to the decree in Callwell *vs.* Callwell (*sup. cit.*), adds his approval of the doctrine there enunciated by saying: "This decision must be supported "on a rule of pleading which is recognized in one of the stages of Wilson *vs.* "Wilson as still in force."

Lord Penzance, in the last-mentioned case (L. R., P. & D., 438-9), ruled identically as above indicated in the case of Zycinski *vs.* Zycinski under very similar circumstances.

Wharton, Confl. of Laws, ch. IV. § 233, *sub fin.* (p. 222), citing Kinnier *vs.* Kinnier, 58 Barbour, 424. See also the decision at special term in this case, reported in 53 Barbour, 454, showing that even if collusive appearance were established neither of the parties could set up their own fraud. The case afterwards came up for review before the Court of Appeals, and the judgments of the Special and General Terms of the Court below were sustained by the concurrence of all the judges. See opinion by Chief Justice Church, reported in 45 N. Y. 430, 544.

Bishop, Mar. & Div. (1864), § 760 (Vol. II., p. 597), says: "According "to a very familiar principle of law, however, one could not be permitted to "set up a fraud to which he was himself privy in obtaining the sentence. And "a still broader principle has been laid down, that only strangers to the sentence "can make, on a collateral proceeding, this averment of fraud."

In the present case no collusion is alleged or proved, and, *a fortiori*, the appellant cannot be heard to call in question the validity of a decree to which he voluntarily submitted.

In the next place respondent submits that, apart from the question of the defendant's appearance in the suit for divorce, the Supreme Court of New York had jurisdiction to pronounce the decree in question.

The question of the competency of any Court to pronounce a divorce between persons validly married is one which has called forth a variety of answers from different writers on Private International Law, and the Courts of different countries have applied divers criteria for the determination of the proper forum in such matters. As our own reports do not appear to contain any cases bearing

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on the question, this Court will doubtless select from the variety of rules offered for the solution of the problem those which are most conformable to the spirit of our own laws and to equity.

The French authorities lay great stress on the *nationality* or *allegiance* of the parties, and when (as in the present case) this coincides with the *lex loci contractus* and the matrimonial domicile, no French Court would hesitate to recognize the validity of a divorce pronounced by such a forum.

Merlin, Répertoire vo. "Divorce" *re* McMahon, *id. ibid.*—vo. "Jugement," § VII. sur arrêt du 10 mars, 1807, Champeaux-Grammont; Fœlix, Droit International Privé, (1866) vol. I., p. 68, note (*a*).; Laurent, vol. I., § 94 *et seq.*; C. Cass., 18 fev., 1818, Gaudi c. Kellermann, S.-V. 15-18, 1, 437; C. Cass. Civ. 28 fev., 1860, Buckley c. le Maire, du 10e arrondissement de Paris, S.-V. 60-2-196; Arret du 6 juil., 1860, Agen: Taillandier c. Herreros, S.-V. 60, 2, 357; C. Cass. Civ., 28 mars, 1878, Princesse de Beauffremont c. Prince de Beauffremont, S.-V. 78-1-193, C. Cass. Civ., 15 juillet, 1878, Plaquet c. Maire de Lille, J. du Palais, 1878, p. 789.

The Italian authorities are at one with the French in regarding nationality as the test. See Fiore, Droit International Privé, trad. par P. Pradier-Fodéré (Paris, 1875), pp. 226, *sqq* § 131.

In Scotland, from a very early period, the Courts have taken jurisdiction in cases of divorce *a vinculo*, without much regard to the permanent domicile of the parties at the time of the institution of the suit. It seems to have been sufficient that a citation, which would found a jurisdiction in ordinary civil cases, should be served upon the defender. Thus, personal service might be made within the country, or at the place of sojourn after forty days of residence, or service might even be made *edictally* where the parties were of Scotch origin and marriage, although, at the time of suit, neither were domiciled in Scotland. This was the case in Pirie vs. Lunan (Fergusson's Reports, 1817, Appen. 260). The parties were Scotch, and were married in Scotland, but afterwards became domiciled in London. The citation in the suit of the wife was proclaimed edictally, and even the oath of calumny of the pursuer was taken by commission at her domicile in London.

Lord Brougham, in Warrender vs. Warrender, discussing the judicial authorities of Scotland, refers to Mr. Fergusson as carrying great weight, and quotes him as follows:—"According to these precedents, the municipal law of Scotland is also now applied by the Consistorial Judicature in all cases of divorce, without distinction, whether the parties are foreign or domiciled subjects of this Kingdom; whether, when foreign, the law of their own country affords the same remedy or not; and whether they have contracted their marriage within this realm; provided only that they become properly amenable to the jurisdiction of this *forum*."

James, L. J., in Niboyet (L. R. 4 P. D. 7), discussing the principle of domicile (Nov., 1875), says:—"The Scotch Courts have exercised jurisdiction in entire disregard of any such principle."

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Mr. Burge, Col. and For. Law, Vol. I., p. 670, says of the Scotch decisions since 1692 :—" Neither the place in which the marriage was celebrated nor that in which the parties were permanently domiciled, formed a subject of enquiry.'

Mr. Bishop in the latest edition of his work on Marriage and Divorce (1881), vol. 2, § 140, includes in his notice of the present condition of the Scotch Law the remark that—" It is often stated in English cases as conceded that the Scotch Law rejects the rule of the domicile:" and he quotes James, L. J., *ut supra*.

The history of English judicial opinion on the subject reveals the fact that in spite of the number of decisions rendered on this point, the law is still in an unsettled state. Before the Divorce Act, 20 and 21 Vict. (1858), the doctrine was that an English marriage could not be dissolved by the decree of a foreign Court. (See Lolley's case, 2 Cl. & Fin. 567 ; McCarthy v. De Caix, 2 Cl. & Fin. 568.) One principle on which this doctrine was founded was that of the *lex loci contractus*, but another principle was the condition of the English law at that time, by which marriage in England was indissoluble as by a process of the law, but only by Act of Parliament. And, thirdly, there was the principle of the allegiance of English subjects to the English Crown and the jealousy of the law against English married subjects going to a more indulgent jurisdiction to have their marriage status discharged, and then returning to England to enjoy a new privilege not recognized by English law, which had given rise to the Stat. 1 James I, against such practices. Under this doctrine it was sufficient if only one of the parties was of English origin and domicile at the time of the marriage in England (see McCarthy v. De Caix above cited), or if, the parties being English, the marriage took place under the authority of English law, as at Gibraltar.

But since 1858 this theory seems to have been abandoned, at least so far as to allow foreign Courts, where jurisdiction is otherwise properly established, to dissolve English marriages for causes which would be sufficient in England; for now the indissolubility of an English marriage could no longer be assigned as the policy of the English jurisprudence. On the other hand, however, the English tribunals have adopted various criteria to determine and enlarge their own jurisdiction to pronounce divorce, which have greatly eaten into the rule of the husband's domicile, if not quite overthrown it. They have used for this purpose the three principles of—1st, English origin ; 2nd, English marriage between British subjects ; and, 3rd, Appearance in the suit without protest.

The principles on which the jurisdiction of the Divorce Court in England since 1858 is founded may therefore be stated as follows:—First. There can be no question that when both parties are domiciled in England the English Divorce Court will be competent to dissolve the marriage. No question of Private International Law is involved in such case.

Secondly. English tribunals will take jurisdiction where the parties are (or even one of them is) of English origin, and the complaining party is resident in England at the institution of the suit. Niboyet vs. Niboyet, Law Reports, 4

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P. D., 1. See also Brodie vs. Brodie, 30 L. J. (P. & M.), 185, 2 Swab. & T., 259, where *British* origin and a residence in England not amounting to domicile was admitted to give jurisdiction.

Thirdly. An English Divorce Court will assume jurisdiction to dissolve an English marriage between British subjects on the petition of a wife who is *resident merely* in England when the husband is, at the time of the proceedings, domiciled abroad, he having been personally served abroad with the citation, although he makes no appearance in the action. Deck vs. Deck, 29 L. J. (P. M.), 129, 2 Swab. & T., 90. See also Bond vs. Bond (Law Journal, 1860, N. S., Vol. 29 Prob. and Adm., p. 143, 2 Swab. & T. 94), where the English Divorce Court took jurisdiction in a suit for dissolution of an English marriage, on the ground of adultery and cruelty, against a foreigner, who was served abroad with the citation, but did not appear in the suit.

Fourthly. English Courts will assume jurisdiction in divorce between parties not domiciled in England at the institution of the suit, when the defendant has appeared absolutely and not under protest. (See authorities quoted above on this point.)

Besides the cases just cited as thus clearly invading the rule of the husband's domicile, on stated principles of jurisdiction, the Judges in numerous of the decisions have let drop *dicta* which go far to establish in English judicial opinion the natural justice of the doctrine that the domicile of the wife does not follow that of the husband in cases where he commits an offence against the marriage purity, or abandons her without cause and without support. Thus see Lord Cranworth in Dolphin v. Robins, 7 H. Lords cases 410, Lord Chancellor Eldon in Tovey v. Lindsay, 1 Dow 136, and Lord Redesdale, sub eodem. Lord Justice Cotton, in Niboyet v. Niboyet, cited above, said: —"There is, in my opinion, no sufficient reason for limiting the right and liability to sue and be sued in the Court of Divorce to persons domiciled in England." And in Pitt v. Pitt, 4 Macq., H. L. App. cases 627, the Lord Chancellor in giving the judgment said: —"I should have the greatest difficulty in holding that the wife must be subject, for the purposes of divorce, to the jurisdiction of any country in which the husband may choose to fix his domicile." See further to the same effect Sir R. Phillimore in Le Sueur v. Le Sueur, Law R., P. D. 142; and among text writers Phillimore, Int. Law, 2d ed. Vol. IV., at p. 71, and especially at p. 349.

Thus we are brought, lastly, to the American doctrine, which is simply the proposition we have just stated, and shown to be supported by the English *dicta* at least, if not by English positive decisions:—That for purposes of divorce a wife may have or acquire a separate domicile of her own. As a principle of American law, this proposition has become so widely known and so well settled in the American Courts, that it would seem to be superfluous to attempt its explanation or discussion here. See Bishop, M. & D. (1881), vol. 2, chap. ix. It has received the sanction of the highest of the American Courts in Cheever v. Wilson, 9 Wallace (U.S.) 108, 113, and of the highest Court of Massachusetts in Harteau v. Harteau, 14. Pick. 181, and in many of the States it has not only been established by the Courts, but has its provisions in the

Statute Law. See as to the decisions, State v. Schlachter, Phillip's N. Car. R 520; Colvin v. Reed, 5 Smith (Pa.) 375, 378; Dutcher v. Dutcher, 39 Wis. 651; Pate v. Pate, 6 Missouri 49; The Republic v. Skidmore, 2 Texas 261; Hopkins v. Hopkins, 35 N.H. 158. In New York it is provided in the Code of Civil Procedure (see deposition of S. F. Shelbourne, App., *sub fin.*, p. 13), as follows—Chap. xv., title i., art. 2, § 1756:—

"In either of the following cases a husband or a wife may maintain an "action against the other party to the marriage, to procure a judgment divorcing the parties and dissolving the marriage, by reason of the defendant's "adultery:

"1. Where both parties were residents of the State when the offence was "committed.

"2. Where the parties were married within this State.

"3. Where the plaintiff was a resident of the State when the offence was "committed, and is a resident thereof when the action is commenced.

"4. Where the offence was committed within the State, and the injured party, "when the action is commenced, is a resident of the State."

And in the same chapter and title it is provided, article 4, § 1768: "If a "married woman dwells within this State when she commences an action against "her husband, as prescribed by either of the last two articles, she is deemed a "resident thereof, although her husband resides elsewhere."

An examination of the foregoing authorities discloses the fact that there is no inflexible rule in any country for the determination of the proper forum in cases of divorce, but that the decision in each case is controlled by the peculiar circumstances of that case. In the divorce suit referred to in the present case the Supreme Court of New York proceeded in strict accordance with the requirements of the statutory law of the State of New York, and with the *dicta* of its own Judges and those of the Supreme Court of the United States. Moreover, this case presents such a number of circumstances favorable to the assumption of jurisdiction by the Supreme Court of New York, that, *under any of the systems of the law above referred to*, the divorce in question must be held valid. The parties were both of American birth, origin and allegiance; there is no proof of their having changed their nationality or of their having been naturalized elsewhere; they were married in New York; their matrimonial domicile during eighteen months after the marriage was in New York; the wife was resident in New York at the time of the institution of the suit, as required by the laws of that State, and in any event she had, through her husband's misconduct, acquired the right to establish a separate residence and forensic domicile; the proceedings were conducted according to rules of natural justice, the husband being personally served with a copy of the citation; and, lastly, the defendant appeared in the suit without protest, and submitted to the jurisdiction of the Court.

Under all these circumstances, the respondent confidently submits that the judgment appealed from should be confirmed.

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CROSS, J. (*dis.*) On the 29th August, 1881, Virginia Gertrude Stevens instituted an action in the Superior Court at Montreal against Henry Julius Fisk, in which she alleged that in May, 1871, they, the plaintiff and defendant, were married in New York, their actual and intended domicile. They made no ante-nuptial contract. Their proprietary rights were consequently governed by the laws of the State of New York, which permitted her to retain the absolute and exclusive ownership, control and disposal of all property, effects and rights belonging to her previous to and at the time of her marriage; that she was at the time owner of valuable effects and securities, amounting to $220,775.74, then held for her by trustees who subsequently placed them in her control, who thereupon allowed the defendant, her husband, to take possession thereof as her agent and trustee. He remained in possession thereof until September, 1876, when plaintiff demanded the return thereof with an account of his management, which he failed to give. He only returned a small portion of her said fortune, disposing of the balance and appropriating the same to his own use, and refusing to account for the proceeds thereof. Further, that in December, 1880, the plaintiff was legally divorced from the defendant by a decree of the Supreme Court of the State of New York, equivalent to a divorce *a vinculo matrimonii* pronounced in favor of the plaintiff by the Dominion Parliament, and thereby became entitled to exercise all the rights of a *fille majeure usante de ses droits.* Concluding that the defendant be ordered to account for and pay over to the plaintiff the balance in his hands, and in default to do so that he should be condemned to pay the plaintiff $222,000.

The defendant demurred to the declaration as insufficient in law, on the ground that the domicile of the parties had been for years in the Province of Quebec, and that therefore no legal dissolution of the marriage had been effected.

A hearing was had on this demurrer, and it was dismissed.

To the merits the defendant, Fisk, now appellant, pleaded that after the parties married in New York they came to Montreal and acquired a new domicile in the Province of Quebec, which new domicile they had at the time of the pretended divorce and for years previously; that therefore the pretended divorce was null and void, and the plaintiff was not authorized to institute the action.

Also a plea of general issue, *défense en fait.*

In answer Stevens reiterates the validity and sufficiency of the divorce, averring that her husband was personally served with the complaint in the divorce suit, and appeared by his attorneys without declining the jurisdiction; that if even the divorce were invalid she would still have a right to demand from Fisk an account of his gestion of her fortune, as well by the law of New York as by that of Quebec.

The facts seem to be briefly as follows:—In 1871, on the 7th of May, the parties Fisk and Stevens, both being native American citizens, were married in the city of New York in the State of New York, having then their domicile in the city of New York. In October, 1872, Fisk came to reside in Montreal and from that time continued to reside there. With occasional periods of absence, his wife finally left him in 1876, returning to New York, but thereafter passing

a part of her time in Paris and part in New York. Mr. Shelburne, an attorney of the State of New York, examined as a witness, swears that after leaving her husband she was a resident of New York, particularly at the time of the institution of the action which she brought against her husband for divorce, and it is presumable that if she could have any other domicile than that of her husband it would be a reversion to her original domicile in the city of New York.

In February, 1880, she commenced a suit in the Supreme Court of New York against her husband for divorce for cause of adultery; it was served upon Fisk at Montreal, in this Province; he appeared by attorney, and, after proof had, a decree of divorce was pronounced there, which is proved to be, according to the laws of the State of New York, an absolute dissolution of the marriage, *a vinculo matrimonii*, more especially as regards her, Virginia Gertrude Stevens.

At the time of the marriage she was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband.

It appears by the proof adduced, that by the laws of the State of New York the husband has no control over the separate property of the wife. She continues, notwithstanding the marriage, to exercise her rights over her own property, the same as if she were a *feme sole*.

The present action was brought by her against the said Henry Julius Fisk for an account of her fortune which she had entrusted to him, and for which, to a large amount, he had refused to account.

She sues as a *feme sole* setting forth the facts of the marriage, the divorce, Fisk's possession of her funds, and his refusal to account.

There is no difficulty about the facts. Fisk defends himself upon two grounds:

1st. The invalidity of the divorce.

2nd. The absence of authority on the part of the respondent, Virginia Gertrude Stevens, a married woman, to bring the action.

Save as matter of simple administration the second ground, according to our law and practice, would probably be a conclusive answer to the suit, if true in fact, that is, if the marriage between her and Fisk still subsisted; C. C. 176: "A wife cannot appear in judicial proceedings without her husband or his authorization." 183. "The want of authorization by the husband constitutes a cause of nullity which nothing can cover." But she may be authorized by a Judge—C. C. 178. For matters purely administrative the wife separated as to property may sue without being authorized by her husband, C. C. arts, 176, 177, 178. I do not propose to decide whether the present suit is administration or not, but will proceed to deal with the main question.

If the divorce be operative authorization is of course unnecessary. The crucial question is whether a divorce obtained from the Supreme Court of the State of New York has force in the Province of Quebec.

In the Province of Quebec the law recognizes no right of divorce; it can only be obtained through the legislative force of the Dominion Parliament.

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The main contention of the appellant is that at the time the divorce was applied for, the parties had their domicile in the Province of Quebec, and that the Supreme Court of the State of New York had no jurisdiction.

It is contended that it is actual domicile that gives jurisdiction in such cases, and that the wife being incapable of having any domicile save that of her husband, the actual domicile of Virginia Gertrude Stevens was in the Province of Quebec, in Canada, at the time she adopted her proceedings for divorce, and that she could not legally resort to any jurisdiction other than in the Province of Quebec or Dominion of Canada to obtain it.

That rule would have a very reasonable application if the actual domicile of the husband was the domicile of origin of the parties, or was even their matrimonial domicile, but there are strong, to my mind, convincing, reasons why it should not apply to the present case.

In the first place the parties are citizens of another State, to a certain extent still owing allegiance and obedience to its laws, which obligations they have never repudiated, nor have they ever renounced to their claim for their protection, although by passing into another State they have thereby undertaken not to offend against any of its institutions or laws. The law of the country to which they have removed does not recognise any legal right to a divorce, although it may be granted by the legislative force of an Act of Parliament. Their own original State, to which they still owe allegiance, recognises a legal right to divorce for cause. In entering into the contract of marriage both parties stood on the same ground as regards the validity of the contract and the conditions of their consent. The subjection of the wife to the husband did not impair these conditions or the right of either party to invoke them. They married under a law which made the contract subject to dissolution for cause. Admitting that the wife undertook to follow her husband, it was always subject to the right to invoke the condition, that if the husband was unfaithful in the execution of the contract she could, for cause sufficient according to the law where the contract was made, ask for its dissolution. Could the husband by carrying her to a country where this right was not recognised deprive her of it? It seems unreasonable to say that he could. Would such an act not be a fraud upon her rights? In my opinion it would. It is vain to say that on account of the subjection of the wife she could not raise the point. Her subjection is on condition that the husband fulfils the contract on his part. What goes to the validity of the contract revives the right of the wife as a party *sui juris* seeking for its fulfilment. If the argument of actual domicile were allowed to prevail, it would in every such case put it in the power of the husband to defeat the wife's right by taking her to a place where her right could not be enforced, or even himself removing to such a place, for by fiction of law and at least for certain, and perhaps for most purposes, his domicile would be held to be that of his wife also. Again, in this particular instance the parties were citizens of New York, they made their contract there. Admitting that they afterwards resided abroad, if both parties found themselves in the State of New York, would a *bonâ fide* suit there, not subject to the suspicion of fraud or evasion, not be

competent to the parties? There seems no valid reason why it should not. The act performed in this case was equivalent to the case stated. V. G. Stevens being in the State of New York, cited Fisk from Montreal, Canada; he appeared, which was equivalent to his being in New York and being served there; he made no objection to the jurisdiction, and was condemned on evidence. Can he now repudiate the force of that decree? It is said that consent does not give jurisdiction. That is true of defect of authority in the tribunal, but it is not true of voluntary submission to or coming within the jurisdiction of a tribunal that has authority, more especially as regards a personal obligation in respect of which its fulfilment may be claimed anywhere that the law recognises it to have binding force. Especially is it appropriate that the sovereign authority which gave the contract its binding force should be the one to decree its dissolution for default of the fulfilment of the essential conditions on which its permanence was to depend.

It perhaps might, with reason, have been argued that if the tie had been created within the sovereign authority of a State whose laws did not permit of a dissolution, and the parties afterwards resorted for a divorce to New York, where the law permitted it, such divorce might be good within the State of New York, but would not be effective in the State or country of their matrimonial domicile.

It was argued that the Imperial Statute establishing the Divorce Court there, in giving authority to a resident there to be plaintiff in a divorce suit, exceeded and became an exception to the general rule which required the parties to be actually domiciled within the jurisdiction, but it seems to me that this argument is based upon the supposition that there is or ought to be such a general rule, the reason of which is not only doubted, but seriously questioned, and, as I have already shown, puts it in the power of the husband to deprive the wife of all remedy. It might rather be inferred that the English legislation was the negation of any such rule, and in fact the sanction of a contrary rule as correct in principle.

Our own Civil Code, Art. 6, says:—"An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons, but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country."

This should be true as regards other countries claiming jurisdiction over their subjects in Canada.

Bishop ("Marriage and Divorce," vol. 1 § 113 a. and § 125) considers that a wife may acquire a domicile for the purposes of a divorce. This may be more true as between the States of the Federation than in regard to foreign countries, but the case is different when she is sought to be deprived of one.

It is to be borne in mind that the status of strangers is not created, but is only recognised here, that its creation abroad would have no force here save by comity, and the change of status, operated by the power that created it, leaves the parties strangers, with the status only which the sovereign power, to which

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they owe their allegiance, has given them, and in this case there is the same reason for the recognition of the status given them by the dissolution of the marriage, as that first given them by the marriage itself; both acts equally depend on the foreign law, the force of which is only recognised by comity.

What some authors call acts of voluntary jurisdiction exercised by foreign Courts are recognised by the sovereignty of each country by comity, as, strictly speaking, no judicial act has force beyond the sovereign territory for which and by whose power it is promulgated.

Fœlix, t. 2, p. 384, No. 10, 2me ed. :—" Quant à la validité intrinsèque et pour ce qui concerne le futur conjoint étranger, il faut appliquer les lois du pays de son domicile, surtout ce qui est relatif à l'état et à la capacité de sa personne." See also Muller v. Hilton, 13 L. A. R., p. 1.

Le droit international, théorique et pratique, par Charles Calvo, 2me ed., t. 1, p. 366, § 247 : " Si la célébration des mariages est une affaire d'intérêt public et social, la dissolution du lien conjugal n'a pas une importance moindre; elle est régie par les mêmes principes de jurisprudence internationale. Ainsi la dissolution d'un mariage judiciairement prononcé par voie de séparation de corps et de biens, ou par voie de divorce conformément aux lois du pays où le mariage a été célébré et où les conjoints avaient leur domicile, produit ses effets dans toute autre contrée. Mais d'après quelle règle se guider et quel principe doit-on appliquer quand la rupture du lien conjugal est poursuivie dans un autre pays que celui de la célébration du domicile, ou dans un pays dont la législation diffère de celle de la patrie des conjoints, c'est là une délicate question de droit international privé, qui a suscité plus d'un conflit. Pour la résoudre il faut tenir compte de la nationalité et du statut personnel des époux. Si les conjoints appartiennent à un pays et à une communion qui repoussent le divorce, c'est-à-dire la rupture absolue définitive du lien conjugal, et admettent séulement la séparation de corps et de biens, ils ne peuvent légitimement tant qu'ils conservent la même nationalité, la même croyance religieuse, faire dissoudre leur union matrimoniale en se transportant dans un pays où prévaut le divorce avec faculté de conclure un autre mariage; car s'ils agissaient ainsi ils s'exposeraient quand ils retourneraient dans leur patrie à y être judiciairement poursuivis et condamnés comme bigames. Lorsqu'au contraire les époux appartiennent à un pays dont les lois intérieures sanctionnent le divorce, et qu'usant du bénéfice des lois qui régissent leur statut personnel ils ont régulièrement fait prononcer la dissolution complète de leur mariage, ils doivent partout ailleurs être considérés comme célibataires et libres de contracter une nouvelle union matrimoniale."

En résumé, la règle à suivre en cette matière est bien moins la loi du domicile que celle de la religion, de la nationalité, et du statut personnel qui en

The Italian author Fiore, as translated into French by Pradier-Foderé, edition of 1875, at p. 216, No. 120; after giving the opinion of Rocco, Italian Jurist, wholly to the effect that the dissolubility or indissolubility of the marriage tie, in other words, the question of the right of divorce, must be deter-

mined by the law of the matrimonial domicile. This proposition in its broadest sense, Flore disputes, but, after reviewing the jurisprudence of different countries, including England, France, Austria, Prussia, the United States of America and Italy, and the opinions of various Jurists, including Merlin, Westlake, Dalloz, Demolombe and others, as well as different arrêts involving various phases of the question, he concludes by giving a kind of qualified assent to Rocco's opinion, which he does in this wise. He puts the question: "Si un homme légitimement divorcé dans sa patrie peut se remarier dans un état tiers dont la loi ne permet pas le divorce." He remarks: "Cette question a été longuement discutée par les jurisconsultes et par les tribunaux." He reviews the opinions and decisions on the subject, the weight of which are in favor of validity, and concludes as follows:

No. 134. "Nous partageons la même opinion et en en faisant l'application nous disons que l'officier de l'Etat Civil ne peut refuser d'assister au mariage d'une anglaise ou d'une polonaise valablement divorcée, et qui voudrait se remarier en Italie. En effet il est certain que la condition juridique d'un étranger, et sa qualité de père, de fils, d'époux, doit se déterminer d'après la loi de sa nation, que les effets qui dérivent de l'état juridique d'un étranger ne peuvent être empêchés que lorsqu'on oppose une loi d'ordre publique de notre Etat; que l'officier de l'Etat Civil ne peut déclarer la dissolution du mariage non existant, quand celui-ci a été déjà légalement dissous, et qu'il ne peut empêcher le divorcé de contracter un nouveau mariage, lequel lorsque le premier est dissous, n'est nullement contraire à nos lois, le divorcé étant dans la situation légale d'un homme non marié. Nous concluons donc que défendre à qui est légalement divorcé de pouvoir contracter un nouveau mariage en Italie est contraire à nos institutions et à nos lois."

Harvey v. Farnie, L. R. Probate and Divorce Cases, vol. 5, p. 153, and others cited do not militate against the view above expressed.

I find no case where the question in issue comes up under precisely similar circumstances to the one now under consideration. One very nearly like the present is the case of Deck vs. Deck, 2 Law Times, 542; 29 Law Journal N.S., Matrimonial Cases, p. 129, which, although criticized by a Scotch writer on the Law of Husband and Wife, 2 Fraser, 1292, I am not aware has yet been overruled, and the doctrine there enunciated seems reasonable. It was followed by the case of Bond vs. Bond, 29 L. J. Mat. 143, very nearly resembling the present case. In the first it was ruled that a natural-born English subject does not by the acquisition of a foreign domicile shake off his allegiance to the Crown of England, but continues liable to be affected by the laws of England. The wife sued for a divorce in England for cause occurring in New York, where the husband had gone; he was cited by service upon him in New York, but failed to appear. The Court held that they had jurisdiction, and granted the divorce. In the case of Bond vs. Bond, an English woman married a foreigner, the marriage being celebrated in England, where for a time they lived together; they also lived together abroad. The wife afterwards being in England cited the husband from abroad (Ireland). The Court held that they had jurisdiction, and granted the

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divorce. In any case the choice of a domicile is a voluntary act, and may be relinquished voluntarily. The husband's appearance to answer the suit in New York may be considered equivalent to his being found and served with process in New York to answer the divorce suit. I think such a service of process upon Fisk would have given the Court jurisdiction over the case, and in my opinion his appearance to answer his wife's suit had the same effect. I consider the divorce obtained by Mrs. Fisk in the Supreme Court of the State of New York valid, and would hold it binding on him here. I would therefore confirm the judgment of the Superior Court, which held him accountable to Virginia Gertrude Stevens, heretofore his wife, for the restoration of her fortune.

MONK, J., concurred in the above dissent.

HON. SIR A. A. DORION, C. J.—This is an action which the respondent, as the divorced wife of the appellant, has brought against him for an account of a sum of $220,775.74, which she alleges she placed in his hands after their marriage to manage for her, as her agent and trustee, and of which he refuses to account.

The facts about which no controversy arises are these:—

In 1871, the parties were married in the city of New York, where they then had their domicile. In 1872 they both came to Canada, and took up their residence in the city of Montreal, with the intention, as declared at the time by the appellant under his own signature, of permanently fixing his residence in this province. Since that time the appellant has been carrying on business in this city, where he has uninterruptedly continued to reside.

Some time about 1876 the respondent, who had also resided here since 1872, left the appellant's domicile, and has since been living either in Europe or in the United States. In 1880 she sued her husband before the New York Supreme Court, and in December of that year she obtained a divorce, on the ground of adultery. The appellant filed an appearance before the Court, but did not contest the suit.

On the strength of the decree of the New York Supreme Court granting her a divorce, the respondent, assuming to be single and an unmarried woman, and without any previous authorization from a Court or judge, has entered the present action against the appellant for an account of monies she has entrusted to him during their marriage.

The appellant has demurred to the declaration, which demurrer has been dismissed. He has also filed a plea to the merits by which he alleges that, at the time, and for years previous to the pretended divorce invoked by the respondent, the parties had acquired a new domicile in the Province of Quebec, and that the pretended divorce is null and void; and also that the respondent has not been and was not authorized to institute the present action.

The respondent has answered by asserting the validity of the divorce pronounced by the New York Supreme Court, and by alleging that even if the divorce were not valid, she would nevertheless have a right to demand from the appellant an account of the administration of her fortune, both under the laws of the State of New York and under those of this province.

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Three questions arise under this issue:

1. Does the divorce which the respondent has obtained in the State of New York affect the appellant who, at the time it was obtained and for years previous, had his domicile in the Province of Quebec?

2. If the decree of the New York Supreme Court granting a divorce to the respondent is not binding here, could the respondent bring the present action without being previously authorized to do so?

3. Has the appellant properly raised by a plea to the merits the questions as to the validity of the divorce obtained by the respondent and of her want of authorization to sue, and should not these questions have been the subject of preliminary exceptions?

A change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment. (Article 80 C. C.)

The proof of such intention results from the declarations of the person and from the circumstances of the case. (Art. 81 C. C.)

In the present case we have the declaration made in writing by the appellant to the custom house officers on entering this province, that he came with the intention of settling permanently in this country, coupled with the facts that he has opened a business and has uninterruptedly resided at Montreal since he has made that declaration, ten or eleven years ago.

There can, therefore, be no doubt that the appellant has abandoned his domicile in the State of New York and has acquired a new domicile here.

The respondent has followed her husband here, where she has resided four years with him, and our Civil Code (article 83) establishes that "a married woman, not separated from bed and board, has no other domicile than that of her husband." Both the appellant and respondent have therefore had their legal domicile in the Province of Quebec since they arrived here, in 1872, the absence of the respondent for the last few years notwithstanding.

It is also undeniable that, according to the laws of the Province of Quebec, the marriage tie is indissoluble, and that divorce is not allowed, but is, on the contrary, considered as opposed to public policy. There are no tribunals here authorized to grant a divorce, that is, to dissolve for any cause whatsoever a marriage lawfully contracted; and to allow a divorce pronounced by a foreign Court to affect here the personal status of persons having their domicile in this country would be to admit that foreign tribunals have a jurisdiction and power over persons domiciled here which our own Courts have not.

No case has been cited and no authority adduced to show that judgments rendered in a foreign Court, contrary to the public policy of the country where the parties concerned have their domicile, at the time, have anywhere a binding effect on such parties in the country of their domicile, where it was intended to enforce them, and we may safely assert that no such authority is to be found.

The books are full of decisions to the contrary, and the application of the rule is not confined to any particular country, but seems applicable to all.

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Fœlix, Droit International Privé, vol. 1, p. 19, says:

No. 9.—Le premier principe général, en cette matière, résulte immédiatement du fait de l'indépendance des nations. Chaque nation possède seule et exclusivement la souveraineté dans l'étendue de son territoire. De ce principe il suit que les lois de chaque Etat affectent, obligent et régissent de plein droit toutes les propriétés immobilières et mobilières qui se trouvent dans son territoire, *comme aussi toutes les personnes qui habitent* ce territoire, qu'elles y soient nées ou non; &c.....

No. 10.—Le second principe général, c'est qu'aucun Etat, aucune nation, ne peut, par ses lois, affecter directement, lier ou régler des objets qui se trouvent hors de son territoire, *ou affecter ou obliger les personnes qui n'y résident pas, qu'elles lui soient soumises ou non par le fait de leur naissance.....*

No. 11.—Les deux principes que nous venons d'énoncer engendrent une conséquence importante, et qui renferme notre doctrine toute entière; c'est que tous les effets que les lois étrangères peuvent produire dans le territoire d'une nation dépendent absolument du consentement exprès ou tacite de cette nation.

P. 58. "*Après le changement* de nationalité *ou de domicile*, changement dont nous parlerons ci-après, la loi de la nouvelle patrie *ou du nouveau domicile exerce sur l'individu les mêmes effets que celle de la patrie originaire ou du domicile d'origine avaient exercés jusqu'alors.* Mais il va sans dire que la loi de la nouvelle patrie n'a pas d'effet rétroactif sur les actes passés antérieurement par les individus."

P. 29. "Aucune nation ne renonce, en faveur des institutions d'une autre, à l'application des principes fondamentaux de son gouvernement; elle ne se laisse pas imposer des doctrines qui selon sa manière de voir sous le point de vue moral ou politique, sont incompatibles avec sa propre sécurité, son propre bien-être, ou avec la consciencieuse observation de ses devoirs ou de la justice. Ainsi aucune nation chrétienne ne tolère en son territoire l'exercice de la polygamie, de l'inceste, l'exécution de conventions ou de dispositions contraires à la morale."

Story, Conflict of Laws, § 25, expresses the same doctrine when he says: "No nation can be required to yield up its own fundamental policy and institutions in favor of those of another nation; much less can any nation be required to sacrifice its own interests in favor of another, or enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness or conscientious regard to justice and duty." And again, at § 32: "It is difficult to conceive upon what ground a claim can be rested, to give to any municipal laws extra territorial effect when those laws are prejudicial to the rights of other nations and their subjects."

It is a maxim, said Best, J., in Forbes & Cochrane (2 B. & Cr. 471,) "that the *comitas inter communitates* cannot prevail, in any case, where it violates the law of our own country, the law of nature or the law of God."

In the case of Hannover v. Turner (14 Mass. Rep. 240), in which a divorce obtained in the State of Vermont was held to be null, because at the time the parties were domiciled in Massachusetts, Putnam, J., said: "If we were to

give effect to this decree we should permit another State to govern our citizens, in direct contradiction of our own statute, and this can be required by no rule of comity."

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Apart from the question of public policy, and which deprives the decree obtained by the respondent of any binding effect, it is also null and void on the ground that it was obtained *in fraudem legis*. It is evident that the defendant who was domiciled here with her husband, has withdrawn from the jurisdiction of our Courts to seek in a foreign tribunal a relief which she could not have obtained in those of her own domicile.

The remarks of Spencer, J., in the case of Jackson & Jackson (1 Johnson's Rep. 429), are so appropriate to this case that I deem it proper to cite here a short extract of what he said in giving the judgment of the Court:

"The case being thus open for examination the [illegible] at once arises, how far this Court will lend its assistance to carry [illegible] between its own citizens, a judgment of a foreign Court, where the [illegible] resorted to that Court, with the avowed object of gaining relief in [illegible] provided for by our laws, and against the policy of them. I say against the policy of our laws, because our own Legislature, having authorized divorce but in one case, intolerable severity of treatment does not warrant a divorce.

"Here is a plain attempt by one of our own citizens to evade the force of our laws. The plaintiff, to obtain a divorce which our laws do not allow, instituted her proceedings in Vermont, whilst she was an inhabitant and an actual resident of this State, and *while her domicile continued in this State*, for she was incapable during her coverture from acquiring a domicile distinct from that of her husband.

"The plaintiff having acted with a view to evade our laws, it would be attended with pernicious consequences to aid this attempt to elude them.

"It may be laid down as a general principle that whenever an act is done *in fraudem legis* it cannot be the basis of a suit in the Courts of the country whose laws are attempted to be infringed."

The principle so broadly laid down in this case was acted upon in a judgment rendered by the Cour Imperiale de Poitiers, on the 7th of January, 18[illegible] (Dev. & Car. 1845,—2-215), and a divorce obtained in Switzerland by a Frenchman who had become a naturalised subject of that country, and the two subsequent marriages which he had there contracted while his first wife was living, were declared null and void, as having taken place in fraud of the laws of France. (Foelix vol. 1, p. 68, note a.)

I may venture to say that this rule prevails everywhere, and on this ground also the decree of the New York Supreme Court should be held to have no binding effect in this province.

It is, however, contended that in matters of divorce it is not the laws of the actual domicile of the parties, but the laws of their matrimonial domicile, to which reference must be had; and that as appellant and respondent were married in the State of New York, where marriage was then and is still dissoluble, either party had a right to resort to the tribunals of that State to

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have their marriage dissolved for causes for which a divorce is allowed by the laws which are there in force.

The respondent, who urges this claim, proceeds on the assumption that divorce is a remedy on the contract of marriage which has taken place between the parties,—and that either of them has an acquired right to claim a dissolution of the marriage tie for causes which, at the time it was contracted, were held, by law, sufficient to obtain a divorce.

This doctrine of an acquired right to a divorce has been denied by all the French writers. Mailler de Chassât, de la rétroactivité des lois, vol. I, p. 229, says on this subject:—"Le divorce ou l'indissolubilité du mariage est dans le domaine de la loi; et la disposition qui consacre l'un ou l'autre est une disposition d'ordre public, et par conséquent une pure concession qui ne confère aucun droit acquis."

The author quotes Merlin in support of the view he takes of this question, and concludes by saying: "Cette doctrine est incontestable," &c.....

If a marriage contracted in a country where divorce is recognised conferred on the contracting parties a right which followed them wherever they might be domiciled, they ought, according to the comity of nations, to be able to enforce such right, as all their other matrimonial rights, before the tribunals of their actual domicile without having to resort to those where their marriage has taken place. Yet it cannot seriously be contended that the respondent could have claimed that a divorce should be granted to her by our own courts on the ground that she was married in the State of New York, where divorce is allowed.

The question, in the precise form in which it is presented in this case, does not appear to have been yet decided either in the United States, in England or in France.

Story, § 232, asks this question: "What would be the effect of a marriage "in Connecticut, a subsequent *bonâ-fide* change of domicile to New York, and "then a divorce in Connecticut, both parties appearing in the suit, remains as "yet undecided."

It must be observed that in the supposed case there would arise a mere conflict of jurisdiction and not a conflict of laws, since the laws of the State of New York admit of divorces as well as those of Connecticut, and notwithstanding, it seems to have been a subject of serious doubt, whether a divorce in such case, when both parties had appeared, could be recognized by the courts in the State of New York, and on this point Story expresses no opinion. If, in addition to the conflict of jurisdiction, which in most cases may be covered by the voluntary submission of the parties to the tribunal seized with the contestation, there was a conflict of laws, as there is in the present case, there can be little doubt of what would have been the views of the author.

Westlake, in his work on Private International Law, p. 215, No. 360, referring to the question of a divorce pronounced in a country where the parties are only transiently sojourning, says: "And, as the Government of their domicile "has the strongest interest in the morals of men, it is not probable that any

"country will recognize these foreign divorces of its resident subjects. They "are certainly not recognized in England."

At number 361, the writer says: "Admitting, then, the necessity that the "jurisdiction shall be founded on domicile, etc."

The Courts in England, in their recent decisions, have acted on the rule that actual domicile gives jurisdiction, irrespective of the matrimonial domicile, and this is unmistakably shown by the rulings in Foster & Foster and Borridge, 10 Jurist N. S. 264; Brodie & Brodie, 4 L. T. N. S. 307; Wilson & Wilson 27 L. T. 351; Gillis & Gillis, 8 Jr. Rep. Eq., 597; Lesueur & Lesueur, 34 L. T. 511; Firebrace & Firebrace, 39 L. T. 94; and Harvey & Farnie, 42 L. T. 12.

This somewhat indicates what would be the decision in a case exactly similar to the present one.

In France the Courts have gone much further than it is necessary for the purposes of this case, and much further than we perhaps would be disposed to go. They have refused in several cases to recognize the validity of divorces pronounced in a foreign country between persons domiciled in such foreign country. The arrets are mentioned by Demolombe vol. 1, No. 101, but the more recent jurisprudence seems to have recognized the validity of such divorces.

The present case must, however, be decided by the rules to be found in our own Code, and we believe that these rules are express and to the point. Art. 6, C. C. provides "that the laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.

"An inhabitant of Lower Canada (which, by section of the schedule to article 17 of the Code, means a person having his domicile in that part of the Province now the Province of Quebec), so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada who, as to their status and capacity, remain subject to the laws of their country."

The exception here mentioned does not apply to the parties in this cause who have their domicile in this country. Their status and capacity must, therefore, be governed by the laws of this province. They came here as a lawfully married couple, as man and wife, and they cannot change that personal status, except according to the laws in force in this province; and as there is here no law authorizing a divorce they must be held to be married as long as they retain their domicile in this province. There is no plainer provision of law than the one just cited—and to show that it is not susceptible of any other interpretation than the one given, we have only to quote a short passage from the report of the commissioners. At page 144 of their second Report, Vol. 1st, p. 144, the commissioners say on Art. 7—which is now the 6th Art. of the Code:—"This article is in- "tended to replace article 3 of the Code Napoleon, which determines what per- "sons and property are governed by the French law. * * * * * * "This article, which is of the utmost importance, has been prepared with care, "and is founded on the numerous authorities cited after each of its paragraphs."

One of the authors cited is Foelix, which we have already quoted at length.

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Boullenois is another, and at p. 157 of the 1st of his Traité des Statuts personnels, etc., he says: "L'on sent que c'est la nature même des choses et la nécessité qui exigent que lorsqu'il s'agit de déterminer l'état et la condition des personnes, il n'y ait qu'un juge qui doit être celui du domicile, à qui ce droit puisse appartenir."

.....

"C'est donc avec beaucoup de sagesse que l'on a réglé que la personne recevait son état et sa condition du lieu de son domicile."

The effect of this rule is that, in case of a change of domicile, the status obtained under the laws of the first domicile is retained until another status is acquired, according to the laws of the new domicile. In the present instance the parties, when they came from the State of New York, were legally married according to the laws of that State, and they were recognised as such by the laws of this country. If they had been mere transient travellers they might have returned to their domicile, obtained a decree of divorce under the laws in force there, and on coming back here they would, on principle (although this has been the subject of much controversy in France, Demolombe vol. 1, No. 101), have been held to be freed from the bonds of wedlock and treated as single persons are. The moment, however, they acquired a domicile here their status could not be changed, except according to the laws in force in this Province, that is, the laws of their new domicile. This is what Fœlix clearly expresses in the passage of his work already cited.

"Après le changement de domicile, la loi du nouveau domicile exerce sur l'individu les mêmes effets que celle du domicile d'origine avait exercé jusqu'alors."

Bourjon Tit. xi., ch. 4, sect. 2, No. 11, p. 114, of the Ed. of 1770, shows so clearly, by the examples which he gives, the effect, on a change of domicile, of the laws of the new domicile on the status of an individual, that I may be permitted to quote his observations on this subject:

XI. "Si un homme (says this author,) originaire du pays de droit écrit, vient s'établir à Paris, avant d'avoir acquis l'âge que la coutume de Paris requiert pour tester, il ne pourra tester aussitôt que le droit écrit le permet, mais seulement lorsqu'il aura acquis l'âge requis par cette coutume; il est venu à Paris incapable, il y reste tel jusqu'à ce que la loi qui régit sa personne lève l'incapacité.

XII. La raison est, que c'est elle, alors, qui régit sa personne et non le droit écrit, et, par conséquent, sa capacité qu'il ne peut avoir que par sa disposition, puisqu'il ne l'a jamais eu par la loi même de son premier domicile; mais si cet homme n'avait quitté le pays de droit écrit qu'après avoir acquis l'âge pour tester, et qu'il fut constaté que son testament est antérieur à son changement de domicile, en ce cas le testament serait bon, quoique le testateur mourut à Paris avant l'âge que la coutume requiert pour tester, c'est droit acquis et consommé.

XIII. Cela est fondé sur ce que le changement de domicile ne peut lui faire perdre un droit et une capacité qu'il avait acquis lors du changement, et *qu'il*

avait consommé avant icelui, mais il faut cette consommation et qu'il soit constaté qu'olle s'est faite avant le changement.

XIV. La nécessité de cette consommation est fondée sur ce que n'ayant pas consommé dans le temps la faculté que la loi de son ancien domicile lui donnait, *cette loi par la suite lui est étrangère*, et il ne peut l'invoquer pour un acte fait dans un temps, où la loi de son nouveau domicile, celle par conséquent qui régit sa personne, lui dénie cette faculté."

By substituting the word "divorce" for that of "testament" in the above citation, we have the exact position of the parties in this cause defined under the rules of law prevailing before the Code, and which the Code has preserved in its integrity, in preference to the new rules adopted by the French Code, which, however, does not expressly touch the point in issue in this case.

On the strict interpretation of the language of the Code we are, therefore, also led to the conclusion that the divorce obtained by the respondent in the State of New York can have no effect here.

The appellant is, therefore, still a married woman, and could only bring an action against her husband to recover her *dot* on being thereto authorized in the manner required by law. (Arts. 176 and 178 of the Civil Code.)

This authorization is more specially required when a woman under coverture wishes to institute judicial proceedings against her husband. (Guyot Rep. vo. Autorisation section 7, No. 16, p. 844, 4 al.)

The want of such authorization constitutes a cause of nullity which nothing can cover, says Art. 183 of the Code. Pothier, Puissance Maritale No. 74.

Duranton, vol. 2, No. 515, says: "Dans l'ancienne jurisprudence le défaut d'autorisation produisait une nullité absolue, qui pouvait être invoquée aussi bien par celui qui avait traité avec la femme, que par elle et son mari, du moins tel était le sentiment commun des auteurs. Aujourd'hui la nullité est seulement relative."

Notwithstanding this change in the law it has been repeatedly held under the Code that the want of authorisation could be invoked at any stage of the procedure, even in Appeal. Sirey, Code annoté Art. 215, Nos. 44, 45 and 46, cites these arrêts.

Our Code differs somewhat both from Art. 224 of the Custom of Paris and from Art. 215 of the French Code, with regard to the necessity of the authorization required by the wife to *ester en justice*; and therefore in deciding the present case particular attention must be given to the stringent terms of our Code, and in doing so we have come to the conclusion that the respondent could not bring the present action without a previous authorization from a judge, and that the objection was well taken by the appellant.

The majority of the members of the Court are, therefore, of opinion that the action of the respondent should be dismissed on the two grounds that the pretended divorce cannot be recognised here, and that she has not been authorized to bring her action.

RAMSAY, J. This action was brought by the respondent, who alleges that she is the divorced wife of the appellant, asking him for an account of the fortune she brought him at her marriage, and which passed into his hands.

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She alleges that she was married in the State of New York, in May, 1871, New York being then the domicile of both parties, that by the law of that State, there being no ante nuptial contract, she had the absolute control of her property, and she alleges, further, that by a decree of the Supreme Court of New York, she was divorced from her said husband, and that she is thereby in the position of a *feme sole*, and entitled to bring this action as such.

The appellant pleaded that the parties after their marriage came to Montreal, and acquired a new domicile in the Province of Quebec, which new domicile they had at the time of the pretended divorce, which is, therefore, null, and that plaintiff could not bring this suit.

There was also a *défense en fait*.

The respondent replied, that the husband was served with the action in New York; that he appeared, and did not decline the jurisdiction of the Court.

The questions that arise on these pleadings are: 1st.—Is the divorce valid? 2nd.—If not a divorce here, could the wife bring the action without authorization; and subsidiarily thereto, is the absence of authorization properly raised by demurrer and plea to merits? And, 3rd.—Does the failure of the husband to decline the jurisdiction of the Court in the State of New York make its decision *res judicata* as against him?

The first of these questions is manifestly the most important and the most difficult. In deciding it we must have recourse to our own law, if its rule can be discovered. But before we attempt to lay down principles, it is necessary to arrive at a definite conclusion as to the main facts that are contested. It would seem that it is not denied that by the law of the State of New York the married woman's property remains separate and her own, unless there be some special disposition of it. Whether this be the sound exposition of the law of that State we are not now called upon to enquire, as no such question appears to have been raised, and on *faits et articles* the husband admits having received a tin box containing securities in bonds and cash, "the separate property and fortune," of respondent. Both parties were American citizens, although the State of New York was not the native State of either; but both seem to have had their principal abode where the marriage was celebrated, and where they lived, except for short periods, till the autumn of 1872.

It seems also clear that appellant and his wife took up their abode in Montreal as their permanent residence, and that the husband acquired a new domicile there which became that of his wife. She could have none other, according to our law, unless separated from bed and board;—C. C. 83. It is, however, proved that the respondent at the time of instituting the suit for a divorce in New York, had that sort of residence there, which, by the laws of that State, gives jurisdiction to its Courts to pronounce a decree in divorce.

The precise legal question we have, then, to decide is this—whether a wife domiciled with her husband in the Province of Quebec can of her own movement, and without any separation as to bed and board, remove to another place, take advantage of the law of the place of marrisge to obtain a divorce *a vinculo matrimonii*, which is absolutely prohibited by the laws of this Province, and afterwards come back here and act as an unmarried woman.

It is argued that if she cannot do this, it is competent for any man, married in a country where divorce *a vinculo* is permitted, by changing his domicile, to deprive his wife of the advantage of dissolubility, if I may use such a word. I am not sure that this is the necessary consequence of refusing the wife the rights claimed in this case; but, if it were, I am not prepared to say that this argument appears to me to be conclusive. In one sense it may be considered a hardship to the wife, but it is one against which it can hardly be expected our law should specially provide. The remedy for the evils complained of by the respondent is the separation *a mensa et thoro*. Our law having provided a remedy, and having positively refused another, I do not think, the husband having retained his domicile in this Province, his wife can seek another domicile and destroy the *status* of an inhabitant of Canada.

The case of *Rogers* v. *Rogers* (3 L. C. J. 65), was cited in support of the contrary view. But in that case all that the Court decided was that community did not exist between husband and wife married in England, then their domicile, subsequently removing to Canada. The doctrine recognized by this decision may perhaps be doubted (Story, Conflict of Laws, § 176). It seems, however, to be the doctrine of Pothier. But the discussion turns entirely on the question of whether community is a *statut réel* or *personnel*, and consequently it does not apply to the case before us, because we are not to consider the effects on the property of the conjoints but as to their personal *status*.

On the second question I am of opinion that the judgment of the Supreme Court of the State of New York does not produce the effects of *res judicata* as against the husband. It is essential that the Court should be competent. Now, the competence does not mean that the Court shall be competent according to the laws of its own State, but that its modes of procedure be not an infringement of the rights of another State. Summoning Mr. Fisk, domiciled in Canada, to appear in New York is summoning him to appear before those who are not his natural judges. And his appearance, without further proceedings, does not appear to me to alter the matter.

It has been said that this action lies even if there be no divorce, and that the husband is obliged to account to his wife for her property. This is very true, but it is contended that she has brought the action as an unmarried woman and without authorization. The prohibition of our law as to the wife appearing in judicial proceedings without the authorization of the husband is express (176 C. C.), and I am not aware that there is any mode of supplying this authorization after the suit is commenced. "She cannot appear," and therefore she is not rightly before the Court, and it is not a question of amendment. To substitute an authorization by the Court is to antedate a power, and one which can only be exercised by the Court on the refusal of the husband (C. C. 178) or if he be interdicted or absent (C. C. 180). But it is said the want of authorization has not been properly pleaded, and a case of *Antaya* v. *Dorge* et al. (6 R. L. 727) was cited in support of the pretension that this question could only be raised by a preliminary plea. I question very much whether, if the defect appears on the face of the proceedings, it is necessary to plead it all, but I think it at all events is a good plea to the merits. It is not a question of *status* only, it

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is a lack of power to act, in addition to this, the whole of the action turns on the alleged fact that she is an unmarried woman.

I am therefore to reverse and dismiss the action *sauf à se pourvoir*.

The following is the judgment of the Court:

"Considering that the parties in this cause were married in the year 1871 at the State of New York, one of the United States of America, where they were then domiciled;

"Considering that shortly after, to wit, about the year 1872, they removed to the City of Montreal, in the Province of Quebec, with the intention of fixing their residence permanently in the said Province;

"And considering that the said appellant has been engaged in business and has continually resided at the said City of Montreal since his arrival in 1872, and that he has acquired a domicile in the Province of Quebec;

"And considering that the female respondent has only left the domicile of her husband at the City of Montreal in 1876, and obtained her divorce from the appellant in the State of New York in the year 1880, while they both had their legal domicile in the Province of Quebec;

"And considering that, according to article 6 of the Civil Code of Lower Canada, parties who have their domicile in the Province of Quebec are governed, even when absent from the Province, by its laws respecting the status and capacity of such parties;

"And considering that, according to the laws of the Province of Quebec marriage is indissoluble, and that divorce is not recognized by said laws, nor are the Courts of Justice of the said Province authorized to pronounce for any cause whatsoever a divorce between parties duly married;

"And considering that the decree of divorce obtained by the female respondent in the State of New York has no binding effect in the Province of Quebec, and that notwithstanding such decree, according to the laws of the said Province the female respondent is still the lawful wife of the appellant, and could not sue the said appellant for the restitution of her property without being duly authorized thereto;

"And considering that the said respondent has neither alleged nor produced any authorization, as required by law, to institute the present action, and that there is error in the judgment of the Superior Court rendered at Montreal on the 25th day of February, 1882;

"This Court doth reverse the said judgment, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the said respondent *sauf à se pourvoir*, with costs, as well those incurred in the Court below as on the present appeal (Judges Monk and Cross *dissenting*)."

Judgment reversed.

Kerr & Carter, for the appellant.

E. Lafleur, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 19TH SEPTEMBER, 1883.

Coram DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., and BABY, J.

No. 474.

THE MONTREAL TELEGRAPH CO. *et al.*,

(Defendants in Court below)
APPELLANTS;

AND

JOHN LOW,

(Plaintiff in Court below,)
RESPONDENT.

HELD:—(Dorion, C.J., and Ramsay, J., dissenting) 1. That the Montreal Telegraph Company had sufficient authority under its charter to make and carry out an agreement (set out below), leasing its lines to the Great Northwestern Company.

2. That the plaintiff had failed to show or prove any damage occasioned to himself personally, resulting from the agreement in question, and had likewise failed to show that he had such right or interest as entitled him to maintain an action, more especially in his own name and on his own behalf.

The present appeal is from a judgment of the Superior Court, Montreal (RAINVILLE, J.), 31st December, 1881, declaring the agreement passed between the Montreal Telegraph Company and the Great Northwestern Telegraph Company on the 17th August, 1881, to be *ultra vires*, and setting it aside, and enjoining the Great Northwestern Company from any longer using the telegraph lines and other property which were transferred to it under the above-mentioned deed of agreement, and ordering the Montreal Telegraph Company to resume possession of its property and operate its telegraph lines. (See 25 L. C. Jurist p. 322, for report of judgment of the Superior Court.) Appeals from this judgment were taken by the Montreal Telegraph Company and the Great Northwestern Company.

Abbott, Q.C., for the Montreal Telegraph Company, appellant:—

The object of the action was to set aside an agreement for the working of the lines of the Montreal Telegraph Company by the Great Northwestern Company. The declaration charged that the Montreal Telegraph Company, by the agreement entered into, entirely abandoned the telegraph business and the objects for which it was incorporated, and retained only a nominal organization; that this agreement was *ultra vires* and illegal, inasmuch as it was, in effect, an alienation of all the business and franchises of the Montreal Company to the Great Northwestern Company and deprived the Montreal Company of the management and control of its affairs. It was, therefore, prayed that the agreement be set aside and an injunction granted to the effect above mentioned. The Montreal Company pleaded (amongst other pleas) that by its Act of incorporation it possessed the right of purchasing, having and holding any estate, real or personal, for the use of the Company, and of letting, conveying, or otherwise parting

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therewith, for the benefit of the Company; that under these powers it had constructed and acquired a large extent of telegraph lines; that during the past ten years another company, called the Dominion Telegraph Company, had established offices in opposition to the defendants, and the business had become unprofitable; that, in order to reduce expenses and increase receipts, an agreement had been made with the Great Northwestern Company, whereby the Montreal Company would be enabled to work its lines under a contract for the performance of all necessary work through that Company. The plea then went on to state in detail the proceedings taken to conclude and ratify the agreement in question. The sum to be paid by the Northwestern was fixed. The holders of 23,204 shares of the stock voted in favor of the proposal adopting the agreement, and only the holders of 1,831 shares voted against it. The rates had then been increased to the same figures as had been charged before the competition of the Dominion Company compelled a reduction, and the opposition of the latter Company was withdrawn. It was denied that in executing this agreement the Montreal Company had exceeded its powers or violated or abused any franchises conferred upon it. The judgment of the Court below held in effect:—

1. That, by its charter, the Montreal Company has the right to construct telegraph lines, to acquire immoveable property, and to fix rates for messages.

2. That by the said agreement the Montreal Company virtually and effectually abandoned to the Northwestern Company the right to construct new telegraph lines; bound itself to fix the rates of messages as the said Northwestern Company should require, provided they should not exceed a certain amount, and deprived itself of the right of making new telegraph lines.

3. That by the said transfer, abandonment and assignment, the Montreal Company had assigned and abandoned part of its privileges and franchises illegally, and contrary to its charter and to law.

4. That the clause of the Act of incorporation giving the Montreal Company the right to convey and part with all its estate for its benefit and advantage, cannot be interpreted to give to the Company the right to execute such an agreement.

5. That the respondent was the holder of one share in the stock of the Company on the 10th of June, 1881.

6. That the majority of the shareholders of a corporation cannot by their decision bind the minority in respect of an act *ultra vires* of the corporation.

For these reasons the Court:

1. Declared the deed in question to be *ultra vires*, set it aside and annulled it.

2. Ordered the Northwestern Company to cease from any longer using the telegraph lines and other property of the Montreal Company, and to re-convey them to the Company.

3. Ordered the Montreal Company to resume possession of the property, and to work its lines in the same manner as before the execution of the deed.

4. Ordered the Northwestern Company to render to the Montreal Company an account of all moneys which it had received for telegraph messages or otherwise under the said deed.

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The appellant's pretension is that the agreement was a hiring of work, that is, a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay. The judge in the Court below refused to interpret it in this way, saying, "the contractors are to pay $165,000 if they do not receive a single cent. That "is, to say the least, a singular hiring of work." It is the contractors, the "persons hired, who are to pay, and the master who is to receive. It is a "singular working arrangement where one of the parties may take the lion's "share." The appellants are not satisfied with this mode of dealing with the question. Hire of work is defined by the Code, and the present agreement satisfies in every respect the definition given by the Code. The Montreal Company formerly employed a great number of persons, about 2,500, who were paid to do certain work. The proposal of the Northwestern Company was, in effect, to perform the services which were previously rendered by the individual employés. Further, it was stipulated that, as payment for the work thus to be done by the Northwestern Company, it was to receive all the amounts collected for messages over and above the sum of $165,000 per annum. The amount which this surplus had reached in previous years was perfectly well known to the contracting parties. It was known that the gross earnings of the Company since its commencement had always exceeded eight per cent. upon its capital. It was not, therefore, the persons hired who were to pay and the master who was to receive. What the master received was a fixed portion of his own money which the servant had collected for him. But the master paid the servant as his hire the further amount above that portion which the servant had received for his master and which belonged to his master, but which, by the agreement, his master allowed him to retain as the price of his services. The factor receives the possession of his employer's goods; he sells them, and pays to his employer the whole of the price of the goods, less a portion of the price which he retains, by agreement with his employer, as the hire of his services. The auctioneer is employed in a similar manner. The Northwestern Company received the possession of the Montreal Company's telegraph line, and collects for that Company the proceeds of its earnings. It then pays over to the Montreal Company the portion of the proceeds fixed by the agreement, and retains for the hire of its services the surplus over that portion. In all this, as appellant contended, there was nothing illegal, or even uncommon, and nothing that would place the agreement beyond the category of contracts for the hire of services. The Court below, however, considered that by the terms of the agreement the Montreal Company abandoned certain of its franchises, viz.: "1. The right to construct telegraph lines. 2. The "right to acquire the immoveable property necessary for their working. 3. The "right to fix the price of messages. As to the first of these, namely, the right to construct new lines, counsel submitted that it is absolutely unfounded in fact. There was nothing in the agreement which in any respect, directly or indirectly, binds the Company, or purports to bind it, not to make new lines. It has a perfect right now to build a new line wherever its charter authorizes it; and it has not agreed to restrict this right in any way or to any extent whatever. All

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that the agreement contains as to new lines is in its second clause. By this clause it is provided, that the Montreal Company shall sell to the Northwestern Company the wire and [illegible] which it had acquired at the time of the agreement; [illegible] lines, and that the Northwestern Company should "[illegible] all expenditure on new lines incurred subsequently to July 1st, 1881." This was simply an agreement which the Northwestern Company's charter entitled it to make, and which, under the power given to the Montreal Company to construct new lines, it also had absolute authority to enter into. The statement as to the second franchise was equally unfounded. The judgment stated that the [illegible]pany had the right to construct telegraph lines, and to acquire immoveable property necessary for their working. This right the Montreal Company had never agreed to abandon, any more than the right to construct new lines. The lines which it had constructed at the time it made an arrangement with the Northwestern Company for working them, comprised the immoveable property which it had acquired for that purpose, and, so far as the use of that immoveable property is necessary to the operation of those lines, it was agreed that the Northwestern Company shall have it while it performs the work it undertook to do. But this does not prevent the Montreal Company from building other lines, nor from acquiring the immoveable property necessary for the purposes of those lines. The third point in which the judgment declared that the Company had abandoned its franchises was in respect of the power to fix rates for the transmission of messages, and this by having bound itself to fix the rates of messages as the Northwestern Company might require, not exceeding a certain amount. It was submitted that this statement, though to a certain extent true in fact, involved no abandonment by the Company of its franchises. There was nothing in the charter, or in the law respecting such corporations, which would prevent the Board of Directors, or the Company, from agreeing with another company as to the rate which it would charge; and, in point of fact, such arrangements are made every day, as well between telegraph companies as between common carriers of all kinds." And there was not a [illegible] in the books which afforded authority for refusing to such companies the privilege of thus mutually arranging their rates, nor any principle which such arrangements violate. It was true that the charter gives to the Directors the power to fix their rates, irrespective of any other company, but it was not accurate to say that there is anything in the charter which prohibits the Company from making agreements with other companies with respect to their tariff. The popular cry which was raised, principally by brokers and stock-jobbers, against the arrangement made by the Montreal Company, was such as to allow pretensions of this kind to pass without criticism in a community where, during every moment of time, goods were being carried by railway corporations at rates restricted and limited by arrangements between them, which were made under precisely similar statutory provisions to those applicable in this respect to the Montreal Company. But the appellant could find no justification for such a pretension, either in the law or in the charter of the Company. As a further text counsel compared the position of the

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Company before and after the agreement. Before the agreement it worked its lines by means of individual operators. Since the agreement it works its lines by means of a corporate company. Before the agreement it made rules and regulations for the conduct of its business and affairs. Since the agreement it retains the power of making such rules or regulations, the only difference being that it does not require so many. And it had not been shown that any of the rules or regulations in force at the time of the agreement have been repealed or altered, or have ceased to have effect. Before the agreement it could construct new lines or extensions of its line to such points as were permitted by the charter. Since the agreement the Company still possesses the power of building new lines or extensions if it chooses so to do. But since the agreement it is not likely to do so at its own expense, as its arrangement with the North-western Company binds that Company to assume and pay all expenditures on the lines, from and after the 1st of July, 1881. And these lines, though built without expense to the Company, form part of its own line, and the possession of them reverts to it on the termination of the agreement, whether by lapse of time, or non-performance of the conditions. Before the agreement the Montreal Company was engaged in a losing competition with the Dominion Company. The expense of telegraphing was rendered heavier than needful, by the number of offices required and operators employed, by reason of the two Companies having lines to the same places. The lines were falling out of repair, the revenues were inadequate to any reasonable dividends, and, in a short time, it would have been impossible to meet the exigencies of the public punctually or efficiently. By the agreement, and its provision is made for the repair of the lines, their maintenance in good order, their extension to suitable points, their effective operation, without impairing the dividends to the shareholders, and without imposing upon the public any greater burthen than had been usual until within a very short time previous to the agreement.

Looking at the powers possessed by the Montreal Company under its charter, it was submitted that the plain language of the Act gives to the Company a right to let (or lease), convey and part with its property of every description, without any restriction whatever. If this were a lease of the property of the Company, as had been contended on the other side, it would be justified by its charter. Reference was then made to some minor points contained in the judgment, such as the alleged rejection of a clause in the Bill formerly submitted to Parliament. This clause was withdrawn, not rejected. Parliament had since conferred upon the Montreal Company greater powers than those exercised in making the agreement complained of. Lastly, it was contended that the respondent had no interest to bring this action. It was proved that he was a mere *prête-nom*, carrying on the proceeding at the will and cost of two or three other persons, whose interest was to keep the stock "active," that its fluctuations might encourage speculation and increase their business. At the time the deed was executed the respondent was only the holder of one share. He was not entitled to take such conclusions as he had taken by the present action without making the other shareholders parties to his suit; and, further, the action should have been in the name of the Attorney-General.

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S. Bethune, Q.C., and *J. J. Maclaren*, for the respondent, cited the following authorities, in addition to those noticed in the judgment:—Hinckley *vs.* Gildersleeve, 19 Grant's (U. C.) Chy. Rep. 212; Attorney-General *ss.* Niagara Falls International Bridge Co., 20 Grant's Chy. 34; Copeland *vs.* Citizens Gaslight Co., 61 Barber (N. Y.) 60; Hattersley *vs.* Shelburne, 31 L. J. Ch. 873; Bird *vs.* Bird's Pat. Dead. Co., L. R. 2 Ch. App. 358, (Brice, p. 163); Brice on *ultra vires*, sec. 25, p. 128; Staffordshire, &c., Canal Nav. Co. *vs.* Birm. Canal Nav. L. R. 1 H. L. 254; Black *vs.* Del. & Rar. Canal Co., 24 N. Y. Eq. 455. In the first of the above cases, the Wolfe Island Railway and Canal Company, under 14 and 15 Vict. c. 149, had the same power as the Montreal Telegraph Company possessed, of "letting, conveying and otherwise departing" with their property; yet these words were held not to cover a lease. In Attorney-General *vs.* The Great Eastern, one railway was supplying another with locomotives, and the Attorney-General, at the instance of an outsider, who was not a shareholder at all, filed an information for an injunction to stop it as *ultra vires* and contrary to the public interest.

Tait, Q.C., and *Doutre, Q.C.*, were heard in reply.

RAMSAY, J.—(*diss.*) This is an action by a shareholder, owner of one share, to set aside an agreement entered into by the appellant—the Montreal Telegraph Company and the Great Northwestern Telegraph Company of Canada—"to work, manage and operate the system of telegraph, owned and heretofore operated by the Company" first named for a period of 97 years from the first day of July, 1881.

The first question that arises is as to whether a single stockholder can, in his own name, maintain a suit of this kind; and whether the respondent, plaintiff in the Court below, has really any interest in the suit, or is only there at the bidding of others to annoy and embarrass the Company.

Where there is only a public interest at stake, a private individual cannot take suit in his own name, unless he suffers some special damage. This is so well known that it is hardly necessary to refer to special cases on the point, but I may say that it was formally decided in Upper Canada in the case of the Attorney-General *vs.* The Niagara Falls Bridge Co. (20 Grant U. C. Chan. Rep. p. 512.) "It is very clear," said Strong, V.C., "that private individuals or corporations cannot be heard to complain of any exorbitant exercise of powers on the part of a statutory corporation or on the ground of public nuisance or obstruction to the enjoyment of public rights, without showing special damage to themselves." But if there is a special damage the private individual may maintain the suit in his own name, and Art. 997 C.C.P. has in no wise altered the law in that respect (Hunt and the Corporation of Quebec, 4 Q. L.R. 275). And any interest as that of a creditor will suffice, or even of a great carrier specially interested in a canal or railway. (Moat, V.C., in Hinckley vs. Gildersleeve, 19 Grant U. C. Chan. Rep. p. 215.) On these very principles it is apparent that in proprietary corporations the right of the shareholder can never be seriously questioned. His individual interest always exists, whether the act he seeks to repress or prevent be one directly and pecuniarily injurious to him, or be only *ultra vires*,

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because a violation of the public policy, in view of which the charter was granted. This doctrine seems to me to be well laid down in Field on Corporations, sect. 402: "For although either a corporation or body of directors may, unless restrained by the constating instruments, manage the affairs of the corporation as they please, so long as they act *bonâ fide* and within the powers conferred upon them, still, if they attempt to exceed such powers, they may be restrained at the suit of a stockholder or of a creditor." Again: "As to every act which is *ultra vires*, any stockholder has a right to restrain and to prevent a repetition of it, though every other member may be arrayed against him." *Ibid.*

Another question has been raised in England, whether one stockholder could sue in his own name singly, or whether he should sue "on behalf of himself and all other corporators." If there is anything in this it is purely technical to English law. There can be no such difficulty with us; a corporator could not sue for others to give himself a seeming right, art. 19 C.C.P., nor does he require any such personation. Our rule is set forth in the familiar saying, "*l'intérêt est la mesure des actions*," art. 13 C.C.P. By interest we mean individual interest, as contra-distinguished from the common interest we all have in the proper conduct of affairs, and the dealing out justice to all men. It seems, however, that even in England in a case like this, no such question could avail. "Such a bill (to prevent a corporation either commencing or continuing something which is beyond the powers of the corporation), indeed, may be maintained by a single corporator, not suing on behalf of himself and others." Jessel, M. R., in Russell vs. Cookefield Water Works Co., L. R., 20 Eq. 44. The remarks of the late Master of the Rolls in this case throw great light on this branch of the case, and his judgment was, I believe, confirmed in the House of Lords, 8 H. L. C. 712 (Clarke & Finnelly), and so it was also held in Cass vs. The Ottawa Agricultural Insurance Co., 22 Grant U. C. Chan. Rep. 512.

But, it is said, Low has no interest; he is only a *prête-nom*, the costs are to be paid by others, and he is acting at their bidding and for an improper purpose. Several English cases were cited in which, it is contended, that under certain circumstances the action was dismissed owing to the small interest of the plaintiff. One of these was the case of Robson vs. Dobbs, L. R. 8 Eq. 301. On referring to that case it will be found that the principle upon which it was decided is that the suit was not that of the plaintiff. It is true the learned Judge said that the plaintiff had only one share in the Building Society, worth £2 0s 3d; that no coin of the realm was small enough to pay the plaintiff's interest in this action, that this share was purchased after the transaction complained of, and that the suit was brought to gratify the spite of an attorney named Harle, who was the real plaintiff, and whose laundress was the wife of the nominal plaintiff. But these may be presumed to be the reasons for the Court arriving at the conclusion that the action was not that of Robson but of Harle. However, in the case of Seaton vs. Grant (L. R. 2 Ch. 464) Lord Cairns called the motion to take the bill off the file "one of a very novel

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character," and he laid down categorically the grounds on which a case could alone be stopped, otherwise than by demurrer or plea. His enumeration included no case like the present. The English law, as laid down by Lord Cairns, does not differ materially from ours. There was another case of Forrest vs. the Manchester, Sheffield & Lincolnshire Railway (9 W. R., 818), in which the action was dismissed for want of interest, but Lord Cairns said, in Seaton vs. Grant, that in that case the Court came to the conclusion that a suit professing to be the suit of Company A was really the suit of Company B.

In our law we know of such a thing as a vexatory action, but the vexatory action, as Cochin has explained, in one of his Plaidoyers, is where there is no real and tangible interest, "Un intérêt réel et sensible, sans cela tout * * * degenère dans une vexation." 3 Cochin, Œuvres, 208. The case was this: M. de Benoise's wife had received a dot; her father's other children had received nothing; they might ask their *legitime*, and consequently the husband of the daughter contended he had a right to mix himself up in his father-in-law's affairs in order to provide the *legitime* of the other children, thus preventing his wife being called on to contribute. This interest was considered to be too remote. "Sane in omni parte juris quotiens quæritur de eo quod interest, non quod quoque modo interest spectatur, sed quod in re ipsa vere et principaliter." Cujas, v., c. 65 D. On the same reasoning we dismissed the intervention of Mrs. Molson and her children, in the case of Molson & Carter. There is also such a thing as a vexatory action where the interest involved is of inappreciable value, *de minimis non curat lex*. This rule does not, however, mean that the cause of action is a trifle because the money value directly involved is minute. For instance, there are exemplary actions and *actions negatoires*, in which it might perhaps be said no coin of the realm is so small as to pay the damage proved. And so, in the case of Seaton & Grant, already cited, Lord Cairns, in refusing the motion to take the bill off the files, said: "The bill contains allegations directed to the invalidity of the proceedings, and a part of the prayer is for a declaration to the same effect." It seems to me the rule must be the same everywhere, and that there is right of action for "quod in re ipsa principaliter interest, quoad minuit rem actoris, quod conditionem actoris deteriorem fecit." Cujas, Ib. E. It would be more than a novelty in our law to hold that, because some one had guaranteed Low's costs, therefore, he had no right of action. If he had ceded his right of action, the suit might have been maintained in his name, unless there was fraud. The expression used to a plaintiff that he is a *prête-nom* was not, so far as I can find, applied to litigants. In the old language of the Courts, the *prête-nom* was the fictitious party to a simulated deed. But, taking the adaptation as admissible, it amounts to this, that the suitor must be fictitious or the suit simulated.

This question, however, gives rise to no difficulty here, for Mr. Low's interest is perfectly clear. His object is to put an end to an agreement which, he says, terminates the whole business of the Montreal Company for 97 years, and places it in the hands of another company. Again, I do not think it would be possible to say [illegible] he was a mere puppet bringing an action nominally to serve an im-

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proper object. What he says amounts to this :—"One share is mine ; it is the balance of some stock I held. Other 25 shares I hold as my own ; I bought them since the meeting, and with a view to taking proceedings in this matter. I have spent none of my own money in the suit, and I am guaranteed against loss by costs verbally. I moved in the matter after receiving the letter I produced from Mr. McLennan. I should not continue the suit without the concurrence of the other parties, with whom I have an understanding, but I am not obliged to abandon it." With us there is nothing illegal in such a suit. It is a test case, and, that is all.

Coming to the merits, it seems that it is admitted, as a general principle, that an incorporated company cannot, at common law, make any arrangement with any other person which shall be in fact an abdication or a delegation of its rights. The respondent, plaintiff in the Court below, contends that the agreement attacked is an abandonment of the franchise of the Montreal Company for a period of 97 years. Appellants contend that it is only a traffic arrangement, that it does not appear to be pecuniarily disadvantageous to the respondents ; that a telegraph company is not like a railway company, for there is no danger to the public as in working the latter, and, consequently, that there is no question of public policy involved. Appellants therefore argue that the railway cases do not apply, and that if they do the weight of authority goes to maintain the agreement entered into between them ; they also say that the agreement entered into by them was within the powers of both companies, specially granted by their acts of incorporation.

I am at a loss to find any substantial reason for distinguishing between a railway company and a telegraph company. Both have rights to interfere with private property, and that presumes obligations towards the public, and, as a consequence, a public policy. Then there are dangers in working a telegraph company, and there may be negligence and wrong doing. A telephone company was indicted as a nuisance, and convicted, at Quebec. The same rule that applies to railway companies was applied to a canal company (Hinckley vs. Gildersleeve) and to a bridge company (The Attorney-General vs. The Niagara Falls Bridge Company), in which Strong, V. C., recognizes "the well known principles which regulate the management by corporate bodies of works like this bridge in which the public have an interest." In the former of these two cases Moat, V. C., referred to the case of Simpson & The Great Western Palace Company (6 Jur. N. S., 985), which seemed to be against his decision, but he pointed out that the arrangement in fact did not violate any rule of public policy, and that it was of such a nature that if no shareholder objected no one else could. There may be some latitude in the interpretation of an agreement by the Courts owing to the nature of the company. The usages and necessities of the business to be carried on more or less enter into consideration as to whether the agreement is *ultra vires* or not. (Art. 358 C.C. See also Ld. Watson in Att'y-Gen. & Great Eastern Railway Company, L. R., 5 H. of L., 478.) But it seems to me that the general principle prevails as to all companies, whether they involve what is called a public policy in its more obvious forms or not. This principle is based on the theory that a Parliamentary charter, like a royal char-

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ter, of incorporation, is granted to certain persons and their successors, in the modes regulated by law. It is true that these acts are easily obtained, and that there is no protection as to whom the successors may be; but it would be to interfere with the legislative power to permit a corporation, no matter for what purpose created, without special authority, to delegate the whole or any of its powers.

Our next enquiry is as to whether the arrangement under consideration is only a traffic arrangement or if it is an absolute abandonment of the powers of the Montreal Company. The articles of agreement between the two companies appellant set out the reasons for making the contract, and then go on to declare that the contractors (that is the Great Northwestern Telegraph Company) "are willing and have agreed to undertake the working of the line of the Company at a fair rate of remuneration upon the terms and conditions hereinafter provided for." The terms and conditions go on to detail what the contractors are to do. They "undertake for a period of 97 years from the 1st of July, 1881, to work, manage and operate the system of telegraph owned and operated by the Montreal Company, by means of its own employees and operators, and conduct the business thereof in all respects as efficiently as the Montreal Company had previously operated the same; collecting in the name of the Company such charges for messages as the Montreal Company should establish from time to time; all which was to be done in such manner as to perform towards the public, to the fullest extent all the obligations of the Montreal Company.

"Then by the second paragraph the contractors agree to maintain the telegraph line. By the third paragraph all the property of the Company is handed over to the contractors. By paragraph 4:

"The Montreal Company agreed to change its tariff upon the requisition of the Directors, provided it was not asked to increase the rate beyond twenty-five cents for ten words."

"5. In consideration of this agreement the North Western Company promised to pay to the Montreal Company quarterly $41,250 from and out of the proceeds of the operation and use of the Company's lines, which proceeds the North-Western Company thereby warranted should amount to the said sum.

"6. The North-Western Company also bound themselves to pay all costs and expenses of operation, taxes and assessments. Also to perform all the contracts of the Montreal Company with railway companies and other parties.

"7. It was agreed that if the North-Western Company should fail to make any one of the quarterly payments, and the default should continue for thirty days, the Company should have the right to resume possession of its lines and property without any legal proceedings, further than a notice in writing of its intention to resume them: whereupon the agreement should become void, and the Montreal Company should hold, enjoy and operate its lines and property in the same manner, and to the same extent, as if the agreement had not been executed. The North-Western Company to forfeit and surrender to the Montreal Company in such case, all additions and improvement made upon the lines and property of the Montreal Company and all new lines constructed during the agreement.

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Then follow stipulations in case the contractors should fail in carrying out their obligations; and, lastly, w have the explanation of the "fixed rate of remuneration" for which the contractors were willing and agreed to undertake to work the line of the Company :—

"12. In consideration of the premises, it is hereby further agreed by and between the parties hereto that the contractors shall retain as their remuneration for the working and operation of the said telegraph lines, and for the performance by them of all the obligations and duties hereby imposed upon them, the balance of the earnings and income of the said telegraph line and property, which shall remain in their hands after the payment to the Company of the said sum of one hundred and sixty-five thousand dollars per annum. The said contractors hereby agreeing to accept such balance as remuneration, to whatever sum the same may amount. And they hereby assume all risk of there not being any such balance, hereby undertaking and agreeing to make no claim or demand upon the Company for remuneration upon any ground, or for any cause whatsoever, the true intent and meaning of these presents being that the Company shall, during the continuance of this agreement, continue to receive the quarterly sum of forty-one thousand two hundred and fifty dollars at the dates hereinbefore mentioned, whether the earnings and revenue of the said lines and property shall amount to that sum, or more or less."

A great many cases have been cited at the bar on both sides to establish what the Courts will consider as an agreement *ultra vires* of a corporation. And going back to these cases, vistas of cases bearing more or less on the subject present themselves. Except for the general principles which we have already examined, it is not easy to draw a precise lesson from these cases. They turn in great part on the interpretation of statutes which frequently have little or no resemblance to ours. Again, some range themselves readily within one class, while others, having some analogy to them, are relegated to the opposite class. As an instance, it has been held that expediency is not the question. (Hare vs. The London, Wood, V. C., 30 L. J. 835) And so the use of the funds of one company to promote the soliciting bills in Parliament by another company is declared to be *ultra vires*. The East Anglian & The Eastern Counties Railway Company, 11 C. B. 775. And generally the doctrine seems to be that a company must reserve its funds for its purposes. And it has been held that the directors of a company had no authority to use the funds of the company to amend its charter. Would it be held that the administration of a company has no right to use its funds to oppose the formation of a hostile company? This might be expedient, and perhaps necessary for self-preservation.

There are cases of agreements being sustained to buy off opposition, where the money was to be given not as a bribe (The Earl of Shrewsbury vs. The North Staffordshire Railway, L. R. 1 Eq. p. 593), but to pay for land required for the works. (Taylor & The Directors of the Chichester & Midhurst Railway Company, 4 E. and I. Appeals p. 628.) The last two cases merely maintain that a company *bonâ fide* may *transiger*, which we have held more than once. (Bachand & The Corp. of St. Theodore d'Acton, Q. B. Sept., 1874)

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Again, we have a totally different class of cases turning on a question of public policy abstracting all private reasons, and, therefore, the sale of the whole business of a company to the promoter of another company is *ultra vires*. (Bird v. Bird's Patent Deodorizing, &c., Co. (9 Ch. App. 358.) And no grant can be made by a company which will affect injuriously the purposes set forth in the Act. (The proprietors of the Staffordshire & Worcestershire Canal Navigation & Proprietors of the Birmingham Canal Navigation, L. R., 1 E. and I. Ap. p. 254.) And so one waterworks company, that cannot carry out the purpose to supply water, is not allowed to delegate its powers to another company and agree to sell all its shares to such other company. The Richmond Water Works Company & Vestry of Richmond, L. R., 3 Chan. Div. 82. The case of the Attorney-General & Great Eastern Railway Company, although it gave rise to much discussion, finally was decided on the provisions of its special Act. The Master of the Rolls held that the agreement was of itself *ultra vires*, and that the Act did not give any special power to make such agreement. In appeal, James and Bramwell, L. L., J J., held (Baggallay, L. J., diss.), that two railroads working in concert and one lending the other part of surplus stock, under an agreement, was not beyond the implied powers of these companies, and that at any rate such agreement was authorized by the special statute. In the House of Lords this judgment was affirmed solely on the ground that the special statute authorized the agreement. The Lord Chancellor [Selborne] said: "In the present case I think with the Court below, that the Acts which the information was filed to restrain are not *ultra vires* of the defendant company. But I come to the conclusion, not on the ground that they are such acts, on the border line between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given; but because I think that they are expressly authorized by the 14th section of Act of 1863." In the same case Lord Blackburn, in the most precise terms refused to express any opinion as to the common law question, confining himself solely to the question of the powers given by the Act. And Lord Watson went no further than to say, on the general question, that a corporation had no power which was not expressly or implicitly granted by charter. (L. R., 5 H. of L., 478.) It was argued at our bar that this case confirms the decision of V. C. Wood in Hare & The London. It seems to me it leaves the decision in that case without confirmation and also without condemnation.

Although the conclusion at which I have arrived in this case is not affected by Hare & The London, simply because it only covers part of the ground, I cannot leave this branch of the subject without some reference to that case (Hare v. The London & Northwestern railway Company, 30 L. J., N. S., ch. 817). It was decided by Wood, V. C., in 1861, and the holdings are thus resumed by the reporter: 1st. There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. 2. Though a public company constituted for a particular purpose will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the Court will not interfere with

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a traffic agreement between two lines to divide the net earnings in certain definite proportions. The opening observations of the learned Vice Chancellor apply solely to one consideration of public policy, namely, that the rule of public policy is rather to avoid competition, which might become ruinous, than to create it. I very readily concur with the opinion thus expressed, and consequently I am prepared at once to set aside the argument of the respondent, that the possibility that the agreement which forms the subject of these proceedings may lead to a monopoly is not a reason for us to decide against the appellants. The question of the policy of competition is purely relative. When carried to the extent of preventing extortionate rates it is wholesome; when it goes farther, and makes a reasonable investment unfruitful, it is the reverse. The second point held is, that two railway companies may agree to work together and divide the profits on an approximate calculation—all other calculations being necessarily impossible. In other words: 1st. A traffic agreement between two companies by which each shall take its own gains is lawful. 2nd. Such agreement does not become unlawful because they are to divide their gains on an approximate calculation.

The great point made by the plaintiff was, that an approximate division was, perhaps, making away with the funds of his company. This proposition appears to me to be untenable. If the companies had a right to agree to carry in common, they had a right to divide the profits in any equitable manner.

The question, therefore, resolved itself into this, can two railway companies agree to facilitate one another's operations in a manner advantageous to both by what is called a traffic agreement? This was not really questioned, and, so far as I can learn, it has never been seriously questioned. Indeed we have daily experience of all kinds of traffic arrangements being entered into. Simple, then, as the question in Hare & The London appears to me to be, V. C. Wood gives a minute account of the difference of opinion existing amongst the most eminent judges as to the right of a company to agree to divest itself of any of its funds in favor of another company, no matter with what object, and however prudent and reasonable the agreement might be. He says: "But still, there is the fact admitted, that a portion of the money earned by the traffic on the London & Northwestern Railway has been handed over to another company, and that raises the whole question in this case. P. 827. The remarks by V. C. Wood have been quoted by both parties to the present suit in support of their various pretensions, and perhaps this is not to be wondered at. As a piece of legal criticism, although it recognizes general principles invoked by respondent, it is particularly directed to the investigation of a point which only forms part of this case. On the point particularly treated I think the opinion of the V. C. is clearly in favor of the appellants; and that it lays down a doctrine which is, as I have already said, impossible to deny. The principle appears to be this, all carrying operations are speculations, and the remuneration gained by the carrier is what he may chance to earn by means of the arrangements he makes. By the arrangement in Hare's case the company agreed to divide on a perfectly equal system, and it is erroneous to say that either agreed to give the other its

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rains. Each agreed to contract to do the other's work at a certain price. I am inclined, however, to think that the learned Vice-Chancellor has to some extent exaggerated the importance of the question he has so elaborately treated, and has perhaps theorized too much on cases scarcely susceptible of a very strict classification. I may quote a few words of his remarks to illustrate my meaning. At the bottom of page 830, 2nd col., he says: "This case seems to be in some sense *a fortiori* with some small incidents, which do not make it, perhaps, quite so strong a case." It is just this inequality of incidents that renders it practically impossible to lay down a perfectly binding rule as to what shall be alienation of the funds. The difficulty has been effectively remarked upon by an American writer:—"The most vexed question in the law of corporations is to determine the legal effect of contracts made by them, which, though not prohibited by any special provision of statutes, or any rule of public policy which binds individuals as well as corporations, involve an abuse of the power to contract merely because they are found on judicial inquiry not to be necessary or incidental to the express powers conferred on the corporation. Not coming within its [illegible] and purpose, and designated as contracts *ultra vires*, they have been the subject of extended discussion by authors and judges." Pierce on the law of railroads, p. 516. I should be much puzzled if I were called on to say scientifically why a company chartered to make and work a railway should be exceeding its powers if it used its funds to run a line of ocean steamers, and that it should not exceed its powers in making a traffic arrangement with another contiguous railway. I could, of course, say it has the power impliedly in the latter case and not in the former; but such a *dictum* does not greatly augment legal science. It is not necessary for me in this case to enter further into this subject, for it is not the only objection to the agreement between the companies appellant. The agreement is not solely objected to because the two telegraph companies shall divide the profits in any proportion for their work. However, that seems to be the proper mode of examination in dealing with such questions; and so it was held in our own courts that a railway company could make contracts to cover delivery by cart in Montreal where there was a sufficient body of carters otherwise to perform the work. Attorney-General, and G.T.R., 1865.

The real difficulty is that under the agreement before us, the Montreal Company has ceased to be a telegraph operator. In answer to this it is said the directors and shareholders never intended to work the line with their own hands; they were to work it by servants, and the other company is that servant. The words relied on are these: "That it shall and may be lawful for the directors of the said Company, or a major part of them, from time to time to fix and regulate the charges or dues to be received by the said Company, for the transmission and delivery of communications by the said electro-magnetic telegraph; and by their clerks and other officers and servants, to ask for, demand, receive, recover and take the same." It is not probable that any Court will be misled by so transparent a fallacy, and one which is so constantly discredited by the words used elsewhere to defend the agreement. In the first stipulation of the agreement the N. W. Company agreed to work and operate the system of telegraph

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owned by the Montreal Company by its own employees and operators, and conduct the business thereof in all respects, collecting in the name of the Company (evidently the N. W. Company) charges for messages, etc. What can the Montreal Company tell the Northwestern Company to do with any right to expect compliance? All through it is treated as a traffic agreement; when was the hiring of a servant so styled? Service is due from an inferior to a superior; but the contract here is between equals, a contract of lease *à longues années* unquestionably in our law an alienation.

One other question remains—It has been said the Montreal Telegraph Co. has the power by its charter to make this arrangement, and that the Northwestern Company was created with the power specially given to enter into such arrangements. With regard to the statutory powers of the Northwestern Company they are limited to making agreements with those authorized so to contract. It is therefore necessary to examine the powers granted to the Montreal Company. Appellants chiefly rely on the following enactments. The first is from the 10 and 11 Vic., cap. 83:—

"They and their successors shall be in law capable of purchasing, having and holding, to them and their successors, any estate, real and personal or mixed, to and for the use of the said company, and of letting, conveying or otherwise departing therewith, for the benefit and on account of the said company from time to time, as they shall deem necessary or expedient; provided always that the real estate to be held by the said company shall be only such as may be necessary for the purpose of building, using and preserving the said electro-magnetic telegraph, and for objects immediately connected therewith."

The second is from the 18th Vic., cap. 207, s. 1:

"For and notwithstanding anything in the Act intituled "an Act to incorporate the Montreal Telegraph Company" contained, it shall be lawful for the said company, and they shall have power to purchase, receive, have and hold to them and their successors, to and for the use of the company, such real estate in this province, and such only, in addition to that now held by them, as may be necessary for the convenient transaction of the business of the company, and for the erection of buildings for the suitable accommodation thereof in this province, now or hereafter to be established, and for the construction of the line or lines or branches thereof, and for the effectually carrying on the operations of such company, and the same to let, convey or otherwise part with, for the benefit and on account of the said company from time to time, as they shall deem expedient."

By the 8th section of the last-named Act it is enacted:—

"The said Montreal Telegraph Company shall be held to have had full power and authority to purchase, and they are hereby empowered and authorized, subject, however, to the provisions of the respective deeds of agreement and purchase thereof, to hold, keep up and work, repair, re-erect and maintain the said two several lines of telegraph, with all and every the instruments, batteries and materials used in working the same, and their appurtenances and branch lines, and the same at their pleasure to lease or depart with, and may further

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construct branch lines thereto, and amalgamate the said lines and branches with the other lines of the company; and the said company is, moreover, invested with all the powers, rights and privileges to the said companies belonging, of whatever nature, and is empowered and authorized to invoke, enjoy and employ the same as fully and effectually as either of the said companies could themselves do or have done; and, moreover, such companies shall have, enjoy and exercise with respect thereto all the powers, rights and privileges conferred upon said companies in regard to other lines and property of like description by their acts of incorporation and the acts amending the same."

No words give directly the power to the Montreal Company to cease to perform the duties of a telegraph company, but it is empowered to hold any estate, real, personal or mixed, for the use of the company, provided the real estate be only such as is necessary for the works, and of letting, conveying or otherwise departing therewith. Therefore it is argued, if the company can let, convey and make away with any and every part of its property for the benefit and on account of the company as it deems expedient, why can it not do so for the whole for ninety-seven years? The answer is that this is not the language in which the Legislature conveys the power to let or alienate the whole line as such, and that the intention was only to authorize appellants to sell such property as they might not require for carrying on the legitimate operations of the company. In the later Act, 18 Vic. c. 207, sec. 8, the company was given special power to purchase two lines of telegraph, to maintain them, or to lease or depart with them. This is clear, but there is no similar provision for the original lines. In the United States it has been pointedly decided that power given to a corporation to "acquire and convey at pleasure all such real estate as may be necessary and convenient to carry into effect the objects of the corporation," do not give the companies power to alienate its franchise or any of the real estate acquired and held solely and exclusively for the purpose of such franchise. Gholson J., in Coe and Columbus, Piqua and Md. R.R., 10 Ohio St. 372. I am of opinion, then, that by these sections no legislative power is given to the Montreal Company to convey their rights to telegraph to any other company, and therefore I am to confirm the judgment of the Court below, on the principle of public policy, namely, that Parliament having authorised the formation of a company to perform a particular duty, such company cannot delegate its powers to another company without the sanction of the creating power.

DORION, C. J., said that the opinion which had just been read by his learned brother relieved him from entering into a lengthy examination of the case. It was no doubt a very important one, both as regards the company and the public. The agreement made between the Montreal Telegraph Company and the Great Northwestern might be stated in a few words to be this: The Montreal Telegraph Company agreed with the Great Northwestern to lease all its lines to the latter for the term of 97 years, the Great Northwestern Company to manage, administer and work the lines, and to pay the Montreal Company the sum of $165,000 per annum in quarterly payments. The Montreal Company reserved

its offices and some lands in Montreal and Ottawa. During these 97 years the Montreal Company were to have nothing to do with the management, the collection of tolls, etc. The Great Northwestern had the control of all that, the only reservation being, that if the above-mentioned payment was not made, the Montreal Company would have power to resume possession. It was stipulated that the tolls should not be altered by the Great Northwestern, but the latter might request the Montreal Company to alter the tolls, and the Montreal Company would have to alter them. This provision appeared to have been introduced for the purpose of preserving a semblance of control in the hands of the Montreal Company. There could be no doubt that an incorporated company could not sell out or lease its franchises, and by franchises must be understood not only their works but the whole of the privileges attached to their corporate capacity. The agreement in this case, it must be admitted, was drawn with great ingenuity, to get over the difficulty created by the previous decisions on the subject. But not a single case had been cited by the appellant in which it had not been held that such an agreement was *ultra vires*, unless special power was given in the charter to make such a transfer. The next question was whether the Montreal Telegraph Company had power by its charter to do what it had done. After citing the clauses of the charter the Hon. Chief Justice proceeded to say that there was no power given to assign its franchises. For example, the Company had a privilege (which for his own part he did not desire to see extended) of putting up poles at people's doors, and of cutting down trees which interfered with their wires. This was part of their franchise. Could the Company part with that? His Honor proceeded to cite the case of Bourgouin & The M. O. & O. Railway, in which the Privy Council held that a sale of a railway could not be made without the intervention of the Legislature, to ratify the assignment of its franchises.

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Cross, J. (for the majority of the Court).—The respondent, John Low, as a shareholder in the Montreal Telegraph Company, instituted this action against that company and the Great Northwestern Telegraph Company, to set aside an agreement entered into between the said two companies which the respondent represented to be a lease, by the Montreal Telegraph Co. to the Great Northwestern Telegraph Co., also to have the latter company enjoined no longer to use the line and property of the former company, and to render an account of their receipts under the agreement to the said Montreal Company and to restore to them their telegraph line and other their property; the latter company to receive the same and operate and use it in the same manner as before the agreement in question.

The Montreal Telegraph Company pleaded a demurrer, giving for reasons: 1st. The plaintiff appeared to have but fifty-one shares, and other shareholders for 49,949 had not been made parties to the action. 2nd. It was not competent for the plaintiff to take conclusions directly affecting said other shareholders. 3rd. Such conclusions could not be taken in an ordinary suit, but only as provided by law for the prosecution of injunctions, or at the instance of a public officer. These grounds were repeated in a plea to the merits, and they fur-

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ther pleaded the terms of their act of incorporation, including the power of purchasing and holding any estate, real or personal or mixed, for the use of the company, and letting, conveying and otherwise parting therewith for the benefit of the company; that the agreement in question was made in the interest of shareholders and to avoid a ruinous competition, and was approved of by mass of the shareholders, and was greatly to their advantage, It was not proposed to relinquish the working of their line, nor did they (the Montreal Telegraph Company) abandon any of their franchises or privileges, but only exercised the powers given them by their charter of incorporation, and the several amendments thereto, and that to the advantage of the company, and had not exceeded their powers. By an amendment subsequently made there was added the ground that the respondent was a mere *prête-nom*, having no sufficient interest to entitle him to bring the action; and that such conclusions as were taken by him in the suit were only available at the instance of the Attorney-General.

The Great Northwestern Telegraph Co. pleaded separately, to the effect that they had not exceeded their powers in entering into the agreement in question, and relied more especially upon their charter, which conferred on them the right to work and maintain the telegraph lines of other companies.

There is no difficulty as to the facts. The agreement is produced. It is proved that it went into operation, and that under it the lines of telegraph and property of the Montreal Telegraph Co. were taken possession of, and worked by and for the behoof of the Great Northwestern Telegraph Co. There is also proof that severe competition had been going on between the Montreal Telegraph Co. and the Dominion Telegraph Co. so as greatly to reduce profits, and that the agreement was [illegible]geous, and in the interest of the shareholders of the Montreal Telegraph [illegible]y. The agreement, besides the preamble, contains twelve clauses to the following: 1st. The Great Northwestern Company, therein called the [illegible]tors, agreed to operate the Montreal Telegraph Company's lines for ninety-seven years at rates to be fixed from time to time by the Montreal Telegraph Company, therein called the company. 2nd. The contractors agreed to maintain said lines in efficient condition; the same to be delivered over to them, with stations, buildings, materials, &c. 3rd. With certain special reservations, the chief of which were a board room and place for safe-keeping of books, the contractors were to have the use of all the offices, stations, buildings and property of the company. 4th. On requisition to that effect made to them by the contractors, the company were to change the tariff of rates, provided they should not be augmented for the extent of present lines in Canada to more than 25 cents for ten words, but subject to adequate increase in case of the imposition of taxes, or its being made compulsory for the company to provide other means than poles for the carrying of the wires. 5th. The contractors to pay the company $41,250 quarterly. 6th. The contractors to bear and pay all expenses of operating the lines and other charges, including taxes and assessments, and keep the company's property clear of liens and incumbrances. 7th. The contractors to assume and fulfil all the contracts, engagements and liabilities of the company. 8th. In default of any one of

the quarterly payments being made within thirty days after notice, the company to have the option of resuming possession of their lines and property, in which case the agreement to become void save as to past obligations. 9th. Contractors to forfeit and surrender to the company additions and improvements and pay all sums due under the agreement up to the time of surrender. 10th. On termination of the agreement by lapse of time or otherwise, the contractors to deliver over the line to the company in as good condition as when received, together with improvements, additions and current supplies [illegible] The company assigned to the contractors all contracts for future [illegible] contractors assumed to the exoneration of the company. 12th [illegible] retain the surplus earnings and to take the risk of deficiency.

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The appellant contends that this agreement is a hiring of [illegible] Montreal Telegraph Co. from the Great Northwestern Co., while [illegible] maintains that it is in effect a lease and conveyance of all the property [illegible] of the Montreal Telegraph Co. While as regards the Great Northwestern Co., and the authority given them by Parliament to work the lines of other companies, it may be said to be a hiring out of their services, yet as regards the Montreal Telegraph Co., I have no difficulty in pronouncing it to be a lease and conveyance of their property, which, if not authorized to make, should be set aside or declared void at the instance of a party sufficiently interested. It contains all the essentials of a lease and agreement to deliver, and a delivery over of property to be enjoyed in consideration of a fixed rent or return. I understand it to be conceded that the difficulty occurs with regard to the powers of the Montreal Telegraph Company, that by the terms of their charter the Great Northwestern Telegraph Company had granted them powers to work and maintain the telegraph lines of other companies, which would have justified the proceeding on their part, provided the Montreal Telegraph Company had possessed the power to make such an agreement on their part, and that this depends on the construction to be put upon the concession to them of powers, as contained as well in their charter of incorporation, Statute of Canada, 10 and 11 Vic. c. 83, as by the different amendments of that statute.

But, before proceeding further with this enquiry, there is a preliminary question to be disposed of. The plaintiff sues in his own name and right, without invoking any class interest or declaring that he acts for others concerned alike with himself. He complains of no injury of a private nature suffered by himself, and none of a public nature which specially affects himself. He complains of *ultra vires* proceedings not specially affecting himself, and has not made the Attorney-General party to the suit, nor shewn that he has refused his ministry in the affair. Where it is stated in Brice, *ultra vires*, part 6, c. 1, art. 280, p. 841—"Any member of a corporation may, by himself, in his sole right, sue to prevent or put a stop to proceedings of any kind which are *ultra vires*," he means *ultra vires* in what he elsewhere explains as in the primary sense, such acts as I understand fail in their effect from the absolute want of power in the corporation to perform them, but not such acts as require to be annulled or set aside on a demand to that effect. It will be seen when he goes on further to

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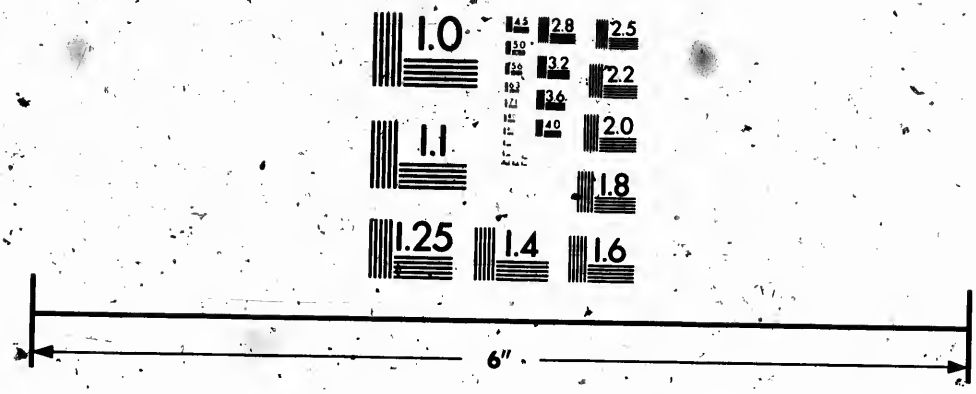

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develop the principle applicable to such cases. (See Part 6, cap. 2, sec. 3, sub s. 1, p. 877.) "The plaintiff must sue on behalf of himself and all the other members in the same position," and at p. 885, he remarks: "It is clear that the object of all commercial corporations is the attainment of profit or emolument for the individual corporators; and it seems established that each corporator has such an individual interest or right in the corporate welfare and assets that he may call upon the Courts to protect such interest or right, whenever anything is being done which admittedly will damnify and depreciate such welfare or assets, and by consequence his interest therein;" and at c. 6, sec. 1, art. 303, p. 891, he remarks, as another of his primary maxims: "No person may institute proceedings with respect to wrongful acts which, if of a private nature, are not wrongs to himself, and if of a public nature, do not specially affect himself." Art. 304: "In all such cases the Attorney-General ought to be the actor, but if he refuses he may be made a defendant." Art. 305: "But if there is a distinct private injury, separate from the wrong to the public, the private individual specially affected may sue for his own protection, without making the Attorney-General a party. Art. 306, "The last three propositions apply equally to *ultra vires* transactions."

If we apply these rules, together with the ruling in the case of Mozly vs. Alston, defining the cases where the company itself must sue, there would seem to be very slight ground for the plaintiff being able to sustain an action like the present in his own right merely. It seems to me that a private party, a shareholder, to establish a right to sue in his own name and in his own behoof, should show an interest other than one in common with the public generally, and if permitted to sue in his own name, for a wrong purely public, he should at least either make the Attorney-General a party, or show that he refuses to institute the necessary proceedings. In the leading case of Cass vs. The Ottawa Agricultural Insurance Company (Grant's U. C. R. Chy. vol. 32) the suit was sustained where the plaintiff sued in his own name; he had clearly a strong personal interest. The company had failed to observe a necessary condition precedent to its legal existence, viz., the payment *bonâ fide* by the shareholder of $50,000 before it was authorised to commence operations, in place of which it had borrowed the money on the credit of the company. The plaintiff as a shareholder had manifestly a strong personal interest in preventing the company from proceeding with its organization and operations until this preliminary requirement was complied with; and in Simpson vs. The Westminster Palace Hotel Co. (H. L. C., p. 712) their lordships merely expressed an obiter opinion that where the acts complained of were void as not authorised by the act of incorporation and did not admit of confirmation by the shareholders, a single shareholder could sue to have them set aside, but the bill in that case was dismissed, and it was held that a hotel company had not exceeded their powers by leasing to the Government part of their premises by a lease advantageous to the shareholders. In Russell vs. the Wakefield Water Works Co., L. R. 20, Equity cases, Sir G. Jessel said, a corporator may sue when the corporation are doing or have done something *ultra vires*, as by agreeing with another company regarding

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anything beyond their power, the other party in such case being made a party to the suit, but Brice, at p. 133, commenting on this very case of a lease, treats it as being *ultra vires* in the secondary sense only and, therefore, a case on the principles he lays down, requiring the plaintiff to sue for himself and other shareholders in similar interest. We have besides our own Code of Civil Procedure Art. 1997 directing as to the cases where the Attorney-General should interfere. As to the ground urged of the plaintiff being merely a *prête-nom*, I do not think the objection well founded. He had been for a considerable time owner of one share, and was given others the better to qualify him to bring the action. It is permissible even to acquire shares with a view to test a like question. Brice, at p. 848, says: A person may even buy shares with the open and avowed object of instituting proceedings to restrain the company from committing unauthorized acts. Brice, p. 248, citing Seton vs. Grant, L. R. 2 Ch. 459, and other cases. I do not think that the authorities cited by the appellant on this point are applicable, and if they were it would still be a question for the discretion of the Court. It seems to me the suit is in good faith and the questions raised by it proper ones for submission to the Courts.

A point is made in connection with this part of the case, that the plaintiff here represents an adverse interest, viz., that of the brokers as a class; but this is obviously too vague to be appreciated as a legal ground. I very much doubt if the plaintiff has shown a sufficient interest to maintain the present suit in his own name and for his own behoof without claiming for the other shareholders in like interest with himself. I am not sure that the measure of interest required has yet been made quite clear by the authority of decided cases.

On the more important question as to the validity of the agreement, I am ready to concede, that if a corporation, as in the case of a partnership, disposes of its whole stock in trade or its assets, so as to prevent the carrying out of the objects for which it was formed, it thereby commits an act which is *ultra vires* and which practically puts an end to its existence; but if the disposal of such property is within the purposes for which it was created, or is only partial, there would seem to be no sufficient reason to restrain the company from effecting it Before entering on this question I may perhaps be allowed a few remarks retrospective as regards the origin and progress of the company. When the Montreal Telegraph Company was first incorporated the science of telegraphy was in its infancy; the value of the invention remained to be proved; its success was yet uncertain; the promoters of the company did not pretend to make any special promises or undertakings towards the public. It was not even declared by the preamble to their Act of incorporation, that any benefit to the public was expected from their enterprise; they were granted no monopoly or exclusive privilege, or any advantage over any rival enterprise; they asked for an incorporation, presumably to test the value of the invention; if a success, to make money out of it for themselves; if a failure, supposing they might lose the capital they had risked. The Legislature asked no guarantee in the public interest, and the shareholders promised none. They besides reckoned on the probability of failure, therefore asked and obtained the right to dispose of their property with-

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out limit, including even the power to wind up the company by a vote of four-fifths of the shareholders. Neither by Statute nor at common law are they made subject to serve the public in such manner, as common carriers are held to do by the law in England. The immense value of the institution to the public was not then realized—it might have been hoped for, and that is all. As regards the scope of the powers conceded, and the extent of the public interest reserved, we must look at the charter in view of the condition of things and the circumstances at the time it was granted. If we do, we are led to conclude that the measure of public interest reserved was extremely limited, and that there is no particular reason why the powers conferred by the charter should be construed in a restricted sense nor otherwise than the natural, ordinary and full meaning of the language employed. The authority of the Montreal Telegraph Company for the purposes in question, so far as it extends, is traceable from its origin in the charter of incorporation 10 and 11 Victoria, chapter 83, through the different amending statutes in the extracts given consecutively in the factum of that company containing the empowering words to be found in each. Its history and extent could be ascertained and judged by this narration alone, but it is necessary to examine these statutes in case it should be found that they contain some qualifying provisions. The primary power conferred by section 1, and declared to be for the purpose of the Act in connection with the erection of the corporation, was the capacity of purchasing, having and holding any estate, real, personal, or mixed, to and for the use of the Company, and of letting, conveying or otherwise departing therewith for the benefit and on account of the said Company, so that the property they were empowered to acquire for the use of the Company they might, without limit or restriction, dispose of by lease and otherwise for its benefit. They were besides specially empowered to maintain and keep up the lines then already existing, as also a line between Toronto and Quebec, and were required to establish stations in cities, towns and villages on the line of their telegraph, where they would be guaranteed a revenue of 10 per cent. on the cost to them of doing so. Should it be supposed that any imperative duty was imposed by these special provisions, it was always subject to the primary power given to them to dispose of their property by lease or otherwise, and if they could still be called upon to fulfil such duties, there is nothing in the agreement they have made to interfere with or prevent their execution. The same may be said of the power given them to fix the rate for transmitting messages. This they would have had without any mention of it in their charter. If in any way authorized to charge the rate became matter of contract, and if unrestricted by the lease would be so with the lessees. But this power has not been delegated; it has wisely been retained by the company as a guarantee for the due execution of the lease. The first amendment of the Montreal Co.'s charter is that effected by the statute 18 Vic., c. 207, passed 18th May, 1855. Strange to say it appears by the preamble to have been passed expressly to remove doubts as to the right of the company to hold real estate in certain cases for the general purposes of the company and the accommodation of the stations thereof. It is therefore thereby enacted "that for and notwithstanding anything

"in the Act, entitled an Act to incorporate the Montreal Telegraph Company, it "shall be lawful for the said company and they shall have power to purchase, "receive, have and hold to them and their successors to and for the use of the "company such real estate and such only in addition to that held by them, as may "be necessary for the convenient transaction of the business of the company, and "for the erection of buildings for the suitable accommodation thereof now or "hereafter to be established, for the construction of the line or lines or branches "thereof, and for the effectually carrying on of the operations of such company, "and the same to let, convey, or otherwise depart with for the benefit and on "account of the company from time to time as they shall deem expedient." They are here empowered to let the real estate they should acquire for the convenient transaction of their business, the erection of buildings, the construction of their lines and branches, and for the effectually carrying on of the operations of the company, the authority is unlimited. It is not restricted by any qualification as to time, utility or other destination, but, on the contrary, includes what is required for the effectually carrying on the operations of the company. By sec. 3 of the same statute they were authorized to purchase and acquire of any other telegraph company, association or person any line of telegraph already constructed, or thereafter to be constructed, and the same to hold, keep up and maintain, or to depart with, or to lease any such line of telegraph, and the same to maintain and, during the lease thereof, to work for the profit of the company. Section 2 of this Act extends the power of the company to make lines and branches from and to any points in the province, leaving their enterprise practically unlimited in respect to all which their power to lease necessarily extends. The next amending statute was the 20 Vic., c. 175, sanctioned 27th May, 1857, passed apparently for the purpose of especially authorizing the company to extend its lines to Labrador, and to lay a cable across the Atlantic, but setting [redacted] section 1 with a clearer enumeration repeated of power conferred on the [redacted]y to establish, construct lines and work any line or lines in any part of the Province of Canada or places under its jurisdiction, or between any two or more points therein. This is the first law which acknowledges that the company have rendered services to the public, and on their part tenders an offer to extend the facilities for telegraphing intercourse to the people of Canada among themselves and to Britain. It confers some privileges to facilitate construction, enacts certain measures for protecting the lines, increases the capital to £500,000, ratifies the purchase by them made of the Canada Grand Trunk line, the line of the British North American Electric Telegraph Association, and with regard to the properties so by them acquired to hold, keep and work, repair, re-erect and maintain, and the same at their pleasure to lease and depart with, and to have enjoy and exercise with regard thereto all the powers, rights and privileges conferred upon the said company in regard to other lines and property of like description by their Act of incorporation and the Acts amending the same. Here we have the terms repeated to lease or depart with and thereto added all the powers conferred by the original charter of incorporation 10 and 11 Vic., cap. 83, and the amendments thereto, viz., powers of letting, conveying and otherwise

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departing with their property for the benefit and on account of the said company from time to time, as they should deem necessary or expedient, and, so far from its being property no longer required for their business, as assumed by the judgment, it is by the precise terms of one of these statutes, viz., the 18 Vic., cap. 207, declared to be the property necessary for the convenient transaction of their business, for the construction of their lines and the effective carrying on of the operations of the company, and it will be seen that these powers by the terms of the respective statutes cited are made to apply to and include the whole of the property of the company, nor is there anything to be found in any of these statutes to warrant the limited construction sought to be put upon this power of disposal. Had it been to authorize the disposal of such surplus property, why should the Legislature have given the power to lease? There is no limit put upon this power of letting, save that it is to be for the benefit of the company, and that in their own judgment and discretion from time to time as they should deem expedient. But it is said that franchises and privileges have been transferred. Nothing has been transferred but the right to exercise the powers incident to leased property. To say that fixing the rate for messages is a franchise is surely carrying the notion too far; this was a wholly unnecessary provision, and might have been left to the discretion of the lessee, which the Legislature might also have very well done with the Montreal Telegraph Company. If enabled to receive compensation, they would have a right to fix the rates unless restrained by Act of the Legislature, but this power was not conveyed by the lease, it was properly withheld as a guarantee in the hands of the Montreal Telegraph Company. Admit it to be a franchise and to have been transferred, and such transfer a nullity, would it affect or make void the lease? It might at the instance of the lessee, if he so claimed, but not at the instance of the lessor who undertook to give this facility. It is argued that these powers were not intended to be exercised to render the Company effete or to entitle them to abrogate their functions as a living operating telegraph company, or, as it has been said, practically to leave the business of telegraphing to others, and to convert themselves into mere annuitants drawing the interest of the capital they have invested. But lest we should adopt too rashly any fanciful inference of intention as distinguishable from the plain meaning of the words used by the Legislature, we must be careful that we have sufficient warrant for doing so. I think, to authorize the taking of such ground, we should at least see that by following out the plain, literal meaning of the terms used we would be doing violence to some evident and material purpose had in view by the Legislature in conferring the powers they did on the Montreal Telegraph Company.

I have so far failed to seize upon anything sufficiently tangible to be a bar or obstacle to the exercise by the company of the authority they had given them to lease and depart with their property, if it should even for the time, and perhaps continuously, reduce them to the position of mere annuitants; but they have still a large unexpended capital, with which they may construct new lines, acquire new properties, and again lease, convey or otherwise depart with such newly acquired property, or the non-fulfilment of their agreement with the

Great Northwestern Telegraph Company may at any time reinvest them with the whole of the property they have parted with under that agreement now complained of, and the plaintiff as a shareholder may exercise his legitimate influence to promote these or any other objects for the welfare of the company. Its autonomy is preserved, its franchises are intact, its shareholders are greatly benefited by the lease it was authorized to make, and the public are apparently being served as they were before, and, if not equally well served, they have the remedy open in all such cases—the promotion of a rival enterprise.

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A case much resembling the present, but with less grounds for arriving at the conclusion I have adopted, is that of Featherstonhaugh vs. the Lee-Moore Porcelain Clay Company. (L.R., 1 Equity, 318.) The Company, after nine years' unsuccessful working as a porcelain company, made an advantageous lease of it for 21 years, which the shareholders complained of. I quote the words of Brice in citing the case given by him at p. 132. Page Wood, Vice-Chancellor, says: The test at least for the purposes of this case is—Have the company by this act which they intended to carry into effect, either on the one hand abandoned their purposes, or on the other hand exceeded their purposes? Have they either done one or the other? It appears to me they have not abandoned the purposes of the company; they have granted a lease for 21 years, and so far they have agreed to take a rent of their property instead of working it themselves and taking the profit. At the end of 21 years they are to have the whole of the property back, and as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case) they would have it back in a more profitable condition at the end of the twenty-one years. They have not exceeded their powers, because nobody can contend that by parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. The directors in this instance were empowered by the constating instrument, on a vote of two-thirds of the shareholders, to bind the shareholders the same as if all agreed. Although this in itself was not deemed sufficient authority to convey all their assets by lease, yet on general grounds the lease of their property under the circumstances of this case was held good. Whereupon Brice remarks:—"The question is: Can a corporation" [meaning a commercial corporation] "always alienate absolutely—that is, convert into money the whole of its assets, real as well as personal?" This has been so decided with regard to personal chattels. Therefore the answer, it is submitted, must be the same as to realty and chattels real. Perhaps, however, such a proceeding, although not *ultra vires* in the strict sense, would be so, special circumstances apart, in the secondary sense, *i.e.*, would be a transaction to which any member might refuse his assent.

The additional amendments to the charter have been made chiefly with the view of extending the operations of the Montreal Telegraph Company to the other provinces of the Dominion, and conferring on the company within these other provinces the same powers, privileges and functions as they were possessed of in and for the Province of Canada, and for increasing the capital, which is now fixed at five millions of dollars. These last amendments have no especial bearing on the

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questions at issue in this case, although they might be made the subject of a question how far the decisions of the courts of Quebec would affect the Company and their property in other provinces.

The view I have taken of the case leads me to the conclusion that the authorities cited by the respondent respecting proceedings *ultra vires* are inapplicable, because, in place of being *ultra vires*, if the acts complained of are as I contend, in furtherance of an object specially attributed to the company in their charter, they become in a particular and express manner *intra vires*. Assuming that the plaintiff's right of action is to be measured by his interest in the absence of proof of damage to himself or other members of the company, it is difficult to conclude that he has a sufficient standing to entitle him to claim the remedy he seeks. It is not the case of the misapplication of the funds of the corporation to other than carrying out the objects for which the company was formed, as in the case of Coleman vs. Eastern Counties Railway (10 Beav. p. 1; 10 L. J. Ch., p. 73); Bagshaw vs. Eastern Union Railway Co. (11 C. B. 775), but the obtaining of a large revenue from their property by its application and disposal within the authority given them by their charters. The autonomy of the company is not destroyed; it can exercise all its franchises, none of which have, in fact, been transferred. If supposed to be under any imperative obligations to the public, it is still in a condition to fulfil them. The agreement the company has made is within the terms of the powers conferred on the company, and in furtherance of its objects. The capital of the company is not exhausted, nor its powers under its charter impaired. It may promote to any extent further and greater enterprises within the Dominion. It has power to make telegraphs all over the Dominion, from any starting points to any termini it may select. It would be a great hardship, where no substantial interest is impaired, where the complainant can shew no damage to himself or others concerned, where the Act complained of confers a benefit on the company, and where there is no apparent injury to the public, if an inconsiderable minority were allowed to thwart the company in effecting a very advantageous agreement, evidently for the benefit of all concerned. Brice remarks: It is comparatively easy to find a few factious individuals ready to oppose any change or innovation; also that the majority from time to time may make such modifications as they think fit in the business to be carried on and the other matters to be engaged in by the corporation, always provided that they do not go beyond its constitution, as fixed by the constating instruments, in the present case its parliamentary charter, should they deem it to their advantage to do so.

These considerations have induced me to come to the conclusion that the judgment of the Superior Court ought to be reversed, and the respondent's action dismissed with costs of both courts, and the majority of the judges being of that opinion it is ordered accordingly.

MONK, J.—This appeal is taken from a judgment of the Superior Court at Montreal, maintaining an action instituted by the respondent, to set aside an agreement for the working of the lines of the Montreal Telegraph Company,

made between that Company and the Great Northwestern Telegraph Company on the 17th of August, 1881. On the 31st December, 1881, the Court below rendered judgment in the cause, by which it was decided: 1. That the deed in question was *ultra vires*, and, consequently, it was annulled and set aside. 2. The judgment ordered the Northwestern Company to cease from any longer using the telegraph lines and other property of the Montreal Company, and to reconvey them to that company. 3. Ordered the Montreal Company to resume possession of the property, and to work its lines in the same manner as before the execution of the deed. 4. Ordered the Northwestern Company to render to the Montreal Company an account of all the moneys which it had received for telegraph messages or otherwise under the said deed. It is, perhaps, unnecessary in this case to describe at length the respective pleadings on either side, as the issues raised by the parties will be made apparent in the course of the observations which it will be necessary to make, in order to dispose of them, according to the views I take of the matter.

Two objections were urged by the appellants against this proceeding, as presented to the Court, and to which it may be expedient that I should briefly advert. 1. It was contended that this suit should have been taken in the name, and under the authority, of the Attorney-General; and, 2. That Mr. Low, the respondent in the Court below, had no real, no *bonâ fide*, interest in the matters involved or the questions at issue, that he was in fact merely a *prête-nom*, and being so, he of himself, and alone of all the directors, had no right and no legal authority to institute this suit.

In my view, and that of the majority of the Court, upon the merits of this case, I do not consider it necessary that I should offer any formal or decided opinions on these preliminary issues, and I express none. In any other and a different decision, it might be expedient, perhaps essential, to dispose of these questions decisively in one way or the other. But with that I have nothing to do, I may add, nevertheless, that in regard to the alleged necessity of this proceeding being taken in the name of the Attorney-General, I should say that it would have been better if that precaution had been taken in a case of this importance, and in which, as it is contended, questions of public policy are to be considered. But whether such a step was in strict requirement of law necessary or not, it may be the business of some members of the court to decide—it is not incumbent upon me to do so. Upon the second point, as to Mr. Low's right, as disclosed in the evidence adduced, to adopt this proceeding, it must be considered that his interest in the concern and in the working of a capital of $2,000,000 is about as small as it could possibly be. Beyond doubt he holds one share of $50, and perhaps a few more, although there is some thing obscure and ambiguous about the others. But even so, he has probably an interest sufficient, and therefore a right to institute this suit. Yet, in view of all the circumstances of this case, and of its magnitude and importance, Mr. Low cannot be considered in a very favorable or reasonable position in regard to the company and the other shareholders. Be that as it may, I would be inclined to the opinion that he has the right to invoke the decision of the Courts upon an agreement to which he, as a stockholder, takes exception.

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With these few remarks I proceed at once to explain and indicate my opinion upon the issues of law and fact respectively urged on behalf of the appellants and respondents. It is contended by Mr. Low that the respondents had no right to enter into the agreement mentioned in this case. Hence it becomes necessary to refer to the statute incorporating the Montreal Telegraph Company and to others amending its provisions. The Act 10th and 11th Vic. chap. 83, incorporating the Montreal Company, after declaring it to be a body politic and corporate, proceeds to enact as follows:—They and their successors shall be in law capable of purchasing, having and holding, to them and their successors, any estate, real and personal or mixed, to and for the use of the said Company, and of letting, conveying or otherwise departing therewith, for the benefit and on account of the said company from time to time as they shall deem necessary or expedient; provided always that the real estate to be held by the said company, shall be only such as may be necessary for the purpose of building, using and preserving the said Electro-Magnetic Telegraph, and for objects immediately connected therewith. Subsequently an Act was passed, being the 18th Vic. chap. 207, which recited that, whereas the Montreal Company had represented that doubts existed as to their right to hold real estate in certain cases for the general purposes of the Company, and the accommodation of the stations thereof, therefore, etc. By the first clause of this Act, it is enacted as follows:—For and notwithstanding anything in the Act intituled an Act to incorporate the Montreal Telegraph Company contained, it shall be lawful for the said Company, and they shall have power to purchase, receive, have and hold to them and their successors, to and for the use of the Company, such real estate in this province, and such only, in addition to that now held by them, as may be necessary for the convenient transaction of the business of the Company, and for the erection of buildings for the suitable accommodation thereof in this province, now or hereafter to be established, and for the construction of the line or lines or branches thereof, and for the effectually carrying on the operations of such Company, and the same to let, convey, or otherwise part with, for the benefit and on account of the said Company, from time to time, as they shall deem expedient. By the 8th clause of this Act, the acquisition by the said Company of the Canada Grand Trunk Telegraph Line, and the line of the British North American Electric Telegraph Association was ratified, and the following is the clause conferring powers upon the Company in that respect:—The said Montreal Telegraph Company shall be held to have had full power and authority to purchase, and they are hereby empowered and authorized, subject however to the provisions of the respective deeds of agreement and purchase thereof, to hold, keep up and work, repair, re-erect and maintain the said two several lines of telegraph, with all and every the instruments, batteries and materials used in working the same, and their appurtenances and branch lines, and the same at their pleasure to lease or depart with, and may further construct branch lines thereto, and amalgamate the said lines and branches with the other lines of the Company. Thus it will be seen the appellants were empowered by the legislature to lease those newly acquired lines, and further to construct

branch lines thereto, and to amalgamate these lines and these branches with the other lines of the Company. I cite these different Acts, and the special clauses thereof, to show that the legislature had conferred upon the Montreal Telegraph Company extensive and even extraordinary powers in the management over all their lines. Upon a careful examination of these several clauses and provisions, I am of opinion that the Company possessed the authority to lease their telegraph lines as well as other property, provided always that by doing so they did not surrender any essential franchise or other corporate powers. If this be so—and upon that point I have no doubt—and although the duration of the lease was to be 97 years, such a lease authorized by the statute, without any restriction or limitation as to time, would not be an alienation of the Company's lines or other property. Where the law makes no distinction and establishes no limits, as in this case, the Court will not. The common law in regard to Baux Emphytéotiques, does not apply in this instance. But I have great difficulty in agreeing with my two learned colleagues in regarding the agreement of the 17th August, 1881, as a lease properly so called. I am quite prepared to admit that it is easier to say what the deed is not, than what it is. Whether, however, we regard this document as a lease, or another kind of agreement, the majority are of opinion that the judgment by the Court below should be reversed. It may, nevertheless, be, to a certain extent, my duty to express my own view as to the character of the instrument in question. Let us come at once to the articles of agreement complained of and examine what their provisions are.

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"These articles of agreement, made this seventeenth day of August, A.D. 1881, by and between the Montreal Telegraph Company, hereinafter called the Company, a body corporate and politic, and the Great Northwestern Telegraph Company, hereinafter called the Contractors, a body politic and corporate, and the Western Union Telegraph Company, a body corporate, duly incorporated under the laws of the State of New York, hereinafter called the Guarantors, parties of the third part.

"Whereas, the Company owns and operates lines of telegraph in the Dominion of Canada and in the United States, and the Contractors own and operate a line of telegraph in the Province of Manitoba, and the Guarantors hold and operate the line of telegraph within the said Dominion of Canada heretofore known as the line of the Dominion Telegraph Company.

"And whereas, for the purpose of terminating unnecessary expenditure and of combining the advantages of the said several systems of telegraph, the Contractors are willing, and have agreed, to undertake the working of the line of the Company, at a fixed rate of remuneration, upon the terms and conditions hereinafter provided, which offer the Company has accepted, and has approved the terms and conditions thereof, as contained in the present articles of agreement, by a resolution of the shareholders of the said Company at a special general meeting thereof, duly called and held at Montreal on the 17th day of August, 1881, for the purpose of considering a proposal for the working of the lines of the Company, for an annual guaranteed dividend of eight per cent. upon the capital stock of the Company of two millions of dollars and upon other con-

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ditions, a copy of which resolution is hereunto annexed. Now, therefore, these presents witness that the parties hereto have covenanted and agreed as follows: —1. The Contractors undertake, for a period of ninety-seven years from and after the 1st day of July, 1881, to work, manage and operate the system of telegraph owned and heretofore operated by the Company by means of its own employees and operators, and conduct the business thereof in all respects as efficiently as the Company has hitherto operated the same, collecting in the name of the Company such rates and charges for messages as the said Company shall establish from time to time, with all other the earnings of the said telegraph system and lines, and all and every part thereof in such manner as to perform to the fullest extent all the obligations of the said Company towards the public."

Now, this appears to me all very plain. By our code, Article 1601, it is laid down that "A lease or hire of work is defined as a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay." Applying this article of the code to the agreement in question, I must say I am somewhat at a loss to understand how this document can, by fair, reasonable interpretation, be regarded as a lease, or in any other light than that of a lease or hire of work. I am quite aware, and every one is, that by a certain amount of legal ingenuity and a fair exercise of judicial discrimination, another name might be found for this agreement, and many things, many evasions even, might be supposed to exist under the language of the deed, and which do not appear in its contents or on the face of it. If not a lease, and in my view it is not—then one may reasonably enquire what description of deed this is. It would, perhaps, be superfluous for me to say that at first I was slightly perplexed in my attempts to give an entirely satisfactory answer to this question. I think, with great deference to the contrary opinion of my colleagues, that the terms and provisions of the deed of the 17th August, 1881, clearly prove that it is not a deed of lease, properly so-called, and as defined and known to the law. It cannot be said that it is in effect a sale or transfer of the whole line to the Great Northwestern Telegraph Company, or a surrender of all its corporate powers; plainly, it is not. Is it an amalgamation of the two lines? Assuredly such a view as this could not be seriously maintained for a moment. Is it a *mandat*? It is impossible so to regard it. Is it a traffic arrangement? Not even that. Is it a hiring of work —a *louage d'ouvrage*? Does the Great Northwestern Telegraph Company agree and undertake, with certain restrictions and under the supervision of the Montreal Telegraph Company, to work the line for the benefit of that Company and the public; and, on the other hand, does not the latter Company undertake to remunerate the Great Northwestern Company for the labor and services they undertake and agree to render? In other words, is it not a hiring of labor, a *louage d'ouvrage*? It is quite true that there may be some incidents not usually attached to a contract of this description; but they are not of the essence of the agreement, and after a careful consideration of the facts and an examination of the law relating to the various forms of this description of contract, I am of opinion that the convention is one of hire of labor for the benefit of the lessor

as well as the lessee under such a contract, and even if regarded as a lease, to pretend that the Company has surrendered its franchise to any extent or at all, or has placed itself in a position at variance with the end and object of its creation, does not seem to be a sound view of the case. The shareholders are benefited, the public are more effectually served, and all the obligations of the Company more effectually fulfilled. It appears by the evidence that these favorable results have been in great measure attained, and are likely to follow in the future. Not only was this the view and intention of the shareholders, but this course was adopted to avert great injury, if not ruin, to the Company, and in any event to disarm or avoid disastrous competition. In the face of such a state of things courts of justice should be extremely cautious and greatly on their guard in proceeding to set aside arrangements such as the one in question. Corporations, like individuals, are supposed to be the best judges of their own business and their own interests, and they should be left free to make their own arrangements, unless injurious to individuals, to the public, or unless they proceed to counteract or defeat the objects of their creation. This cannot for a moment be said to be the case here, unless it be argued that Mr. Low's one share may be jeopardized. It is simple justice and plain common-sense that the agreement should receive a fair and reasonable interpretation. I may remark, in connection with the view I take of the character of this agreement, that the Montreal Company appears to have had 1,400 or 1,500 telegraph offices. Most of these were conducted by operators employed by the Company, exceeding two thousand in number. Each of these employees was remunerated by the Company in some way, either by direct salary, or by a proportion of the charges received for telegraph messages. The proposal of the Northwestern Company was, therefore, in effect to perform the services which were previously rendered by those employees; and by the agreement those were precisely the services which that Company undertook. That is to say, the Northwestern Company undertook to do for the Montreal Company the same work which had previously been done for it by two thousand five hundred individual employees. And although the Northwestern Company was a body corporate they were expressly authorized and empowered to enter into and perform such undertakings as were contained and agreed upon in the articles of the 17th August, 1881? As to these, there could be no difficulty. And if it were for the advantage of the public and the shareholders, why should not the Montreal Company perform through the Northwestern Company, then employed under the deed, all that was done before by the 2,500 individual employees? I cannot see why such a working arrangement should not have been made, particularly if it secured greater economy and efficiency. It has been said that if this act is to be considered a lease, making it for a period of 97 years, would, under our law, constitute an alienation of the property of the Company. Holding, as I do, that the law has conferred upon the Montreal Telegraph Company the authority to lease their line, and having fixed no restriction on that power nor any limitation of the period during which such lease should exist, I hold that where the law has not made such distinction or limitation the Court should not give so serious an effect to the lease in the absence of

inconsistent with the opinion expressed by the Judicial Committee of the Privy Council in the case of the Citizens Ins. Co. vs. Parsons (7 L. R. Appeal cases 96.)" In that case, their Lordships in their observations on the judgment of Mr. Justice Taschereau of the Supreme Court, expressed themselves to the effect that the power to incorporate an Insurance Company to carry on business in one of the Provinces of the Dominion, lay with the Legislature of that Province; while the incorporation of Companies to carry on business throughout the whole Dominion or in more Provinces than one, was vested in the Parliament of Canada, as not coming within the classes of subjects exclusively assigned to the Provincial Legislatures.

Although the question alluded to was not specially raised in the case of The Citizens Ins. Co. vs. Parsons, yet the opinions expressed were so directly to the point, that we do not feel it would be competent for us to consider the question as being now an open one.

We do not, however, consider that the opinion so expressed covers the present case. Here we have a Company incorporated to carry on its operations throughout the whole Dominion, which assumes to do business in one Province only, that is, in the Province of Quebec. The exclusive right of the Legislature of that Province to regulate the establishment of Building Societies within its own limits, would be destroyed if the Parliament of Canada could, by granting general powers, authorize a Company to act within one of the Provinces only. The inconvenience resulting from the exercise of such a power is well exemplified in the present case. If the Company, respondent, had been incorporated

D. Bethune, Q. C., Counsel.

(J. K.)

it may have the power to incorporate Companies to do business throughout the whole Dominion, has no right to alter or repeal the general or special laws of the several Provinces affecting the tenure of lands or the right to acquire and hold lands therein.

This question was formally decided in the case of "The Citizens Ins. Co. vs. Parsons," already cited, and apart from the general rule there laid down we find in the exhaustive judgment of their Lordships the following passage, p. 117:—"But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words, '*the regulation of trade and commerce*,') that because the Dominion Parliament has alone the right to create "a corporation to carry on business through the Dominion, that it alone has the "right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a Company, with power, among other "things, to purchase and hold lands throughout Canada in mortmain, it could "scarcely be contended if such a Company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province "having exclusive legislative power "over property and civil rights in the "Province) that it could hold land in that Province in contravention of the "Provincial Legislature, and, if a Company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that "it would do no business in any part of it, by reason of all the Provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

motion and taxing the bill at $30.55, with $4 costs of motion, or, in all, $34.55.

Motion granted.

Doherty & Doherty, for plaintiff.
John L. Morris, for defendant.
(J.L.M.)

SUPERIOR COURT, 1883.

MONTREAL, 31ST OCTOBER, 1883.

Coram JOHNSON, J.

No. 2003.

Lawrence vs. *Ryan*.

HELD:—That notice of claim for goods seised by the customs authorities must be given by the owners in writing within one month from the day of seizure.

PER CURIAM.—The defendant is collector of customs at this port, and the plaintiff sues him as such, giving the month's notice of action required in cases against public officers. The declaration avers that about the 28th of December

erroneous, and acting upon the suggestion contained in the above extract from the Judgment in the Citizens Insurance Company and Parsons, without deciding that the whole Act incorporating the Company respondent is *ultra vires*, we hold that the Company has no right to exercise in the Province of Quebec the powers conferred by its Act of incorporation, to buy, lease and sell lands, &c., in the Province of Quebec, and it is by our Judgment forbidden to do so.

PER CURIAM:—

This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney General of the Province, praying that it be declared that the appellant company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a Corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict., c. 103).

The preamble states—

"That the persons therein-after named, 'owners of real estate in the city and 'district of Montreal, and elsewhere in the Dominion, have petitioned for an 'Act of Incorporation, to establish an Association to be called the Colonial 'Building and Investment Association, whereby powers may be conferred on the 'said Association for the purpose of buying, leasing, or selling landed property,

should be paid to him for their illegal detention— a sum not giving jurisdiction here, and no value being put upon the books themselves,—and then he asks that the defendant, in default of restoring the books, should be made to pay $102 damages: so that it is certain that the books themselves are claimed by the action, although their pecuniary value has been omitted to be claimed; and the only damages asked within the jurisdiction of this Court are undoubtedly prayed as the alternative for the books themselves not being restored.

The defendant pleaded: 1st, a demurrer, which was dismissed; 2ndly, he pleaded by exception that he had seized and taken the books on the 28th December, as forfeited under the customs laws, and the plaintiff never gave any notice in writing to the defendant, the seizing officer, or other chief officer of customs, within one month from the day of seizure, as required by law, that he claimed, or intended to claim them; whereby they became condemned absolutely, and without suit or proceeding of any kind, at the expiration of one month from their seizure.

A third plea set up the insufficiency of the notice of action, and also a variance between the grounds stated in the action and those stated in the notice.

determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the Association may be made payable at any of the said offices or agencies."

The Secretary of the Association, the only witness called in support of the petition, proved that the Association had bought lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the Province of Quebec, though efforts had been made to extend the business of the Company to other Provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the Association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this Appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition and the nature and form of the judgment appealed from.

The heading of Chapter 10, section 1, of the Code is: "Of Corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

"(1.) Whenever any association or number of persons acts as a Corporation without being legally incorporated or recognized;

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that he claims or intends to claim the same; and the burden of proof that "such notice was duly given in any case shall always lie upon such owner."

Therefore this exception will be well founded, if these facts are true, viz. that there was a seizure, and a condemnation without any necessity of process, and if there has been no notice of claim, which the plaintiff has to show the giving of. Now both of these facts are incontestable. The proof is that no entry was ever made, because the examining officer took the books at once to the collector, who refused to allow them to be entered, and ordered them to be, detained, as clearly appears by the evidence of Mr. O'Hara. The provision of law which the defendant invokes is a very old one in the customs laws, and I have always seen it acted upon, and I particularly asked the defendant's counsel at the hearing whether he insisted upon it, and his explicit answer was that his instructions did not allow him to do otherwise. Therefore, there has been some time spent in vain upon a discussion which took a very wide range under the pretensions set up by the 5th plea, and on which I am not now permitted to enter; and my duty is to dismiss the action under the defendant's first exception. This may be somewhat disappointing; but it cannot of course be a surprise. I am aware that the learned counsel for the defendant accompanied his

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a Corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognized.

"That the operations and business of the said Association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said Association could not lawfully be incorporated, except by or under the authority of the Legislature of the Province of Quebec.

"That the said Association was incorporated by the Parliament of Canada, in the year one thousand eight hundred and seventy-four, 37th Victoria, Chapter 103, and has ever since been in operation under the said Act of Incorporation which, for reasons above alleged, is null and void and of no effect, the said Act of incorporation being *ultra vires*.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said defendants be adjudged and declared to have been, and to be illegally formed and incorporated, and that the said illegal Association may be ordered to be dissolved,

stances would only give the officer the right to sell; and that the defendant does not plead that he has sold these books; but that can make no difference, for, of course, if the power is given, it *can* and *may* be exercised (and whether it has or not is immaterial), for it never *could* be exercised at all if the plaintiff had a co-existing right to get the goods back without giving the notice. The result of this ruling is to put the plaintiff out of Court; and it is of course impossible to proceed to adjudicate upon the merits of a case no longer *sub judice*. If the defendant's counsel, however, meant to invite my opinion as to whether the books in question are prohibited by law as immoral, or indecent, an opinion which now can have no legal effect upon the case, I must decline to exercise my office uselessly and without authority.

Action dismissed with costs, under defendant's first exception.

Action dismissed.

Doutre, Joseph & Dandurand, for plaintiff.
H. Abbott, Jr., for defendant.
(J. K.)

the judges, that the Association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

"That the said Company, respondents, had and have no right to act as a Corporation for or in respect of any of the said operations of buying, leasing or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said Company, respondents, from acting as a Corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in the Citizens Insurance Company vs. Parsons, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of Companies.

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service of summons may be contested upon motion, unless the Court otherwise orders.

Art. 116 C.C.P., which provides that informalities in the writ or service must be pleaded by *exception à la forme*, is not inconsistent with the articles cited.

Art. 116 only refers to informalities or irregularities appearing upon the face of the return, but here there are none such. The bailiff's return is formal and regular and *prima facie* true, for it is an *acte authentique*.

The *exception à la forme* attacks its truth, which can only be done by improbation or motion.

Tait, Q. C., for defendants, contended that the first step was to fyle an *exception à la forme*, and subsequently proceed by improbation or motion.

PER CURIAM. (Loranger, J., in Superior Court, 10th October, 1883.) The bailiff's return is an *acte authentique*, and under the articles of the Code cited by the plaintiff it is clear that it can only be contested by improbation or by motion. I am with the plaintiff, and the answer in law will be maintained, and the *exception à la forme* dismissed with costs.

On the 31st October, 1883, in appeal, the defendants moved to be allowed to appeal from the judgment of the Superior Court.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the Counsel for the Attorney General that, on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the Company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the Building Acts of the Province.

It may be granted that, by the law of Quebec, Corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign Corporations in the case of the Chaudière Gold Mining Company *v.* Desbarats (L. R. 5 P. C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the Company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit Corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have

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the defendant for all damages and costs [illegible]

session.

Beaudin, for defendant, contended that the amount involved took the case out of the jurisdiction of the Circuit Court, and that, as the sheriff's return had been fyled and the report of distribution made in the Superior Court, the petition could only be presented to the Superior Court.

Morris, for petitioner, argued that he could only approach the Court by a petition in a case entered in the books of the Court, and there was no such case or number in the Superior Court. All the proceedings up to sale had taken place in the Circuit Court. The preparing of the report of distribution by the Prothonotary did not bring the case into the Superior Court.

If he were to present a petition in No. 6077 Superior Court he would be told that there was no such number or case entered in its books.

PER CURIAM.—The Circuit Court has no jurisdiction, as the sheriff's return was fyled in the Superior Court, and report of distribution made there. The petition will be dismissed, but without costs.

Petition dismissed without costs.

J. L. Morris, for petitioner, *adjudicataire*.
Loranger & Beaudin, for defendant.
(J. L. M.)

that, inasmuch as the Legislature of the Province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question.

If the Association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may, doubtless, be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the Mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains. The first paragraph, after stating that the Corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognized."

The 2nd paragraph avers that the operations of the Company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the Province, "could not lawfully be incorporated except by the authority of "the Legislature of the Province."

The 3rd paragraph alleges that, for these reasons, "the Act of Incorporation "is null and void, the said Act of Incorporation being *ultra vires*."

" " Mr. Justice Taschereau.
" " Mr. Justice Cross.
" " Mr. Justice Baby.

The Court of our Lady The Queen, now here, having heard the appellant and respondent by their counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of appeal fyled by the appellant and the answers thereto, and mature deliberation on the whole being had;

Considering that the operations which appear to have been carried on by the company respondents have been so carried on exclusively within the Province of Quebec, and have been of the nature and description following, to wit, the buying, leasing and selling of landed property, buildings and appurtenances thereof, the purchase of building materials to construct villas, homesteads, cottages and other buildings and premises, and the selling and letting the same, and the establishment of a building or subscription fund for investment or building purposes, and acting as agents, which operations have been confined to the city of Montreal and its vicinity, within the said Province of Quebec;

Considering that said operations have been in their nature local and provincial, and for provincial objects, affecting exclusively property and civil rights within the said Province, therefore not within the control or jurisdiction of the Dominion

with the law of that Province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to Corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any Province in which they sought to acquire it, had not in view the special law of any one Province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a Corporation could only exercise its powers subject to the law of the Province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the Company "be prohi-" bited from acting in future as a Corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the Company from doing specified acts in violation of particular laws of the Province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the Company has no right to act as a Corporation in dealing with lands and buildings, and certain other matters within the Province. This declaration, with the

ment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid or any like affairs, or any matter of property or civil rights or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said company respondents from acting as a Corporation within the said Province of Quebec for any of the ends or purposes aforesaid, and this Court doth further condemn the said company to pay the appellant the costs as well of the Court below as of the present appeal.

(The Honorable Mr. Justice Monk dissenting.)

The following was the judgment of the Superior Court, at Montreal:—

The 9th July, 1881.

Present:

MR. JUSTICE CARON.

La Cour ayant entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure, les pièces produites et la preuve et délibéré:

Considérant que le requérant demande par sa requête qu'il soit déclaré que la compagnie défenderesse a été illégalement incorporée et formée, et qu'elle soit déclarée dissoute et qu'il lui soit défendu d'agir à l'avenir comme corporation, vû que la défenderesse a limité ses opérations à la Province de Québec;

JOHN PANGMAN,

APPELANT;

ET

DAME BERTHE BUCHANAN,

INTIMÉE.

JUGE :—Que dans le cas de l'appel d'un jugement renvoyant la contestation d'un jugement de distribution, et maintenant la collocation, l'appelant n'est tenu de donner cautionnement que pour les frais.

L'appelant, créancier colloqué, avait contesté le rang de l'intimée, aussi créancière colloquée. La contestation fut renvoyée. Il appelle et donne caution seulement pour les frais en appel, fixés par le protonotaire à $150.

L'intimée fait motion pour renvoyer l'appel pour raison de l'insuffisance du cautionnement.

A l'encontre, la cause de Lionais & Molsons Bank (2 Déc. de la Cour d'Appel, p. 194) fut citée.

Motion renvoyée, mais sans frais, parce qu'on a rayé dans l'acte de cautionnement le mot, *dommages*.

DeBellefeuille & Bonin, pour l'appelant.

Archambault & Archambault, pour l'intimée.

(E. LEF. DE B.)

"Province, and having provincial objects affecting property and civil rights in "the said Province, the said Association could not lawfully be incorporated "except by or under the authority of the Legislature of the Province of Que- "bec."

It is not pretended that the law as passed by the Dominion Legislature was or is *ultra vires*; the contention is that the Company having commenced business in the Province of Quebec by virtue of the Statute in question renders the law inoperative, and that the Association should be dissolved, and to do so this Court must declare it to have been illegally formed and incorporated. Now there can be no doubt whatever that the enacting of this law was exclusively within the powers and jurisdiction of the Federal Parliament. This view of the case is not disputed even by this Court, but it is urged that because the Company has not so far extended its operations to the full limits of its corporate authority, the Act is therefore, they contend, *ultra vires*, and the Company should be dissolved. This appears to be a most extraordinary idea. I cannot concur in adjudging that the partial or an incipient compliance with a Statute would authorize this Court in setting it aside; so long as the law stands and is unassailable by Courts of Justice, and the Corporation has a legal existence, we cannot interfere. The Dominion Legislature probably foresaw that the important

the raising of a revenue for provincial, local or municipal purposes; sub.-sec. 15: The imposition of punishment by *fine*, penalty or imprisonment, for enforcing any law of the Province, made in relation to any matters coming within any of the classes of subjects enumerated in this section.

The Quebec License Act of 1878, 41st Vic. cap. 7, enacts that, whoever sells intoxicating liquors in any of the organized territory in this Province, outside of Montreal, without a license to that effect still in force, shall be liable to a fine of $75.

The Local Legislature *may not prohibit*, but they may legislate exclusively upon this subject for the purpose of raising a revenue for provincial, local or municipal purposes.

Section 63, 41 Vic. cap. 3, prescribes the tariff of duties payable to the License Inspector. Sections 7, 8, 9, 10, 11, 12 and 13, provide formalities for obtaining licenses, and declare that Municipal Councils shall confirm certificate upon ascertaining its correctness. It is said in this case that the Municipal Council of the Township of Hatley, under sec. 561 of the Municipal Code, had prohibited the sale within their territory. They could not legally do this, and what petitioner had to do was to get the necessary certificate, present it to the Council, and demand its confirmation; and, if refused, either proceed by mandamus to enforce its confirmation, or, on establishing such refusal, tender to local Government or its License Inspector the amount due for provincial revenue purposes, and demand the license (sec. 70); but petitioner cannot come forward and say that he has a right to sell without any license and without the payment of any duty.

diction du Parlement du Canada, parce qu'elle était autorisée à exercer des pouvoirs et privilèges, agir et contracter, dans toutes les provinces de la Confédération.

Par la preuve et l'admission des faits il paraît que cette association a limité ses opérations à la Province de Québec, mais ce n'est pas là la question. La vraie question est de savoir si les opérations qu'elle est autorisée de faire en vertu de son acte d'incorporation sont de celles qui tombent exclusivement sous la juridiction et dans les attributions de la Législature locale de Québec.

La Section 92 de l'acte de la Confédération dit que "dans chaque province "la Législature pourra *exclusivement* faire des lois relatives aux matières tom- "bant dans les catégories de sujets ci-après, *inter alia*."

No. 10. "Travaux et entreprises d'une nature locale."

No. 13. "La propriété et les droits civils dans la province."

No. 16. "Généralement toutes les matières d'une nature purement locale ou privée dans la province."

Voyons maintenant quels sont les pouvoirs conférés à cette association.

Le préambule du Statut indique l'objet principal: "Acheter, louer, vendre "des propriétés foncières, maisons et dépendances."

deposit of fine, costs, and $50 additional, must be made within 48 hours after conviction. It is not pretended that this has been done.

It was urged by respondent that the provisions of 45 Vic. cap. 4 had not been complied with, and no notice given to Attorney-General. This Act applies to suits, not to writs of certiorari, and I do not consider notice necessary.

Petition rejected with costs. Same judgment in two cases Nos. 54 and 55, Ayer and respondents and Hadley and respondents, argued at same time.

Jos. L. Terrill, and *J. W. Merry*, for petitioner.

Wm. White, Q.C., for respondents.

(J. K.)

SUPERIOR COURT, 1882.

MONTREAL, 6TH MAY, 1882.

Coram MATHIEU, J.

No. 1195.

David vs. *Richter*.

HELD:—That a clause in a deed of lease, prohibiting sub-letting without the consent in writing of the lessor and his approval of the sub-tenant, is not so absolute that the lessor may refuse to accept of any sub-tenant offered, and, consequently, the lessee may cede all rights under the lease to a person proved to be as acceptable a person as the lessee, notwithstanding the refusal of the lessor to accept of such sub-tenant.

The facts and circumstances of the case, and the legal questions involved therein, are fully detailed in the judgment of the Court, which was worded as follows:

Supposons qu'un statut semblable à celui-ci eut été passé par la Législature de Québec, peut-on maintenir qu'il serait *ultra vires*. Ce serait une subtilité que de prétendre que parce qu'il y est question de débentures et coupons d'intérêt, cela est dans les attributions du Parlement Fédéral; ce n'est pas là l'objet *principal* du Statut, et ce n'est qu'un accessoire de l'objet principal. Cet accessoire devient soumis aux lois générales du Canada.

Si ce Statut en question est de la compétence du Parlement du Canada, on peut repousser les centaines de Statuts des Législatures provinciales incorporant des compagnies de mine de phosphate, de manufactures de drap, de coton, de chaussures, de colonisation, d'exploitation, de propriétés foncières, et dire que pourvu que l'on dise que ces sociétés pourront avoir une succursale ou agence à *Toronto et à Québec*, ou à New York, et Londres, elles tombent sous la juridiction du Parlement Fédéral!

Des jugements rendus récemment par le Conseil Privé en Angleterre nous donnent des règles d'interprétation qui peuvent s'appliquer ici. *In re* Citizens Insurance Company vs. Parsons, Legal News, vol. 5, p. 27, les Juges du Conseil Privé auraient dit:

dernier, lui demandant la permission de céder son bail, et après avoir reçu du demandeur le 5 février dernier une réponse à sa lettre, par laquelle le demandeur refuse absolument de consentir à cette cession de bail, déclarant qu'il entendait mettre un prix à être fixé entre eux, à son consentement, a mis à sa place Victor Olivon, restaurateur, de la cité de Montréal, et lui a cédé sur bail par acte passé à Montréal, devant maître W. F. Lighthall, notaire, le 7 mars 1882, et ayant elle-même vidé les lieux elle a été l'objet d'une saisie-gagerie opérée sur ses biens meubles par le demandeur qui l'a fait assigner pour entendre prononcer en résiliation du bail et la validité de la saisie, qu'il y a lieu pour le tribunal, d'examiner si la défenderesse a pu valablement, malgré les clauses de son bail, céder son bail, et si c'est à bon droit, que la saisie-gagerie a été pratiquée ;—attendu qu'il est prouvée que la clause telle qu'elle était imprimée dans la formule dont on s'est servi pour le bail contenait la défense de céder le bail et de sous-louer et que la défense de céder le bail en a été biffée, laissant que la défense de sous-louer: que quoique la défense de sous-louer puisse en droit strict comprendre la défense de céder le bail, cependant il résulte des faits de la cause que les parties dans leur intention considéraient cette stipulation comme renfermant un sens différent, et cette Cour recherchant et constatant l'intention des parties, déclare que le demandeur n'a pas eu l'intention de défendre la cession du bail.

Attendu que, s'il résulte du dit bail que la défenderesse ne pouvait sous-louer qu'avec le consentement écrit du propriétaire, et pourvu que les nouveaux locataires soient approuvés par le bailleur, cette clause ne saurait s'entendre dans le sens absolu que la locataire ne pouvait sous-louer, quel que fût le

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the right of the respondent to act as an incorporated Building Society, and as such to acquire and sell real estate situated within the Province.

By an Act of the Parliament of Canada, passed in the 37th year of Her Majesty's reign, ch. 103, William Ruddé and others were incorporated under the name of the Colonial Building and Investment Association, for the purpose, as stated in the Preamble of the Act, "of buying, leasing, or selling landed property, buildings and appurtenances thereof, &c.

The Company is not by its act of incorporation restricted to carry on business in the Province of Quebec, although it would seem from several clauses of the Act and from the legal terms [illegible] sections four, thirty-four, thirty-five, and the reference in section thirty-[illegible] Code of Civil Procedure of Lower Canada, that the principal, if not [illegible] object of the Company was to carry on its operations in the Province of [illegible] has been established in evidence, that since its organization, in [illegible] Company has been carrying on business exclusively in that Province, where it has purchased real estate to a very large amount.

Under this state of facts two questions are raised:

allégué au plaidoyer de la défenderesse, que la réputation de Victor Ollivon, est telle en la cité de Montréal, qu'il est loin d'être un locataire désirable pour le demandeur, cette objection est repoussée par la preuve faite en cette cause, et nommément par le témoignage de Louis Hercule Edouard Paradis, chef de police de la cité de Montréal, que la réputation actuelle de Victor Ollivon, est bonne, et attendu que par les termes de la lettre du demandeur du 5 février dernier, ainsi que des circonstances de la cause et de la preuve faite, il est résulté que le demandeur n'avait rien à objecter contre la personne de Victor Ollivon, ni contre les conditions du sous-bail, mais qu'il entendait mettre un prix à son consentement;

Attendu qu'il est prouvé que les changements qui ont été faits dans les lieux loués constituent des améliorations et non des détériorations comme le prétend le demandeur, et qu'ils ont augmenté la valeur de sa propriété;

Attendu que l'action du dit demandeur est mal fondée, et que la défense de la défenderesse est bien fondée;

A maintenu et maintient la dit défense de la dite défenderesse et a renvoyé et renvoie l'action du dit demandeur avec dépens.

Action dismissed.

Geoffrion & Co. for plaintiff.

Barnard & Co., for defendant.

(S. B.)

The Provincial Legislatures have the same exclusive right under section 92 of the British North America Act, 1867, to pass laws relating to the subjects therein mentioned, as the Parliament of Canada has under section 91 to pass laws on subjects not expressly assigned to the former.

It became therefore impossible that both Legislative bodies should have had the power to command the repeal, in whole or in part, the provisions of ch. 69 of the Consolidated Statutes of Lower Canada.

The question was submitted to us in the case of McClanagan and the St. Ann's Mutual Building Society (24 L. C. J. 162), and we there decided on the authority of L'Union St. Jacques and Belisle (20 L. C. J. 29) that ch. 69 of the C. S. of L. C., having a provincial object and affecting civil rights, came within the exclusive jurisdiction of the Provincial Legislature under subsections 10, 11, 13 and 16 of section 92 of the British North America Act, 1867, and that the Act 42 Vict. ch. 48, passed by the Parliament of Canada, to provide for the liquidation of Building Societies in the Province of Quebec, was *ultra vires*. We, at the same time, maintained the Act of the Quebec Legislature, 43 Vict. ch. 32, which had the same object as the Dominion Act. We

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thereby held that the Provincial Legislature had exclusive control over the Acts authorizing the establishment of Building Societies in the Province of Quebec.

It is, however, argued that the Company, respondent, is not incorporated for the purpose of doing business in the Province of Quebec only, but in all the Provinces of the Dominion, and that as none of the Provinces could pass such an Act, the authority to do so vested in the Dominion Parliament, the subject not coming within any of the classes of subjects assigned exclusively to the Provincial Legislatures by Section 92 of the Imperial Act.

In the case of the Queen vs. Mohr (7 Quebec Law Rep. 113) this Court held that a Company incorporated by an Act of the Parliament of Canada (43 Vict. ch. 67) to establish telephone lines in the several Provinces of the Dominion, had no right to establish an independent line of telephone wholly within the Province of Quebec and not connecting this Province with any other of the Provinces, or not being extended beyond the limits of the Province, as such independent telephone line did not come within any of the exceptions contemplated in paragraphs *a*, *b* and *c* of sub-section 10 of section 92 of the British North America Act, 1867. Our judgment in that case was based on an express provision of the Act applying to lines of steamships, railways, telegraphs and other similar undertakings. Building Societies are not expressly mentioned in that sub-section, and their object is not of the same character, as the works and undertakings to which it refers. Although it is difficult to understand why a different rule should prevail, yet it cannot be said that Building Societies come within the express provision of sub-section 10, and that decision is not therefore inconsistent with the opinion expressed by the Judicial Committee of the Privy Council in the case of the Citizens Ins. Co. vs. Parsons (7 L. R. Appeal cases 96.)" In that case, their Lordships in their observations on the judgment of Mr. Justice Taschereau of the Supreme Court, expressed themselves to the effect that the power to incorporate an Insurance Company to carry on business in one of the Provinces of the Dominion, lay with the Legislature of that Province; while the incorporation of Companies to carry on business throughout the whole Dominion or in more Provinces than one, was vested in the Parliament of Canada, as not coming within the classes of subjects exclusively assigned to the Provincial Legislatures.

Although the question alluded to was not specially raised in the case of The Citizens Ins. Co. vs. Parsons, yet the opinions expressed were so directly to the point, that we do not feel it would be competent for us to consider the question as being now an open one.

We do not, however, consider that the opinion so expressed covers the present case. Here we have a Company incorporated to carry on its operations throughout the whole Dominion, which assumes to do business in one Province only, that is, in the Province of Quebec. The exclusive right of the Legislature of that Province to regulate the establishment of Building Societies within its own limits, would be destroyed if the Parliament of Canada could, by granting general powers, authorize a Company to act within one of the Provinces only. The inconvenience resulting from the exercise of such a power is well exemplified in the present case. If the Company, respondent, had been incorporated

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under the Acts in force in the Province of Quebec, relating to Building Societies, it would only have obtained the limited powers conferred upon such Societies by ch. 69, of the Consolidated Statutes of Lower Canada and its Amendments, but by going to the Parliament of Canada for a special Act of Incorporation, it has obtained powers of a much more extended character, and such as are not conferred on other Building Societies in the Province of Quebec.

As the Dominion Parliament could not directly incorporate a Building Society to do business exclusively in the Province of Quebec, it would seem that a Company incorporated to do business throughout the whole Dominion cannot restrict its business to one Province only, without infringing on the exclusive right of the Legislature of such Province to grant the authority necessary for that purpose.

We now come to the second question relating to the power granted to the Company, respondent, to acquire and hold land, to an unlimited extent within the Province of Quebec.

In the case of "The Chaudiere Gold Mining Company vs. Desbarats" (5 L. R., P. C. 277) it was held by the Judicial Committee of the Privy Council, confirming the judgments both of the Superior Court and of this Court, that a corporation, whether foreign or domestic, is incapacitated from acquiring as well as from holding lands in Lower Canada, without the permission of the Crown being first obtained. This restriction relates to property and civil rights (Art. 366 and 836 Civil Code of L. C.), and as such can only be removed by the Legislature of the Province of Quebec. The Parliament of Canada, although it may have the power to incorporate Companies to do business throughout the whole Dominion, has no right to alter or repeal the general or special laws of the several Provinces affecting the tenure of lands or the right to acquire and hold lands therein.

This question was formally decided in the case of "The Citizens Ins. Co. vs. Parsons," already cited, and apart from the general rule there laid down we find in the exhaustive judgment of their Lordships the following passage, p. 117:—"But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words, '*the regulation of trade and commerce,*') that because the Dominion Parliament has alone the right to create "a corporation to carry on business through the Dominion, that it alone has the "right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a Company, with power, among other "things, to purchase and hold lands throughout Canada in mortmain, it could "scarcely be contended if such a Company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province "having exclusive legislative power "over property and civil rights in the "Province) that it could hold land in that Province in contravention of the "Provincial Legislature, and, if a Company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that "it would do no business in any part of it, by reason of all the Provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

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The supposed case commented upon by their Lordships is exactly the one we have to deal with. The Civil Code in the articles already cited prohibits the acquisition of immoveable property by Corporations without the previous permission of the Crown, and ch. 69 of the Consolidated Statutes of Lower Canada (sections 13 and 23) has especially guarded against the accumulation of landed estate, in the hands of Building Societies, by providing that they could only hold real estate as security for loans made by such Societies, or for monies due for the payment of stock; the only power to hold real estate absolutely being limited to an amount of $6,000. Yet the Dominion Parliament in contravention to both the general laws of the Province and the special laws enacted in reference to Building Societies, has incorporated the Company respondent, for the very purpose, as stated in the preamble of the Act, of buying, leasing, and selling landed property, buildings and appurtenances, (37 Vict. ch. 103, preamble and sect. 4,) and it is in evidence that acting under this Act, the Company Respondent has already acquired large tracts of land in the City of Montreal, and its immediate vicinity. Whatever, therefore, may be the ultimate decision as to the right of a Company to do business in one Province only when that Company is incorporated by the Parliament of Canada to do business throughout the whole Dominion, it is clear from the opinion expressed by the Judicial Committee of the Privy Council, that the Company Respondent had no power to deal in the purchase, lease and sale of real estate, &c., in the Province of Quebec.

We therefore consider the Judgment of the Superior Court to have been erroneous, and acting upon the suggestion contained in the above extract from the Judgment in the Citizens Insurance Company and Parsons, without deciding that the whole Act incorporating the Company respondent is *ultra vires*, we hold that the Company has no right to exercise in the Province of Quebec the powers conferred by its Act of Incorporation, to buy, lease and sell lands, &c., in the Province of Quebec, and it is by our Judgment forbidden to do so.

PER CURIAM:—

This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney General of the Province, praying that it be declared that the appellant company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a Corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict., c. 103).

The preamble states—

"That the persons therein-after named, 'owners of real estate in the city and 'district of Montreal, and elsewhere in the Dominion, have petitioned for an 'Act of Incorporation, to establish an Association to be called the Colonial 'Building and Investment Association, whereby powers may be conferred on the 'said Association for the purpose of buying, leasing, or selling landed property,

'buildings, and appurtenances thereof; for the purchase of building materials, to 'construct an improved class of villas, homesteads, cottages, and other buildings 'and premises, and to sell or let the same; and for the purpose of establishing a 'building or subscription fund, to which persons may subscribe or pay in money 'for investment or for building purposes, and from which payments may be 'made for said purposes; and also to act as an agency.'

"Sec. 1 incorporates the Association.

"Sec. 4 enacts that the Association shall have power to acquire and hold, by purchase, lease, or other legal title, any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every description of materials for building purposes; to lend money on security, by mortgage on real estate, or on Dominion or Provincial Government securities, or on the stocks of chartered banks in the Dominion; and to acquire, hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. The clause provides that the Association shall sell the property so acquired within five years from the date of the purchase thereof.

"Sec. 5 enables the Association to act as an agency and trust company.

"Sec. 11 provides that the chief office of the Association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in the Dominion of Canada, for such purposes as the Directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the Association may be made payable at any of the said offices or agencies."

The Secretary of the Association, the only witness called in support of the petition, proved that the Association had bought lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the Province of Quebec, though efforts had been made to extend the business of the Company to other Provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the Association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this Appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition and the nature and form of the judgment appealed from.

The heading of Chapter 10, section 1, of the Code is: "Of Corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

"(1.) Whenever any association or number of persons acts as a Corporation without being legally incorporated or recognized;

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"(2.) Whenever any Corporation, public body or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney General for Lower Canada to prosecute, in Her Majesty's name, such violations of the law whenever he has good reason to believe that such facts can be established by proof, in every case of public general interest; but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a Judge, of a special information containing conclusions adapted to the nature of the contravention, and supported by an affidavit to the satisfaction of the Court or Judge, and the writ of summons cannot issue upon such information without the authorization of the Court or Judge."

The material allegations of the petition filed by the Attorney General are the following:—

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a Corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypotheo on real estate in this province, the whole without being legally incorporated or recognized.

"That the operations and business of the said Association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said Association could not lawfully be incorporated, except by or under the authority of the Legislature of the Province of Quebec.

"That the said Association was incorporated by the Parliament of Canada, in the year one thousand eight hundred and seventy-four, 37th Victoria, Chapter 103, and has ever since been in operation under the said Act of Incorporation which, for reasons above alleged, is null and void and of no effect, the said Act of incorporation being *ultra vires*.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said defendants be adjudged and declared to have been, and to be illegally formed and incorporated, and that the said illegal Association may be ordered to be dissolved,

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and to be declared dissolved; and, finally, that the defendants be prohibited from acting in future as such corporation, the whole with costs distraits to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the Company was issued by a Judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the Company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordships take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney General in the petition is that the Association was not legally incorporated, the statute incorporating it being *ultra vires* of the Parliament of the Dominion.

The judgment of the Superior Court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other judges, acknowledged that having regard to the observations of this Board in the case of The Citizens Insurance Company of Canada *v.* Parsons (L. R., 7 Appeal Cases, 96), it could not be held that the incorporation of the Association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the judges, that the Association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

"That the said Company, respondents, had and have no right to act as a Corporation for or in respect of any of the said operations of buying, leasing or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said Company, respondents, from acting as a Corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in the Citizens Insurance Company vs. Parsons, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of Companies.

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It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the Association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and, consequently, that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a Corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion Parliament. The Company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a Corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz., that the Company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the Association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the Counsel for the Attorney General that, on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the Company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the Building Acts of the Province.

It may be granted that, by the law of Quebec, Corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign Corporations in the case of the Chaudière Gold Mining Company *v.* Desbarats (L. R. 5 P. C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the Company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit Corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have

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the consent of the Crown. If that consent be obtained, a Corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that Province relating to the acquisition and tenure of land. If the Company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the Company has, in fact, violated the law of the Province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a Corporation of the mortmain law would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So, with respect to the objections founded on the Acts of the Province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the Province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question.

If the Association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may, doubtless, be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the Mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains. The first paragraph, after stating that the Corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognized."

The 2nd paragraph avers that the operations of the Company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the Province, "could not lawfully be incorporated except by the authority of "the Legislature of the Province."

The 3rd paragraph alleges that, for these reasons, "the Act of Incorporation "is null and void, the said Act of Incorporation being *ultra vires*."

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The conclusion and prayer based on these allegations are, that the Association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a Corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case which, assuming a lawful incorporation, rests on the supposed infringement of the laws of the Province by the Company in conducting its operations. This is not the wrong struck at by the petition, but a wrong-doing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the Company's secretary were of a general nature, and mainly directed to support the allegation in the petition that the Company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney General: so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the Company is really holding property in Quebec without having complied with the law of that Province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to Corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any Province in which they sought to acquire it, had not in view the special law of any one Province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a Corporation could only exercise its powers subject to the law of the Province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the Company "be prohibited from acting in future as a Corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the Company from doing specified acts in violation of particular laws of the Province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the Company has no right to act as a Corporation in dealing with lands and buildings, and certain other matters within the Province. This declaration, with the

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prohibition founded on it, is obviously too extensive. A prohibition in those wide and sweeping terms would prohibit the Company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their lordships' view; or at least by affirming that the Company, in exercising its powers in the Province, must necessarily violate the provincial law, which, as already shown, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present respondent. The appellant must also have the costs of the appeal to Her Majesty.

Judgment of Court of Queen's Bench reversed.

(S.B.)

COUR DU BANC DE LA REINE, 1883.

MONTREAL, 19 NOVEMBRE, 1883.

Coram DORION, J. en C., RAMSAY, TESSIER, CROSS et BABY, JJ.

JOHN PANGMAN,

APPELANT;

ET

DAME BERTHE BUCHANAN,

INTIMÉE.

JUGE:—Que dans le cas de l'appel d'un jugement renvoyant la contestation d'un jugement de distribution, et maintenant la collocation, l'appelant n'est tenu de donner cautionnement que pour les frais.

L'appelant, créancier colloqué, avait contesté le rang de l'intimée, aussi créancière colloquée. La contestation fut renvoyée. Il appelle et donne caution seulement pour les frais en appel, fixés par le protonotaire à $150.

L'intimée fait motion pour renvoyer l'appel pour raison de l'insuffisance du cautionnement.

A l'encontre, la cause de Lionais & Molsons Bank (2 Déc. de la Cour d'Appel, p. 194) fut citée.

Motion renvoyée, mais sans frais, parce qu'on a rayé dans l'acte de cautionnement le mot, *dommages*.

DeBellefeuille & Bonin, pour l'appelant.

Archambault & Archambault, pour l'intimée.

(R. LEF. DE B.)

SUPERIOR COURT, 1883.

DISTRICT OF ST. FRANCIS, 10TH NOVEMBER, 1883.

Coram BROOKS, J.

Ex parte Charles Edson, applicant for certiorari, and *The Corporation of Hatley*, respondents, and *George E. Rioux*, District Magistrate.

HELD:—1. That although the Local Legislature has no authority to *prohibit* the sale of intoxicating liquors, it has power to make laws for the purpose of regulating the traffic therein, and to raise revenue by enforcing the payment of money for licenses, and to impose a fine for selling without license.

2. That a Municipal Corporation has no authority under M. C. 561, to prohibit the sale of intoxicating liquors within the limits of the Municipality.

PER CURIAM:—This was an application to remove by *certiorari* into the Superior Court, the proceedings had in a cause where applicant was convicted and fined $75, on complaint of respondents, for selling intoxicating liquors without a license.

The two principal grounds alleged, were:

1st. "The Quebec License Act of 1878," *ultra vires*; the Local Legislature had no right to impose a fine for selling without license.

2nd. Penalty made payable to License Inspector.

As to the first point, the B. N. A. Act must be the guide. Sec. 92, sub-sec. 9 declares that they may, exclusively, make laws upon such matters, in order to the raising of a revenue for provincial, local or municipal purposes; sub.-sec. 15: The imposition of punishment by *fine*, penalty or imprisonment, for enforcing any law of the Province, made in relation to any matters coming within any of the classes of subjects enumerated in this section.

The Quebec License Act of 1878, 41st Vic. cap. 7, enacts that, whoever sells intoxicating liquors in any of the organized territory in this Province, outside of Montreal, without a license to that effect still in force, shall be liable to a fine of $75.

The Local Legislature *may not prohibit*, but they may legislate exclusively upon this subject for the purpose of raising a revenue for provincial, local or municipal purposes.

Section 63, 41 Vic. cap. 3, prescribes the tariff of duties payable to the License Inspector. Sections 7, 8, 9, 10, 11, 12 and 13, provide formalities for obtaining licenses, and declare that Municipal Councils shall confirm certificate upon ascertaining its correctness. It is said in this case that the Municipal Council of the Township of Hatley, under sec. 561 of the Municipal Code, had prohibited the sale within their territory. They could not legally do this, and what petitioner had to do was to get the necessary certificate, present it to the Council, and demand its confirmation; and, if refused, either proceed by mandamus to enforce its confirmation, or, on establishing such refusal, tender to local Government or its License Inspector the amount due for provincial revenue purposes, and demand the license (sec. 70); but petitioner cannot come forward and say that he has a right to sell without any license and without the payment of any duty.

The Local Legislature had power to legislate for certain purposes, and to enforce the provisions of their enactments within this power; to declare otherwise, would be to declare that prior to the passing of "The Liquor License Act of 1883," any person could sell. This I am not prepared to do.

In Griffith, petitioner, and Rioux, respondent, Legal News, Vol. 6, p. 211, held—that Local Legislature had no right to prohibit, that they could not, directly or indirectly, repeal the Temperance Act of 1864, because they could not re-enact; but to declare that they have no power to enforce laws which they may pass in relation to any matter coming within their jurisdiction would be to declare sub.-sec. 15 of sec. 92, B. N. A. Act, void, and sub.-sec. 9 of said sec. 92, inoperative.

I cannot say, therefore, that this provision of the Quebec License Act is *ultra vires*, and this opinion is sustained by the case, not cited at the argument, of Coté & Paradis, 11 R. Légale, p. 1, where the Court of Queen's Bench decided in a case of conviction *sans la license exigée par la loi en pareil cas*, and reversed the judgment at Arthabaska on the ground that the District Magistrate had exceeded his jurisdiction, not in inflicting a fine of $75, but in condemning to imprisonment in default of payment, that the conviction was good.

As to the second ground, that the fine was made payable to License Inspector, this is fully covered by articles 241, 242, and 243 of 41 Vic. cap. 3, as amended by 44 Vic. cap. 11, sec. 44.

Again, sec. 239 provides that before application is made for certiorari, a deposit of fine, costs, and $50 additional, must be made within 48 hours after conviction. It is not pretended that this has been done.

It was urged by respondent that the provisions of 45 Vic. cap. 4 had not been complied with, and no notice given to Attorney-General. This Act applies to suits, not to writs of certiorari, and I do not consider notice necessary.

Petition rejected with costs. Same judgment in two cases Nos. 54 and 55, Ayer and respondents and Hadley and respondents, argued at same time.

Jos. L. Terrill, and *J. W. Merry*, for petitioner.

Wm. White, Q.C., for respondents.

(J. K.)

SUPERIOR COURT, 1882.

MONTREAL, 6TH MAY, 1882.

Coram MATHIEU, J.

No. 1195.

David vs. *Richter.*

HELD:—That a clause in a deed of lease, prohibiting sub-letting without the consent in writing of the lessor and his approval of the sub-tenant, is not absolute that the lessor may refuse to accept of any sub-tenant offered, and, consequently, the lessee may cede all rights under the lease to a person proved to be as acceptable a person as the lessee, notwithstanding the refusal of the lessor to accept of such sub-tenant.

The facts and circumstances of the case, and the legal questions involved therein, are fully detailed in the judgment of the Court, which was worded as follows:

David vs. Richter.

" La Cour * * * attendu que par bail passé à Montréal devant Mtre. C. Cushing, notaire, le deux septembre 1879, le demandeur Moses E. David a loué à la défenderesse Dame Emilie Richter tous les lieux connus et désignés par les numéros cent quarante-sept et cent quarante-neuf, rue St. Jacques dans la Cité de Montréal, y compris le soubassement sur la ruelle Fortification, bornés en front par la rue St. Jacques, en arrière par la ruelle Fortification, d'un côté par la Compagnie d'Assurance sur la vie Standard, d'autre côté par le bureau des billets du Grand Tronc, la propriété du demandeur, avec droit de passage de la ruelle Fortification en commun avec d'autres pour le prix de $2,000 par année pour une période de cinq ans, à compter du 1er mai 1880, avec les stipulations suivantes : Il est expressément convenu entre les dites parties que la dite locataire n'aura pas le droit de sous-louer sans le consentement par écrit du dit bailleur ou ses représentants, et pourvu que les nouveaux locataires soient approuvés par le dit bailleur."

" La dite locataire ne fera aucun changement dans les dits lieux loués sans le consentement du dit locateur ou ses représentants, et dans le cas où de tels changements seraient faits, alors la dite locataire sera tenue de remettre les dits lieux loués dans le même état qu'ils étaient au commencement du présent bail, à moins que le dit bailleur ne préfère les conserver sans aucune compensation à la dite locataire pour ces changements."

Attendu que la défenderesse après avoir écrit au demandeur le trente janvier dernier, lui demandant la permission de céder son bail, et après avoir reçu du demandeur le 5 février dernier une réponse à sa lettre, par laquelle le demandeur refuse absolument de consentir à cette cession de bail, déclarant qu'il entendait mettre un prix à être fixé entre eux, à son consentement, a mis à sa place Victor Olivon, restaurateur, de la cité de Montréal, et lui a cédé sur bail par acte passé à Montréal, devant maître W. F. Lighthall, notaire, le 7 mars 1882, et ayant elle-même vidé les lieux elle a été l'objet d'une saisie-gagerie opérée sur ses biens meubles par le demandeur qui l'a fait assigner pour entendre prononcer en résiliation du bail et la validité de la saisie, qu'il y a lieu pour le tribunal, d'examiner si la défenderesse a pu valablement, malgré les clauses de son bail, céder son bail, et si c'est à bon droit, que la saisie-gagerie a été pratiquée ;—attendu qu'il est prouvée que la clause telle qu'elle était imprimée dans la formule dont on s'est servi pour le bail contenait la défense de céder le bail et de sous-louer et que la défense de céder le bail en a été biffée, laissant que la défense de sous-louer: que quoique la défense de sous-louer puisse en droit strict comprendre la défense de céder le bail, cependant il résulte des faits de la cause que les parties dans leur intention considéraient cette stipulation comme renfermant un sens différent, et cette Cour recherchant et constatant l'intention des parties, déclare que le demandeur n'a pas eu l'intention de défendre la cession du bail.

Attendu que, s'il résulte du dit bail que la défenderesse ne pouvait sous-louer qu'avec le consentement écrit du propriétaire, et pourvu que les nouveaux locataires soient approuvés par le bailleur, cette clause ne saurait s'entendre dans le sens absolu que la locataire ne pouvait sous-louer, quel que fût le

sous-locataire présenté, et que la seule opposition du bailleur, n'importe le motif, suffirait pour empêcher le sous-locataire; que si la clause sus-énoncée devait être ainsi interprétée, elle serait l'équivalent de la prohibition complète de sous-louer; qu'enfin il ne dépendrait plus que du propriétaire d'annuler et rendre illusoire cette autorisation en refusant systématiquement tous les sous locataires qui lui seraient offerts; qu'ainsi le bénéfice et l'exécution d'une stipulation consentie et acceptée par les contestants et par laquelle la défenderesse a dû comprendre qu'elle aurait le droit de sous-louer, pourvu que le sous-locataire qu'elle présenterait serait acceptable, ne dépendrait plus que du bon plaisir de l'une des parties; que telle n'est pas l'interprétation qui doit être donnée à leurs accords; que leur convention exigeant le consentement, même écrit, du propriétaire de sous-louer et pourvu que les nouveaux locataires soient approuvés par lui, doit avoir un sens pratique qui lui ferait complètement défaut s'il était décidé que le propriétaire peut, à son gré et même sans motifs, repousser péremptoirement tout sous-locataire; qu'il appartient aux tribunaux dans le cas d'un refus systématique d'apprécier les causes de ce refus, et d'ordonner, s'il ne refuse sur des motifs sérieux et légitimes, qu'il soit passé outre. Attendu que dans l'espèce la défenderesse après avoir tenté en vain d'obtenir le consentement du bailleur à la cession de son bail, a mis à son lieu et place Victor Ollivon; exerçant une profession identique à la sienne; que si le demandeur refuse de l'accepter et critique ce choix en alléguant dans sa réponse au plaidoyer de la défenderesse, que la réputation de Victor Ollivon, est telle en la cité de Montréal, qu'il est loin d'être un locataire désirable pour le demandeur, cette objection est repoussée par la preuve faite en cette cause, et nommément par le témoignage de Louis Hercule Edouard Paradis, chef de police de la cité de Montréal, que la réputation actuelle de Victor Ollivon, est bonne, et attendu que par les termes de la lettre du demandeur du 5 février dernier, ainsi que des circonstances de la cause et de la preuve faite, il est résulté que le demandeur n'avait rien à objecter contre la personne de Victor Ollivon, ni contre les conditions du sous-bail, mais qu'il entendait mettre un prix à son consentement;

Attendu qu'il est prouvé que les changements qui ont été faits dans les lieux loués constituent des améliorations et non des détériorations comme le prétend le demandeur, et qu'ils ont augmenté la valeur de sa propriété;

Attendu que l'action du dit demandeur est mal fondée et que la défense de la défenderesse est bien fondée;

A maintenu et maintient la dit défense de la dite défenderesse et a renvoyé et renvoie l'action du dit demandeur avec dépens.

Action dismissed.

Geoffrion & Co. for plaintiff.

Barnard & Co., for defendant.

(S. B.)

SUPERIOR COURT, 1883.

MONTREAL, 31st DECEMBER, 1883.

Coram RAINVILLE, J.

No. 91.

La Cité de Montréal vs. *Wylie et vir.*

HELD :—That property exclusively occupied as a seminary or school for the education of young ladies, but under the charge of private individuals, and not subject to public control, is not an "educational institution" within the exemption of 41 Vict. (Que.) cap. 6, sec. 26.

PER CURIAM.—La Corporation de Montréal réclame de la défenderesse, une somme de $440.80, pour taxes imposées sur une propriété appartenant à la défenderesse, pour les années 1878, 1879 et 1880.

La défenderesse, ne nie pas qu'elle soit propriétaire, mais elle allègue que sa propriété est exempte de taxes, en autant que pendant tout l'espace de temps pour lequel les taxes sont réclamées, sa propriété a été exclusivement employée aux fins d'éducation; que c'était en réalité une maison d'éducation (educational institution), et qu'elle n'a reçu aucune subvention de la demanderesse.

Les faits ne sont pas contestés, et il est admis par les parties que la propriété mentionnée en la déclaration sur laquelle les taxes sont réclamées, a été occupée et employée pendant tout le temps pour lequel les taxes sont réclamées comme maison de pension et d'école de jour, pour les jeunes filles et, maintenue par la défenderesse qui y employait plusieurs institutrices pour l'enseignement, et qu'en moyenne quatre-vingt-cinq élèves fréquentaient cette institution annuellement; que cette institution n'a jamais reçu de subvention de la Corporation demanderesse; en un mot, que si la dite institution n'est pas une maison d'éducation (educational institution) sous l'acte 41 Vict., ch. 6 (Q.) jugement doit être rendu en faveur de la demanderesse, sinon l'action doit être renvoyée.

Il ne s'agit donc, en cette cause, que d'interprêter l'acte sur lequel est basée la prétention de la défenderesse.

Voici les termes de cette disposition :

"Toutes maisons d'éducation qui ne reçoivent aucune subvention de la "Corporation ou Municipalité où elles sont situées, ainsi que les terrains sur "lesquels elles sont érigées et leurs dépendances, seront exemptes des cotisations "municipales et scolaires, quelque soit l'acte ou charte en vertu duquel ces "cotisations sont imposées, et ce, nonobstant toutes dispositions contraires."

Le texte, en langue anglaise, rend les expressions: "*Toutes maisons d'éducation*" par "*every educational institution.*"

Cette disposition est assez étrange: elle est donnée comme devant être ajoutée à la sect. 77 ch. 15 des S. R. B. C., lequel n'a trait qu'aux écoles. La § 2 de cette section 77 exemptait des taxes imposées en vertu de cet acte (c'est-à-dire des taxes scolaires)"tous les bâtiments consacrés à l'éducation ou au culte "religieux, presbytères, et toutes institutions charitables ou hôpitaux incorporés "par acte du parlement, et le terrain sur lequel ils sont érigés." "*All buildings "set apart for purposes of education*, or of religious worship."

La Cité de Montréal vs. Wylie et vir.

Il ne s'agit dans ce statut que de taxes scolaires: comment dans un amendement ajouté à cet acte, a-t-on introduit une disposition relative à l'exemption de taxes municipales?

Cependant là n'est pas la question: il s'agit seulement de déterminer si sous le nom de "*Maisons d'éducation*," "*Educational Institution*," on doit comprendre les maisons *d'éducation privée*, "*private schools*."

La question ne laisse pas de présenter quelques difficultés: car on a greffé sur une loi qui n'avait trait qu'à l'exemption des taxes scolaires, une disposition qui exempte des taxes municipales, et l'on s'est servi, pour déterminer les propriétés et choses que l'on entendait exempter de taxes, d'expressions différentes de celles que le législateur avait employées dans la loi originaire. Dans cette première loi (S. R. B. C., ch. 15, s. 77) le législateur s'était servi des expressions: "tous les batiments consacrés à l'éducation: "all buildings set apart for purposes of "education," et dans la s. 26 du ch. 6 de 41 Vict., on emploie les mots: "Toutes maisons d'éducation": "every educational institution." A-t-on voulu par là étendre les dispositions du statut originaire? A-t-on voulu comprendre d'autres propriétés ou institutions que celles que comprenait ce statut? Puis on n'a aucune définition des expressions employées par le législateur.

Et, dit la défenderesse: voici une maison qui est exclusivement employée pour les fins de l'éducation: un grand nombre de maîtres y enseignent, et cent personnes y reçoivent l'instruction: est-ce que ce n'est pas là une maison d'éducation, *An educational institution?*

Et prenons pour exemple le collége de Sorel, qu'un M. Lyall, je crois, vient d'acquérir: ce collége peut contenir 200 élèves, et est, si je ne me trompe, exclusivement occupé par des élèves et des professeurs qui donnent une éducation complète: n'est-ce pas là une maison d'éducation? *An educational institution?*

Et parce que ces institutions sont privées, appartiennent à un particulier, n'ont-elles pas autant de droits qu'une institution semblable qui serait sous le contrôle d'une corporation?

Sans doute, et ces motifs me sembleraient très-puissants en législation. Mais sont-ils bien fondés en loi? Là est la question.

Il est assez difficile de trouver des autorités et surtout des précédents sur le point: aux Etats-Unis, chaque Etat a sa législation particulière sur les exemptions de taxes et chaque législature a employé des termes différents.

La loi qui me paraît le plus ressembler à la nôtre, est celle de l'Etat de New-York: elle est dans les termes suivants:

"The following property shall be exempt from taxation:

"4o. Every building erected for the use of a college, incorporated academy, "or *other Seminary of learning, every school-house*....."

Sous l'opération de cette loi on a maintenu que:

"Exemptions from taxation of educational property are held not to include "*private schools*, nor the property devoted for their use."

Hilliard on Taxation, Ch. 3, § 31.

Les tribunaux ont aussi décidé en ce sens.

3 Sandford Rep. p. 409.—*Clegaray* vs. *Jenkins*.

La Cité de Montréal vs. Wylie et vir.

Le juge Paine en rendant jugement, s'exprime dans les termes suivants:

"It is urged on behalf of the plaintiff, that the premises are a seminary of learning, within the meaning of this statute. It is very questionable, however, to say the least, whether upon a just construction of it, boarding-schools of this description are comprehended within its letter or spirit.

"This school was established by private enterprise, is under no legal or public control, and is no more of a public character than any boarding-house, or other private property used for the accommodation of the public. On the other hand the institutions among which seminaries of learning are classed in this statute are not merely of a public character, and under the management and control of the public, but are incorporated and endowed by the State.

"The clause is: 'Every building erected for the use of a college, incorporated 'academy, or other seminary of learning.' The maxim *noscetur a sociis* appears to be applicable here, and to limit the exemption from taxation to such seminaries alone as are incorporated. The expression was, no doubt, intended to include such incorporated institutions of this description, as might not be properly called colleges or academies.

"Neither does it appear to us that the school in question is any more within the spirit than the letter of the statute.

"We certainly do not mean to detract from the great responsibility and usefulness of this and similar schools: but taxation is designed to be an equal burden upon all: and if any inequality is allowed to exist, it is supposed to be in favor of the poor rather than of the rich. Boarding-schools, however, are not within the reach of the poor.

"Their children live in such accommodation as can be provided for them at home, and are taught at schools that are common to all, and which are expressly exempted from taxation. If boarding-schools, therefore, were exempted from taxation, it would be exclusively for the benefit of the rich."

3 Sandford Rep. p. 412 et seq.

Une décision dans le même sens a été rendue par la Cour d'Appel de l'Etat de New York, en 1855.

3 N. Y. Rep. Kerman, p. 220.

So a grammar school kept by a person at his own risk and on his own account, is not "a college, academy or seminary" within the exemption of the (N. Y.) tax act of 1851.

Hilliard on Taxation.—Ch. 3, § 31, p. 88.

But buildings erected, kept and appropriated for the use of a literary and scientific institution, and in which a corps of teachers has been engaged in teaching pupils in all the branches of education usually taught at colleges, are exempt from taxation under the Indiana act of 1861, although the institution is conducted on private account and the earnings are applied to the personal benefit of the individual proprietor.

Hilliard loc. cit. Et il cite 24 Ind. R. 391. Mais il ne cite pas les termes de l'acte de 1861.

Les termes dont se sert notre statut: "Toutes maisons d'éducation:" "*Every educational institution,*" me semblent indiquer que le législateur n'entendait inclure que les institutions publiques et non des institutions privées. Les mots indiquent quelque chose de permanent et qui ne doit pas prendre fin suivant le caprice ou la volonté du propriétaire.

La défenderesse est donc mal fondée, et la demanderesse doit avoir jugement.

The judgment is as follows:—

"La cour, etc.....

"Attendu que la demanderesse réclame de la défenderesse la somme de $440.80, étant pour taxes municipales pour les années 1878, 1879 et 1880, les dites taxes étant imposées sur une propriété située dans le quartier St. Antoine et appartenant à la dite défenderesse, et pour intérêt sur les dites taxes à compter du 1er novembre de l'année où elles sont devenues dues respectivement jusqu'au 23 février 1881;

"Attendu que la dite défenderesse a plaidé que la propriété sur laquelle les dites taxes ont été imposées a été, durant le temps pour lequel les dites taxes sont réclamées, exclusivement occupée par la défenderesse comme maison d'éducation (educational institution) avec ses dépendances, pour l'éducation des filles, et que la dite maison d'éducation n'a reçu aucune subvention de la Corporation demanderesse, et qu'elle est en conséquence exempte des taxes municipales ou scolaires;

"Attendu que les parties ont admis que la propriété sur laquelle les dites taxes sont réclamées a été occupée pendant tout le temps mentionné en la déclaration comme maison de pension privée et école privée de jour (day school) pour les filles; que la défenderesse employait pendant ce temps plusieurs maîtresses et qu'on y enseignait en moyenne à quatre-vingt-cinq jeunes filles par année; que la dite institution n'a jamais reçu aucune subvention de la demanderesse; et que la seule question est de savoir si la dite institution est une maison d'éducation aux termes de la section 26 de l'acte de Québec 41 Vict., chap. 6;

"Considérant que les expressions dont s'est servi le statut, impliquent l'idée que les maisons d'éducation (educational institution) sont des institutions d'un caractère permanent et fondées dans un intérêt public, et sous le contrôle de l'autorité, et non des institutions privées, et qu'en conséquence les lieux occupés par la défenderesse ne sont pas exempts de taxes;

"Déboute la défenderesse de son plaidoyer, et la condamne à payer à la demanderesse la dite somme de $440.80, avec intérêt et les dépens."

Judgment for plaintiff.

R. Roy, Q.C., for the plaintiff.

Kerr & Carter for the defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 24TH MARCH, 1882.

Coram DORION, C. J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

No. 163.

ROBERT BICKERDIKE,

(*Defendant in Court below,*)

APPELLANT;

AND

DANIEL MURRAY,

(*Plaintiff in Court below,*)

RESPONDENT.

HELD:—1. In an action by the master of a ship, for freight, where it was not pleaded that the action could not be brought in the name of the master (the contract being signed by the agents of the ship-owners), that the objection could not be urged afterwards.

2. That where the shipper has signed the bill of lading without having his attention directed to stipulations printed on the back thereof he will not be bound thereby.

3. That in this case it was unimportant whether the contract should be considered as completed by the letters exchanged between the shipper and the ship-owners, or as evidenced by the bill of lading, inasmuch as in either case freight was due for animals lost on the voyage without the fault of the master.

The action in the court below was for the freight of cattle and sheep shipped from Montreal to Glasgow on the deck of the Steamer "Colina."

The defence was that the cattle were jettisoned in mid-ocean and were never delivered; that the plaintiff, therefore, had no right to freight; that they were thrown overboard under such circumstances as would give rise to a general contribution.

The Court below (JOHNSON, J.) condemned the defendant to pay freight according to the bill of lading. The judgment was in these terms:—

"The Court, etc.

"Considering that this action is by a master of a ship to recover freight for the conveyance of cattle on his ship from Montreal to Glasgow, and that the plaintiff alleges an exemption by the terms of the contract from any liability or responsibility whatever with respect to the loss of the cattle;

"Considering that the defendant pleads a general denial, but not an express denial of any one fact by itself as required by law;

"Considering that the allegations of the declaration that are not expressly denied as required by law are held to be admitted, and that therefore the plaintiff must recover, unless the defendant has alleged and proved something entitling him to avoid the conclusions otherwise deduciblo from the plaintiff's declaration;

"Considering that the only thing alleged by defendant is, substantially, that his cattle so laden on the said ship were jettisoned in mid-ocean, and that the plaintiff, therefore, has no right to freight, and he, the defendant, has a right to contribution on a general average;

"Considering that the right so averred by the defendant to contribution as arising from the jettison of the cattle characterizes the said jettison as one which does not deprive the plaintiff of his right to recover freight;

"Doth adjudge and condemn the said defendant to pay and satisfy to said plaintiff the sum of $1,750, for the causes mentioned in the plaintiff's declaration, with interest thereon, from the 19th of December, 1878, date of the service of process in this cause, until paid, and costs of suit *distraits* to Messieurs Abbott, Tait, Wotherspoon & Abbott, attorneys for plaintiff, reserving to defendant the exercise of any rights he may have respecting the said contribution."

In rendering judgment in this case and in the similar case of Murray vs. Head, JOHNSON, J., observed:

The plaintiff in these two cases is the master of the steamship "Colina," and he sues to recover the freight for a large number of horned cattle, sheep, and pigs laden on his ship by the defendants for conveyance from Montreal to Glasgow, and he alleges a tremendous list of exemptions from liability stipulated in the bills of lading, which were not furnished till afterwards. The pleadings and evidence are the same in both cases; and the plaintiff puts his case on the ground that the exemptions in the contract entitle him to freight, delivery or no delivery; and undoubtedly they do upon the face of the bill of lading; even though he alleges the fact of the loss of the cattle during a great storm at sea, by *force majeure*.

The plea of the defendant in my opinion raises merely one point. It says the plaintiff did not perform his part of the contract, which was to deliver the cattle safely at the port of destination; that, in fact, they were not delivered; but were jettisoned in mid-ocean, which, it further says, not only deprived the plaintiff of a right to the freight, but gave the defendant a right to contribution on a general average. I say this seems to me to raise only one point. The defendant plainly says:—"You threw my cattle into the sea, and I have a right of contribution which I can urge against the owners." There is no express denial of the averments as to the excepted risks, or anything else in the declaration. Those facts are therefore admitted, and must have their effect, unless the defendant on his part can allege and show something to avoid the conclusion otherwise arising from them. What is it, then, that he says? He merely says the cattle were thrown overboard, and he has acquired thereby a right of contribution on a general average.

It is, therefore, quite immaterial and useless to enquire whether they were properly or unnecessarily jettisoned. The defendant himself tells us he has a right to contribution arising from the fact of the jettison. Therefore he must pay freight. Nothing is plainer on general principles than the liability of the freighter under such circumstances; and the reason cannot be given better than in the words of Pothier:—Il y a quelques cas," says Pothier (Charter-party, sec. 3, art. IV.) "où le fret est du en entier, quoique les marchandises n'aient pu parvenir à leur destination. Le premier cas est celui auquel elles ont été jetées à la mer pour le salut commun. L'affréteur à qui ces marchandises appartiennent, devant être en ce cas indemnisé de la perte des dites marchandises par tous

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les intéressés à la conservation du navire, il en doit le fret. S'il n'est pas juste que le jet ayant été fait pour le salut commun, il porte seul la perte de ses marchandises, par la même raison, il n'est pas juste que le locateur du vaisseau en perde le fret." Our own Code reproduces this rule at art. 2450.

Then it was said in argument that the master could not bring the action in his own name, when the bill of lading has been signed by another. This point is not presented by the pleadings, and I do not decide it. But the plaintiff's allegation is that the master made this contract through his agents. That may be true or not; but it is nowhere expressly denied, as the law requires before it need be proved. There is a general protestation and a general denial, but that is all. The law says that every fact *that is not expressly denied* (not denied in the general mass, but by itself) is held to be admitted. The judgment will therefore be for the plaintiff for the amount demanded; but as the contribution is of course not asked here against the master, but only averred, and it was mentioned by Mr. Kerr that it was asked in another case, any rights the defendant may have to a *pro rata* reduction will be reserved to him. The judgment is the same in both cases.

Kerr, Q. C., for the appellant:—

This action was instituted by the Master of the SS. "Colina," the present respondent, to recover the freight of certain cattle and sheep shipped on board that steamship by the appellant for Glasgow in Scotland on or about the 27th September, 1878, but which, as alleged in the declaration, were never carried to their destination, having been swept overboard in a storm.

On the 11th September, 1878, the following letters were exchanged between Messrs. Robert Reford & Co., merchants of Montreal, and the present appellant.

"Montreal, 11th September, 1878.

"Messrs. ROBERT REFORD & Co.

"Sirs,—I hereby engage to ship per Steamer 'Colina' to sail hence for "Glasgow on or about the 25th Sept. inst. all the cattle and (or) sheep and (or) "hogs which she can conveniently carry on her upper deck, at the rate of four "pounds sterling per space of two feet nine inches in width by the usual length "(surface of deck), sheep to be estimated as twelve (12) and hogs as ten (10) in "number to that space in lieu of cattle—you to supply all fittings, and ship to "supply water only, and not to be responsible for loss of cattle, sheep or hogs "from any cause whatever.

"Yours truly, ROBERT BICKERDIKE."

On the same day Robert Reford & Co. answered the said letter in the following terms:

"Montreal, 11th Sept., 1878.

"ROBERT BICKERDIKE, Esq. (Montreal).

"Sir, we hereby engage to take for you per steamer 'Colina,' to sail "hence for Glasgow on or about the 25th Sept. inst., all the cattle and (or) sheep "and (or) hogs which she can conveniently carry on her upper deck, at the rate "of four pounds sterling per space of two feet nine inches in width by usual

"length (surface of deck), sheep to be estimated as twelve (12) and hogs as ten "(10) in number to that space in lieu of cattle—you to supply all fittings, and "ship to supply water only, and not be responsible for loss of cattle, sheep or "hogs from any cause whatever.

"Yours truly, ROBERT REFORD & Co."

On the part of the appellant it is contended that the two letters above set out constituted a charter of the upper deck of the steamship "Colina" for the voyage therein specified, and was a binding contract between the parties, viz., between the owners of the vessel, represented by the ship's agents, Messrs. Robert Reford & Co., and Mr. Bickerdike.

On the 27th Sept., an agreement having been made by the appellant with a Mr. Head with the consent of Robert Reford & Co., that Mr. Head should furnish the cattle, &c., for a portion of the space so chartered, the appellant placed on board the said steamship under the aforesaid contract eighty-one head of cattle and one hundred and eighteen sheep, and thereupon Messrs. Reford & Co. delivered to the appellant a bill of lading in the following terms:

"Clyde Line. Received in good order and condition from Robert Bickerdike "for shipment in and upon the screw steamship called the Colina, whereof is "master for the present voyage Murray, or whoever else may go as master in "the said ship, and bound for Glasgow, said to be

"(81) Eighty-one head cattle and
"(118) One hundred and eighteen sheep

"being marked and numbered as in the margin, and are to be delivered from "the ship's deck (*where the shipowner's responsibility shall cease*), in the like "good order and well conditioned (*subject to the exceptions and restrictions of "the following and undermentioned clauses*), at the port of Glasgow." [Here follows a list of exceptions, including jettison, and the following clause:—]

"Freight on live stock payable on the number of animals embarked, without regard to and irrespective of the number landed; and the owners of the "vessel are not to be responsible for accidents, injury or death arising from any "cause whatsoever."

The numbering and marking in the margin was as follows: "said to be "81 head cattle. "& 118 sheep. } "quantity unknown.

"To be put on board and landed at shipper's risk and expense, and vessel "not responsible for loss from any cause whatever, and to supply water only."

It will be observed, that in the bill of lading were interpolated conditions and exemptions from risk which did not appear in the letters constituting the contract:

1. There is a condition directly at variance with the general rule common to the laws of all maritime countries, that freight is earned only on delivery at the place of destination of the goods, and which is well expressed in Art. 2442 C. C. L. C.—"Freight is the recompense payable for the lease of a ship, or for

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"carrying goods upon a lawful voyage to the place of their destination. In the "absence of express stipulation it is not due until the carriage of the goods is "completely performed, except in the cases specified in this section."

2. In the contract itself, as shown by the letters, the ordinary maritime exemptions from risk were understood, but the right of obtaining contribution for jettison—an ancient and well understood right—was therein implied, and under the contract, as made by the letters above set forth, any loss by jettison would render the ship liable for contribution, whilst in the bill of lading jettison was placed amongst the excepted risks.

Moreover the bill of lading was made out by a clerk in the employ of Messrs. Robert Reford & Co., and was signed by them. It was handed over to the appellant at some time near three o'clock in the afternoon, and, as he had to give it to the Bank, he never examined it. He swears that there never was any understanding as to the conditions among the exceptions "free from jettison," "freight on live stock payable on the number of animals embarked, without regard and irrespective of the number landed."

The first plea filed by the appellant denied that the cattle and sheep were swept off by the sea, as alleged in the respondent's declaration, and alleged that they were thrown overboard under such circumstances as should give rise to a general contribution.

The appellant also pleaded a *défense en fait.*

From the proof it would appear that the cattle and sheep were thrown overboard by the respondent's orders because, the stalls having been in part broken down, they incommoded the seamen in working the vessel, and also because the fodder for them had been partially carried away by the sea.

The first point submitted by the appellant is:

The respondent (the contract for carriage and the bill of lading being both signed by Messrs. Robert Reford & Co., the agents of the shipowners) had no right whatsoever to institute the action in the Court below under the said contract and bill of lading.

By Art. 13 C. C. P. it is provided that "no person can bring a suit at law unless he has an interest therein," and by Art. 19 C. C. P. it is provided that "no person can use the name of another to plead except the Crown through its recognized officers."

The master of a ship is merely an agent of the owners, in the words of Lord Tenterden "he is the confidential servant or agent of the owners"—Abbott on Shipping, (11th Ed.) 101.

The next point to be considered is whether the agreement contained in the letters exchanged between Robert Reford & Co. and the appellant constitute the binding contract between the parties. Having preceded the delivery of the bill of lading, the appellant contends that the agents of the ship were bound to deliver to him a bill of lading containing the ordinary conditions of bills of lading.

In the letters no express stipulation appears by which, in the event of the cattle, &c., being swept overboard, jettisoned, or dying on the voyage ere arrival, freight should be paid on the number shipped, consequently the rule laid down

in Art. 2442 C. C. L. C. hereinbefore set out applies, and the cattle having been thrown overboard soon after leaving the Gulf of St. Lawrence, and never having been carried to their destination, no freight was earned. Robert Bickerdike, and Daniel Murray.

The extraordinary conditions introduced into the present bill of lading, and upon which in fact the present action is founded, were never agreed to nor even brought under the notice of the appellant. He was justified in supposing that the bill of lading given to him was in accordance with his agreement, and did not examine it, having received it on the 27th September, the same day the vessel sailed, and it being near the close of banking hours, he had no time for examination.

Lush, J., in the case of *Crookes* vs. *Allan*, 49 L. J. Q.B. 202, 28 W. R. 304, 305, says: "A bill of lading is not the contract but only the evidence of the "contract. It does not follow that a person who accepts the bill of lading which "the shipowner hands him, necessarily, and without regard to circumstances, "binds himself to abide by all its stipulations. If a shipper of goods is not "aware when he ships them, or is not informed in the course of the shipment, "that the bill of lading which will be tendered to him will contain such a "clause, he has a right to suppose that his goods are received on the usual terms "and to require a bill of lading which shall express these terms."

By Art. 1676 C. C. L. C. it is provided "that notice by carriers of special "conditions limiting their liability is binding only upon persons to whom it is "made known."

From this provision the appellant draws the conclusion that the special conditions under Art. 1676 are analogous to the express stipulation in Art. 2442 C. C. L. C., none of them being binding unless made known; and the declaration of the English law hereinbefore set out, made by Mr. Justice Lush, applies to stipulations and conditions introduced into bills of lading, under our law of Quebec.

The appellant refers to the following authorities in support of his pretension: Angell on Carriers, § 247; Browne on Carriers, p. 119.

The appellant therefore contends that all the provisions of the bill of lading in excess of the usual terms of such document as modified by the contract of carriage contained in the two letters of the 11th September, 1878, and notably that by which "freight shall be payable on the number of animals embarked "without regard to the number landed" are invalid, null and void.

With reference to the allegation in the plaintiff's declaration, that the cattle were swept overboard by the sea, this is shown by the evidence of almost every witness examined to be untrue. It is true that some of the stalls were destroyed by the sea and certain of the animals were loose on the deck and liable to be dashed from side to side by the rolling of the vessel. A portion of the fodder was also carried away; but the animals were not swept away; one of the gangways was opened, and the cattle were shoved into the sea, whilst the sheep were sent overboard by the crew and the drovers acting under the orders of the respondent. All this took place but a short distance from the Straits of Belleisle, between two and four hundred miles apparently. It is not shown that the vessel could not have made St. John's, Newfoundland, which was but

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at a short distance comparatively, but, in lieu of attempting to do anything to save the cattle, the respondent ordered them to be thrown overboard.

It either was a case of jettison, which under general circumstances should give rise to a general contribution, or it was a wanton act on the part of the respondent. If it were a case of jettison, the freight should be deducted from the general contribution by the respondent. If, on the contrary, the act was wanton on the master's part, no freight is due.

The arguments already urged as to the freight being made payable, by the bill of lading, on the number of animals shipped, apply to the exception of jettison included amongst the excepted perils, and the judgment of *Crookes* vs. *Allan* above referred to, is exactly in point.

Abbott, Q.C., for the respondent :—

At the *enquête* in the case the facts were established without much contradiction by the officers of the ship on the one side, and the men in charge of the cattle on the other, although the latter were unable to speak with much precision as to what had taken place, having evidently suffered both from the storm, and from the alarm which it caused. The result of the evidence may be stated as follows :—

The cattle were shipped at Montreal on deck, in stalls prepared under the supervision of the appellant, and paid for by him.

The vessel sailed about the 27th September, 1878, by the Straits of Belœil. She passed through the Straits on the Sunday following. On the afternoon of that day a gale of wind commenced from the north-east, with snow and sleet, which continued until Monday inclusive, on which day a heavy sea was shipped, smashing and breaking a portion of the cattle pens and stalls, the funnel gags and the life boat, and washing overboard about sixty of the cattle forming the cargo: part of which belonged to the appellant, and part to Mr. Wm. Head. Upon the breaking up of the stalls, these animals were swept all together into a heap, in a confused mass, on the lee-side of the deck, then backwards and forwards, from one side of the ship to the other, there being nothing to fasten them to, after the houses were down, and it became impossible to save them. The gangways were accordingly opened, and they were swept overboard into the sea. The gale continued for several days. On the following Thursday, the wind blowing a hurricane, the engines being kept going dead slow, just sufficient to keep the vessel's head to the waves, the ship was thrown on her beam-ends. On that day the vessel shipped a tremendous sea, and the remaining stalls and pens were smashed to pieces. The remaining cattle were all swept to leeward on the decks, and tumbled together with the fragments of the houses and pens, and they were all in a confused mass, surging from one side of the deck to the other. The animals were starving, as it had been impossible to feed them during the four days of the storm. Their hoofs were all torn, the ropes had cut into their heads at their horns, where they were tied; the tails of many of them were rubbed off. In fact the cattle were in a state of complete wreck, and could not possibly have been saved. They could not possibly have been kept on board the ship and refastened, even if that had been practicable; many of them were so injured that they could not have survived their wounds;

and those that could have recovered from their injuries could not have reached land, as their food had been washed overboard. They were embarrassing the working of the ship, and it was useless to prolong their lives. Thereupon the gangways were opened, and they were partly washed and partly pushed over the side into the sea, and the decks cleared.

The officers do not consider the vessel to have been in danger on account of the cattle; but the chief difficulty was that they embarrassed the working of the ship, by encumbering the deck with a floating mass of animals, rubbish and water.

The foregoing statement of the condition of the animals is mainly taken from the depositions of the officers of the vessel. Some of the men who crossed with the animals were examined on behalf of respondent, and although they made general assertions as to how the animals had been put overboard, yet, on being pressed, they shewed that they had not any clear knowledge or recollection of the details of what passed during the storm. They were mostly men entirely unaccustomed to the sea, and the occurrence of so violent a storm, so shortly after leaving the Straits, no doubt severely tried both their courage and their endurance. The respondent is confident, that the more closely the evidence is scrutinized, the more the Court will be satisfied of the accuracy of the description which has been given, of the condition of the cattle and their loss.

The only other evidence which was adduced was proof of the bill of lading the originals of which had been delivered to the appellant, and he could not produce them. Proof of it was thereupon made by the production of the triplicate copy retained by Reford & Co., the correctness of which was established by the clerk who prepared the triplicates. But with regard to the details of the agreements between the parties, including the Bill of Lading, no issue was raised; the appellant contenting himself with a plea which raised only two points of defence, namely:—

1. That he was not liable for the freight, the animals not having been delivered at the port of delivery.

2. That the cattle were jettisoned for the safety of the ship and cargo, and that he was entitled to a contribution by the ship to the loss, in the nature of a general average.

The appellant produced, as has been stated, some of the persons in charge of the cattle, to prove that there was an actual jettison of the animals, and he also caused the examination of Mr. Popham, the agent of the Insurance Company which had a risk upon the animals; Mr. Coughlin and Mr. Price, cattle dealers; Mr. McLean, clerk of David Shaw, ship broker, agent of the Temperly Line of Steamers; and Mr. Chandler, an insurance and ship agent at Montreal. The object of the examination of these gentlemen was to endeavor to prove that it was the custom at Montreal to ship cattle to Britain on deck. The evidence in this respect was, that during the three years previous to the shipment, a cattle trade between Canada and England had sprung up, and had reached considerable proportions. That the majority of the cattle shipped were shipped on deck, the

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remainder being shipped under deck. None of the witnesses could speak as to any custom respecting the responsibility of the ship or of the shipper for the safety of the cattle; or respecting the obligation of the ship to contribute to the loss in the case of jettison. But Mr. McLean proves that the custom in shipping cattle is that the freight shall be paid whether the cattle arrive or not, which in fact is equivalent to holding the shipper responsible for the loss of the cattle. This class of evidence may be summed up by stating that it is proved that a considerable proportion of the cattle shipped from Montreal to Britain are shipped on deck, and that in such case the freight is payable whether the cattle arrive or not. No evidence is offered as to the custom in cases of jettison of cattle shipped on deck, except the evidence of Mr. McLean, that the freight is payable whether the animals arrive or not.

Under these circumstances the respondent submits that there can be no question as to the responsibility of the appellant for the freight.

The law on the subject has been the subject of much discussion. Up to 1837, jettison of deck loads was never admitted as a ground for contribution of any kind. If the goods were placed on deck without the consent of the shipper, the ship was liable for any loss by jettison or otherwise; if with the consent of the shipper, he bore the loss. But in neither case was an apportionment of the loss in case of jettison, made between the shipper and the ship.

According to the French law there is in no case any liability to contribution by the ship in case of jettison of a deck load; but under the English system two or three exceptions have gradually been recognised on the ground of custom. It is said that the "old and notorious rule" is that deck load jettison is in no case average. "If the shipper assented by express words in "his "charter-party or bill of lading to such stowage, he could not sue the ship-"owner on the ground of its being improper; the whole loss by jettison conse-"quently fell on himself."

There seems to be a difference of opinion amongst the writers as to whether by law the shipper assumes the responsibility for the entire value of the goods jettisoned, if it appears that he has authorised their being stowed on deck; or whether he only becomes responsible by reason of a custom to that effect.

Such a custom appears to be proved by Mr. McLean, as has been stated. But this question is not important in the present case, as there is an express agreement between the parties establishing on whom the loss shall fall. The most favorable *dicta* of text writers do not go further in favor of the shipper than that, in order to throw the responsibility upon him for shipments made on deck with his consent, some proof must be made of a custom to that effect. And this opinion is confined to a very limited class of goods, in which cattle are not included; and, even with that restriction, is by no means unanimous. But if proof of such a custom binds the shipper, *a fortiori* he must be bound if he enters into an express agreement with the ship owner which declares the latter "not to be responsible for loss of cattle, sheep or hogs from any cause "whatever," and that the freight should be "payable on the number of

"animals embarked without regard to, and irrespective of, the number landed: "—and the owners of the vessel not to be responsible for accident, injury or "death from any cause whatsoever."

The respondent also submits that the appellant himself was undoubtedly aware of his liability, for by a letter signed by himself and William Head, on the 15th November, 1878, he offered to pay the freight demanded at once, if the respondent would make a small deduction from the amount due.

The respondent, therefore, submits that the judgment of the Court below should be confirmed:

1. Because there is no legal liability by a ship-owner for the loss of cattle shipped on deck.

2. Because by the agreement and bill of lading under which the cattle and sheep in question were shipped, it was agreed that the ship should not be responsible for jettison; or for any accident, injury or death from any cause whatever.

3. Because the bill of lading provided that the freight should be payable upon the number of animals embarked, without reference to the number of animals landed.

4. Because it would have been impossible to have saved the said animals, and to have carried them or any of them to their destination; because they were so injured by the storm and its effects that they must have died; and because there was no fodder or food upon which to feed them during the rest of the voyage. The ship not being responsible for furnishing such fodder or feed, but only water.

5. Because the said animals were a complete wreck; and their destruction, as it occurred, was only anticipating by a few hours their death on ship-board.

6. Because the animals in question were lost without any fault or neglect on the part of the respondent, or of the crew of the said vessel "Colina."

The unanimous judgment in appeal was rendered as follows:—

RAMSAY, J. This is an action brought by the master of a ship, for freight.

The first question raised is whether the action is properly brought in the name of the master. It is possible that this question might have given rise to some difficulty had it been pleaded, but it is evidently an afterthought. Defendant pleaded over and met the master, holder of the bill of lading, on the merits. I think, therefore, he is too late to raise the objection, even if well founded.

The next point at issue between the parties is as to whether the contract is evidenced by the letters of the 11th September between the appellant and the agents, Messrs. Reford & Co. The appellant's contention is that the letters contained a contract complete in itself, and that the bill of lading is merely a receipt to establish the fact that a certain number of cattle and sheep had actually been received on board, and that every addition, not an absolute condition of the law, is valueless and does not bind the appellant. The argument of the respondent is, that the letters were only a general proposition, and that the usual bill of lading was understood to follow containing the ordinary clauses of a bill of lading, and that the bill of lading in question contained no clause that was unusual or incompatible with the letters of 11th of September.

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Next comes a question of fact—was it a case of jettison giving rise to average, or was it merely the throwing of the useless remains of destroyed goods into the sea? Appellant has pleaded that it was jettison, that he has an action against the owners for contribution, and that, moreover, the cattle and sheep not being delivered at Glasgow, owing to this jettison, no freight was due, because the contract was not fulfilled. This plea gives rise to confused, and even contradictory, pretensions. It is one thing for defendant to say, "I have not to pay freight at all because my goods were not delivered according to contract;" and quite another to say that the freight was compensated by contribution which has never been adjusted. It may not, however, be very important whether we can look at this last pretension or not. If we do, I think the balance of evidence shows that the cattle and sheep were not jettisoned in the conditions to give rise to contribution, even if the jettison of a deck load of this kind could give rise to average under the special exception of our Code. Jettison must be to lighten the ship, and for the common good, or it gives rise to no contribution. Abbott 1280, p. 499; C. C., Art. 2402. As to the justification of the captain for throwing the animals overboard, the weight of evidence seems to be in favor of the respondent; but, if doubtful, the presumption is in favor of the captain.—"*Quia pro non culpa capitanei præsumendum sit.*" Casaregis, Dis. XLV. 31. Secondly, the exception of Art. 2557 is not pleaded; and, thirdly, no usage is proved. But, on the other hand, if the deckload, jettisoned, is not to be paid for by contribution, freight is not due unless otherwise provided for. That is to say, it is the contribution that gives a fictitious delivery of the articles jettisoned. V. O. M., Liv. III, Tit. III, Art. XIII and commentary. The doctrine is fully recognized in Art. 2558 C.C.

We are therefore forced back on the former question—that is, as to the contract. If the bill of lading be the evidence of the contract, there can be no doubt appellant must fail, for it expressly stipulates that the freight is earned, whether the animals arrive or not. I cannot concur with the learned counsel for the respondent in the general proposition that notices on tickets or unsigned papers form part of a contract to limit the common law responsibility of the person giving the ticket, simply by their reception. There must be some proof of acquiescence. That this is our law is undoubted. C.C. 1676. It seems, however, that when there has been a signature by the shipper, without reserve, on a bill of lading it will be held sufficient proof of a deliberate contract. Our law being so precise on the subject, it becomes necessary to examine very critically the opinions of the learned Judges in the English cases cited. It appears to me, however, that the opinion of the majority of the learned judges in appeal, delivered in the cases of *Parker & Gabell* against the *South Eastern Railway Co.* (L. R. 2 Com. Pl. Div. 416), does not differ very materially from our law. I may be permitted also to add that the policy of our law is wise. It seems to me in the last degree absurd to presume that a passenger going to the wicket at a railway station, or a cloak-room, for a ticket, is presumed to have examined the legal value of a notice in minute print limiting the legal responsibility of the carrier or proprietor of the cloak-room. I can easily understand that a person might not consent to take charge of the Koh-i-noor diamond for

twopence, but if he does it, it seems to me, he ought to be held liable, and he cannot relieve himself of the risk by saying that the depositor is presumed to know that there was a notice on the back of his ticket limiting the risk to £10. Nor is this an extraordinary application of the principle in England, for the courts there have very recently condemned a railway company to enormous damages because a very skilful physician had had his head injured in a railway accident. The cloak-room man can see whether the garment you give him to keep is valuable or the reverse, but the railway company can hardly be expected to judge of the occult science of every person who asks for a sixpenny ticket. It should be observed that it is fallacious to insist that 2d. is an insufficient recompense for the care of one article of great value. The carrying or care-taking is a business for which the price charged is an equivalent not for one case, but for many.

The question, then, seems to me to be whether there is evidence to show that the attention was directed to the numerous stipulations on the back of the bill of lading. I am unable to see any such evidence in the record. It is true that appellant took the bill of lading and raised money upon it. But what else could he do, even if had seen the notices? His animals were on board the vessel, and he must either go without this very necessary receipt for their existence, or take what was offered. Again, by the ordinary course of business, the bill of lading was his only means to get money. He might, of course, have refused the bill of lading, and have brought an action to get one in the terms of his contract. This can hardly, however, be suggested as a practical remedy, or one the appellant was bound to adopt, if otherwise in the right.

But what seems to me to be more debateable ground is, whether the added clauses of the bill of lading are really more than were fairly covered by the original letters, or at all events whether the condition as to freight of animals lost on the voyage is anything more than a stipulation, which is presumed if nothing be said.

On this point a good deal of authority has been cited, or rather I should say many authors have dealt with the subject, but I can hardly say they have added much clearness to the subject. The fact is the writers have followed one another's expressions slavishly. They all refer to the few lines in the Dig. (XIV. 2, 10), which are to this effect:—"If you have leased your ship to carry slaves, no indemnity shall be due you for the carriage of those who die in the ship. But Paulus asks what is the contract, whether the bargain is made for what is put on board or for what is carried over. And he decides that if there be no stipulation, it will be sufficient for the captain to show that they were put on board." It is impossible, I think, to reconcile the first sentence of this paragraph with the latter part. If the general rule be that freight for live animals not delivered is exactly the same as for every other kind of merchandise, it seems strange that in the absence of any special stipulation the presumption should be for the ship instead of against it. It is useless, as some of the modern writers seem to see, to say that the contract when express shall be the law of the parties. But none of them give any good reason why Paulus should have arrived at a conclusion

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which seems exceptional. Roccus says that there is a rule that "a doubtful contract must be construed against the shipper." Flanders, No. 524, note. But why should it be *doubtful* if the law supplies the stipulation? The first part of 2, 10, purports to be from Labeo; but it is quite possible what Labeo said may have had a context which would alter its meaning, or the passage may have been deliberately altered to keep up an imaginary symmetry in the law, to be pulled right in practice by a contradiction. We have examples of such legislative operations in our own days. Reason or not, it seems to be universally admitted law that when there is no stipulation on the point, freight is due for animals that perish without the fault of the captain, or, as the Dig. puts it, it is sufficient if the master shall prove the putting on board.

But if we go back to the letters as the basis of the contract, they seem to support the idea that this doctrine was dominant in the mind of the contracting parties. It was not even necessary that the captain should prove the putting on board. He had to account for those he took on board, that is all; but his freight was due for space, not for animals. Again, there is a clause of non-warranty for loss of cattle, both in the letter of offer and in the letter of acceptance. To what did that refer if not to freight? Under our law it could not be intended to cover negligence (1676 C.C.) The most it could do in this respect would be to shift the burthen of proof from the owner to the shipper.

Taking this view I am to confirm with costs, and this is the judgment of the Court. *

Judgment confirmed.

Kerr, Carter & McGibbon, for appellant.
Abbott, Tait & Abbotts, for respondents.
(J. K.)

* A similar judgment was rendered on the same day in the case of Head, appellant, and Murray, respondent.

PRIVY COUNCIL, 1883.

LONDON, 8TH MARCH, 1883.

Coram LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

JOHN ELLIOT ET AL.,

(*Plaintiffs in Superior Court,*)

APPELLANTS;

AND

JAMES LORD ET AL.,

(*Defendants in Superior Court*),

RESPONDENTS.

The plaintiffs entered into a charter-party with the defendants for the chartering of a steamship owned by plaintiffs, then at Liverpool, which [illegible] to proceed to Sydney, C.B., and take on board a cargo of coals. In the charter-party [illegible] his stipulation: "Taking her turn "with other steamers, and taking precedence [illegible] coaling vessels, and receive prompt "despatch in loading and unloading." Sydney is a coaling station, and the coal is brought straight from the mines to the pier at which vessels load. There was evidence that the facilities of the pier were greater than the production of the mines, and that the vessel could have been loaded in a shorter time if the facilities at the mines had been better. The action was to recover damages for seventeen days' detention.

HELD:—That the deficiency of coals, and not the waiting for her turn (according to the custom of the port), being the cause of the plaintiffs' vessel not sooner getting her cargo, the plaintiffs were entitled to recover for the detention.

The appeal was from a judgment of the Court of Queen's Bench at Montreal, a report of which will be found in 27 L.C. Jurist, p. 30.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), in an action by the appellants against the respondents to recover damages in the nature of demurrage for the detention of the appellants' ship, the "Gresham," at Sydney, N.S., whither she had gone to load under a charter-party dated the 12th of June, 1872. Mr. Justice Torrance, as the Judge of the Superior Court for Lower Canada, Province of Quebec, District of Montreal, on the 21st May, 1880, decided that the "Gresham" was unduly detained for seventeen days, and condemned the defendants in £850 damages, with interest and costs. This decision was reversed on the 21st of March, 1882, by three of the judges of the Court of Queen's Bench (Appeal side)—one Judge, Mr. Justice Cross, dissenting.

No objection was made in this appeal to the amount of the damages, and it was agreed before their Lordships by the respondents' counsel that, if the appellants are entitled to recover damages, they are to be calculated for seventeen days at the rate of £50 per day, as was adjudged by Mr. Justice Torrance.

The appellants were the owners of a steamship called the "Gresham," and the defendants were merchants trading at Montreal under the firm name of Lord, Magor & Munn. On the 12th of June, 1873, the plaintiffs, through Mr.

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John G. Sidey, their agent at Montreal, entered into a charter-party with the defendants for the hire of the "Gresham," then at Liverpool. The material part of it is as follows:—

"It is this day mutually agreed between J. G. Sidey, of Montreal, agent of the good steamship or vessel called the "Gresham," whereof ——— is master, of the measurement of 1801—1102 tons, or thereabouts, now in Liverpool, of the one part, and Messrs. Lord, Magor & Munn, of Montreal, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Sydney, or other port, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat."

The "Gresham," under the command of E. G. Bulkeley, the master, proceeded from Liverpool to Sydney and arrived there on the morning of Saturday, the 19th of July, 1873, when the master, about 9 a.m. on that morning, notified to Messrs. Archibald & Co., of Sydney, the agents of the charterers there, that she was ready to receive and load her cargo under the charter-party. On the 25th of July a few bunker coals were shipped, but no cargo coals were shipped on board the "Gresham" until the 4th of August, on which day she began to take in cargo coals, and finished loading on the 13th. She was then compelled to leave with less than her full cargo by 300 tons, but no question arises as to this.

The appellants in their declaration alleged that the defendants did not according to the terms of the charter-party load the "Gresham" with a full and complete cargo of coals taking her turn with other steamers, but taking precedence of sailing vessels, and afford and give the said steamship prompt despatch in loading her cargo of coals. And the defendants by their plea averred that they complied with the conditions of the charter-party, and that the "Gresham" had her turn with other steamers, taking precedence of sailing vessels, according to the custom and usage of the port of Sydney, and had prompt despatch in loading at Sydney.

The material evidence upon this matter is that of Mr. Frederick N. Gisborne, the only witness called for the defendants, and the entries in a shipping book of which he produced a copy, and which, he said, contained a complete history of the business done during the period to which they relate. Mr. Gisborne stated he was the engineer of two or three coal companies at Sydney; that all vessels loading from the mines he was attending to were of necessity reported to him, and no other person had any right to enter reports of vessels. Each vessel was put down in turn in the book at the time it was reported, and they were loaded in that order. None of the steamships that were berthed or reported after the "Gresham" were loaded before her, and the "Hibernia" being reported before the "Gresham," was loaded before her. They gave the "Gresham," coal as fast as they could deliver it—as fast as facilities of the mines would

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allow the facilities of the pier were greater than the production of the mines, and the vessels could have been loaded in a shorter time or with more despatch if the facilities at the mines had been better.

The following is a copy of the entries in the shipping book:—

"Extracts from Shipping Book.

"1873.

"SS. Kangaroo—Telegraph Cable Fleet.

"Commenced loading, 19th July. Completed, 24th. Cargo, 761 tons.

"SS. Gresham—Reported, 22nd July. Commenced loading, 25th. Completed, 13th August. Cargo, 1,830½ tons.

"Schr. Heroine—Arrived, 22nd July. Loaded, 24th. Cargo, 120 tons.

"Schr. Fear Not—Arrived, 24th July. Loaded, 25th. Cargo, 52 tons.

"Schr. Trial—Reported, 25th July. Loaded, 26th. Cargo, 41 tons.

"SS. Hibernia—Telegraph Fleet. Reported, 19th July. Commenced loading, 30th. Completed, 5th August. Cargo, 1,901 tons.

"Schr. Rebecca Ann—Arrived, 31st July. Loaded, 1st and 2nd August. Cargo, 192 tons.

"SS. Alpha—Completed discharging, 1st August. Commenced loading, 7th August. Completed, 16th. Cargo, 1,959 tons.

"SS. R.M. Hunton took 143 tons bunker coal 6th and 7th August.

"SS. Crosby took 234 tons bunker coal 11th and 15th August."

It was explained by Mr. Gisborne that the three schooners, "Heroine," "Fear Not" and "Trial," occupied inside berths where no large steamers could lie, and the loading of them did not interfere with the loading of the larger vessels. But the "Hibernia" which was reported on the 19th July, did not commence loading until the 30th, and between the 24th and 30th only three small cargoes of 120, 52 and 41 tons respectively, were loaded, viz., on the 24th, 25th and 26th. No coals were loaded on the three following days, and the loading of the "Hibernia's cargo" of 1,901 tons was completed between the 30th of July and the 5th of August. The loading of the "Gresham's cargo," 1,830½ tons, was completed between the 4th and 13th of August, only a few bunker coals having been loaded on the 25th of July. These dates show the time within which it was possible to load the cargoes if the coals had been ready.

The arrival of the "Gresham" having been notified to the defendants' agents on the 19th of July, the plaintiffs were, by the terms of the charter-party, entitled to a full and complete cargo of coals on that day. The respondents' counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th of August because the cargo was not ready. The facts, however, are, that the defendants employed the same person, the agent of the coal companies, to load the "Gresham" as was employed to load the "Hibernia." In consequence of the delay in getting the coals down from the mines, there was

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not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. This deficiency of coals, and not the waiting for her turn, was the cause of the "Gresham" not sooner obtaining her cargo.

The defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay.

It is not necessary to consider whether the "Gresham" was thus delayed for the whole of the 17 days, it having been agreed that £850 shall be taken as the amount of the damages. Their Lordships, therefore, will humbly advise Her Majesty to reverse the decree of the Court of Queen's Bench (Appeal Side), and to affirm the judgment of the Superior Court of the 21st of May, 1880, with costs. And the respondents will pay the costs of this appeal.

C. P. Butt, Q.C., and *Dunlop & Lyman*, for appellants.

Cohen, Q.C., and *Kerr, Carter & McGibbon*, for respondents.

(J. K.)

SUPERIOR COURT, 1883.

MONTREAL, 30TH APRIL, 1883.

Coram TORRANCE, J.

No. 1023.

Laveau vs. *La Compagnie d'Imprimerie de la Minerve.*

Held:—Where the defendants published in their newspaper that the plaintiff was a freemason, and there was then an election for the House of Commons going on in which the plaintiff was a candidate, and the statement was untrue and injurious to the plaintiff, and had the effect of preventing electors from voting for him, that he was entitled to recover damages which were assessed at $400.

The plaintiff, a practising advocate in the City of Montreal, was nominated as candidate in the electoral division of Rouville for the House of Commons on the 13th June, 1882, and the voting taking place on the 20th June the result was that G. O. Gigault, the other candidate, was elected by a majority of 150 votes. On the 16th June the *Minerve* published an article headed, "Soyez francs," in the following words:

"Nous ne sommes pas de ceux qui dénoncent un candidat protestant, reconnu comme tel, parce qu'il est franc-maçon. Nous n'avons jamais songé à publier le portrait des candidats libéraux protestants avec les insignes maçonniques. Mais nous avons le droit de dénoncer comme hypocrites ces candidats soi-disant catholiques qui se présentent dans des circonscriptions catholiques *en cachant leur qualité de franc-maçon* et en dénonçant même les candidats protestants qui sont orangistes ou francs-maçons.

Tel est le cas de MM. Geoffrion, Poirier, Laflamme, et autres candidats rouges, membres de sociétés coudamnées par l'autorité ecclésiastique.

"La *Patrie*, feuille maçonnique, n'a-t-elle pas été jusqu'à dénoncer faussement elle-même, il n'y a pas deux ans, des députés français comme francs-maçons, et ne dénonce-t-elle pas, actuellement, les anglais orangistes à pleines colonnes.

"On ne peut être en même temps franc-maçon et catholique, déclarait l'année dernière le journal *Le Monde Maçonnique*, organe attitré de la franc-maçonnerie.

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"Notre but final, disait encore la Vente Suprême du Carbonarisme Italien, est celui de Voltaire et de la Révolution française.

"Il y a deux abominables, disait une autre autorité maçonnique, le Roi et le Pape.

"Que MM. Huntington, Holton, Ward et autres candidats libéraux anglais soient franc-maçons, leur religion ne leur défend pas de l'être, et nous ne songeons pas à les attaquer à cause de cela. Mais nous avons le droit de demander à MM. Geoffrion, Poirier, Laflamme, Lareau, Robidoux, etc., ce qui en est à cet égard, pour ce qui les concerne, eux, candidats catholiques dans des comtés catholiques. *Que ces messieurs soient francs-maçons ou membres de sociétés excommuniées, c'est leur affaire, mais qu'on le sache* et qu'ils se donnent pour ce qu'ils sont, au lieu de se borner à dénoncer les protestants orangistes ou francs-maçons."

In the same number was an article headed "A propos de franc maçons" beginning with these words: "La *Patrie* est indignée parce que nous avons révélé le fait que MM. Geoffrion et Poirier, *entre autres* candidats rouges, sont francs-maçons."

The plaintiff said that he was individually denounced as a freemason in the above words. He also said that in the number of the *Minerve* of the 17th June, the defendant made similar imputations against the plaintiff in an article headed "Rouges et Franc Maçons". The words were: "Nous affirmons "le fait que ces messieurs sont francs-maçons. Nous savons que l'organe rouge "maçonnique, publié par le principal dignitaire français de l'ordre en Canada, "se prépare à donner une déclaration du secrétaire général, que MM. Geoffrion, "Poirier *et al.* ne sont pas sur la liste." Plaintiff also complained that defendant in its number of the 19th June, in the article headed "La question de franc-maçonnerie," reiterated the imputation of freemasonry against plaintiff. Further, that in the number of 11th June, the defendant, under the head "Les sociétés secrètes," where the oath of the freemasons is given, insinuated maliciously that plaintiff was among them. He affirmed that this journal falsely, maliciously, for revenge, and with premeditation—with the view of injuring plaintiff and ruining his credit and destroying his reputation with the public, and with the view of making him lose the confidence, the support and the votes of the electors of Rouville, published the foregoing injurious libel against plaintiff. That these imputations and libels were untrue: that the great majority of the electors of Rouville were Catholics, and plaintiff was a Catholic. That it was forbidden in the most formal manner by the Catholic religion to belong to the society of freemasons under penalty of excommunication and of exclusion from said religion; that Catholics considered it a crime to belong to the freemasons, and a freemason to be unworthy of their confidence; that said libels had profoundly injured and humiliated plaintiff; that his good character, credit, respectability and honor had suffered, and said libels had done him irreparable wrong, and alienated the support and votes of many electors of Rouville; that the *Minerve* and the numbers of 16th, 17th and 19th June were circulated in the District of Montreal and the electoral district of Rouville, to the injury of plaintiff.

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The defendant by its plea denied that it had affirmed that M. Lareau was a freemason; it alleged that the federal elections were taking place; that the journals of the Liberal party, including M. Lareau, were denouncing the English Protestant Conservative candidates as freemasons, and sought to excite the prejudices of Catholic electors against Catholic Conservative candidates because these had, as chiefs or allies, Protestant English orangemen or freemasons. That said articles were published in answer to the attacks of the Liberal press, and put the plaintiff and other Liberal candidates *en demeure* frankly to declare what their position was in relation to societies condemned by the Church: that the defendant was justified in putting this question to Liberal candidates, and was justifiable in mentioning, as it had done, the name of plaintiff because he was one of the candidates of the Liberal party in Rouville: that the writings published by plaintiff and his past relations with the Institut Canadien Society, to-day condemned by the Catholic Church, could justify the defendant to make upon plaintiff the demand contained in the articles complained of.

PER CURIAM.—There is no question as to the publication. Further, plaintiff was meant by the articles in question. Defendant says it only put a question to M. Lareau, and it had a right to ask the question and get an answer. The Court does not understand the words referring to M. Lareau as a mere question. They are plainly an accusation that he belonged, like other men named, to the proscribed order of freemasons. At the beginning of the article headed "Soyez francs" we find a denunciation as hypocrites of candidates presenting themselves and hiding their quality of freemasons. "Tel est le cas de MM. Geoffrion, Poirier, Laflamme, et autres candidats rouges, membres de sociétés condamnées par l'autorité ecclésiastique?" It goes on to say, "nous avons le droit de demander à MM. Geoffrion, Poirier, Laflamme, Lareau, Robidoux, etc., ce qui en est à cet egard, pour ce qui les concerne, eux, candidats catholiques, dans des comtés catholiques. Que ces messieurs soient francs-maçons ou membres de sociétés excommuniées, c'est leur affaire, mais qu'on le sache, et qu'ils se donnent pour ce qu'ils sont," etc. The only suggestion of a question here is in the words, "qu'on le sache, et qu'ils se donnent pour ce qu'ils sont." But the idea thrown out conspicuously at the beginning is that M. Lareau, among others mentioned, is a member of societies under the ban of the church. The same idea is unmistakeably put forth in the article headed, "A propos de francs-maçons," beginning with the words, "*La Patrie* est indignée parce que nous avons révélé le fait que MM. Geoffrion, et Poirier, *entre autres* candidats rouges, sont francs-maçons." The article of the 16th was circulated in the County of Rouville on Saturday the 17th, and there is the evidence of credible electors, both Conservative and Liberal, that they understood the charge was made against M. Lareau that he was a freemason. We [illegible] unquestionable evidence as to the reputation of freemasons in the Catholic counties and in Rouville. In a word, the reputation is bad. The country people regard them with horror, says a witness. The explanation is easy to find. Freemasons are under the ban of the Church, and it is universally known. If the evidence were wanted it is found in the deposition of Messire Joseph de Repentigny, vicaire of Montreal. The effect of the

articles in question was most prejudicial to the plaintiff as regards his candidature. Was the accusation true? There was not a word of truth in it. Therefore the defendant should pay damages. These are assessed at $400.

Judgment for plaintiff.*

Laroua vs. La Compagnie d'Imprimerie de la Minerve.

J. E. Robidoux, for the plaintiff.

Lacoste, Globensky, Bisaillon & Brosseau for the defendant.

(J.K.)

COURT OF REVIEW, 1883.

MONTREAL, 30TH NOVEMBER, 1883.

Coram TORRANCE, J., RAINVILLE, J., MATHIEU, J.

No. 138.

Dupuis vs. *Bouvier.*

HELD:—1. That the tenant who is sued in a petitory action is not entitled to ask that the action be dismissed, but only that he be dismissed from the cause when the lessor declared by him shall have been brought in. If the lessor designated by the tenant denies that he is lessor, the tenant, on notice of such defence, will be obliged to prove the truth of his declaration.

2. The indication by the tenant of the name of his lessor must be made by preliminary plea, and not by peremptory exception.

The inscription in Review was from a judgment of the Superior Court, District of Iberville (CHAGNON, J.), 30th May, 1883.

RAINVILLE, J. L'action est au pétitoire. Le demandeur allègue qu'il a acquis la propriété revendiquée de Wm. Vanvliet par acte du 16 avril 1881; que le dit Vanvliet lui a livré la possession et qu'il l'a gardée jusqu'au 28 mai 1882, jour où le défendeur par force et illégalement, se serait emparé de cette propriété.

Par son acte d'acquisition Vanvliet a declaré que cette propriété lui appartenait pour l'avoir acquise de T. Arpin, par acte du 30 décembre 1872, dûment enregistré.

A cette action le défendeur a plaidé:

1o. Par une défense en droit:

2o. Par une exception péremptoire.

La défense en droit invoque trois raisons:

1o. Parce qu'il n'appert pas par la déclaration que le nommé Vanvliet fut au temps de la dite vente propriétaire de la terre revendiquée: 2o. Parce qu'il n'appert pas par la déclaration que le demandeur est propriétaire de la dite terre; et 3o. (la raison banale) Parce que les allégations de la déclaration ne justifient pas les conclusions prises en icelle.

Par son exception péremptoire le défendeur allègue qu'il est faux qu'il se soit emparé forcément, par malice et de mauvaise foi de la propriété en question; qu'il occupe la dite propriété depuis le 28 mars 1882, mais à titre de fermier seulement, et non comme propriétaire, en vertu d'un bail que lui aurait consenti un nommé Frédéric Lefebvre, de Williamstown, dans l'Etat de Massachusetts, (Bail: Barrette, N.P.,) lequel dit Lefebvre se prétendait propriétaire et possesseur de la dite propriété depuis plus de sept ans:

* An appeal was taken to the Court *of* Queen's Bench, but the case was settled by the defendant before hearing.

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Que le demandeur connaissait, avant d'instituer son action que le défendeur n'occupait la propriété en question qu'à titre de fermier du dit F. Lefebvre :

Que le demandeur par action portée devant la cour de Circuit avait poursuivi le 3 avril 1882, un nommé Edouard Lefebvre qu'il prétendait être son locataire, et en même temps le présent défendeur pour les faire condamner à déguerpir. Cette action a été intentée sous l'acte des *locateurs et locataires ;*

Qu'à cette action le défendeur Bouvier plaida, invoquant son bail de F. Lefebvre, et que jugement intervint maintenant son exception et renvoyant l'action quant à lui :

Qu'il résulte de cela que le demandeur connaissait que le défendeur n'occupait qu'à titre de fermier, et que la présente action n'aurait pas dû être dirigée contre lui. Et il conclut au renvoi de l'action avec dépens.

A cette exception le demandeur a produit une réponse en droit basée sur le principe que le défendeur invoquant sa détention précaire ne peut pas conclure au renvoi de l'action, mais seulement à sa mise hors de cause.

Le demandeur a produit aussi une réponse spéciale alléguant certains faits. Sur réplique en droit ces allégations ont été retranchées sur le principe que c'était une allégation de faits nouveaux. (Je crois que ce n'était qu'une inutile répétition de faits allégués dans la déclaration). Dans tous les cas nous n'avons pas à nous en occuper.

Par sa réponse spéciale le demandeur a allégué que le défendeur possédait comme propriétaire ; que son bail était simulé et fait pour couvrir sa possession frauduleuse.

Par un jugement interlocutoire la défense en droit du défendeur a été renvoyée, et sur la réponse en droit du demandeur à l'exception du défendeur, preuve avant faire droit a été ordonnée.

Par le jugement final l'action a été renvoyée pour les raisons suivantes :

1o. Parce qu'il est prouvé que le défendeur ne possédait qu'à titre de fermier et que son bail n'était pas simulé.

2o. Parce que le demandeur connaissait par suite des faits qui lui avaient été dénoncés dans l'action en expulsion, que le défendeur ne possédait qu'à titre précaire.

3o. Parce qu'en loi un locataire ne peut pas répondre à telle action, et que de fait le dit défendeur "en produisant *son titre de bail sans attaquer le fond de "la demande pétitoire et en concluant au renvoi de l'action, attendu la connais-"sance qu'avait le demandeur de tel titre, n'a pas excipé du droit d'autrui.*"

Le demandeur soumet ce jugement à la révision de cette cour, et il admet qu'il a failli de prouver sa réponse spéciale à l'exception du défendeur, savoir qu'il fut un détenteur *animo domini*, et il a admis à l'argument que le défendeur n'était qu'un détenteur précaire. Mais il prétend que la cour n'aurait pas dû renvoyer son action : que le jugement aurait dû lui donner l'occasion et le temps de mettre en cause le locateur F. Lefebvre, indiqué par le défendeur.

Pour décider ce point il s'agit d'interpréter l'art. 1618 de notre Code Civil. "Le locataire, dit cet article, sur toute action portée contre lui concernant la "propriété à lui louée, peut demander congé de la demande en faisant connaître "au poursuivant le nom de son locateur."

Mais quand et comment peut-il demander sa mise hors de cause ? Et d'abord quand peut-il faire cette demande ?

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Pothier qui a traité cette question dans deux de ses différents ouvrages, semble énoncer une opinion différente dans chacun.

Dans son traité sur le "domaine de propriété" il s'exprime dans ces termes:

"Le propriétaire qui a perdu la possession d'une chose, doit donner l'action "en revendication contre celui qu'il trouve en possession de cette chose."

"Mais lorsque le détenteur indique le nom et la demeure de celui dont il "tient (à ferme, etc.) le demandeur doit assigner la personne indiquée. Et "*après* que celui de qui le fermier tient l'héritage *a été mis en cause, et qu'il* "*a pris le fait et cause de son fermier*, ce dernier doit être mis hors de cause."

Bugnet, en sa note sur ce passage, dit:

"L'Art. 1727 du Code Civil contient l'application du même principe."

9 Pothier, No. 298, Ed. B. p. 205.

Mais dans son traité du louage il semble exprimer une opinion contraire et indiquer une procédure un peu différente. Si le fermier ou locataire, dit-il, est assigné par un tiers sur quelqu'une de ces actions (revendication, etc.), il n'est pas obligé de défendre: il n'a pas même qualité pour le faire: il n'est obligé qu'à indiquer au demandeur la personne de qui il tient l'héritage, et sur cette indication, il doit être renvoyé de la demande et le demandeur *renvoyé* à se pourvoir contre cette personne.

4 Poth. Louage, No. 91, Ed. B. p. 38.

Tous les auteurs sont d'opinion que le locataire n'est pas obligé d'appeler en cause son locateur: c'est au demandeur à agir, sur l'indication qui lui est faite.

Merlin. Rep. Vo. Garantie, § 1.

Papon, Arrêts, Liv. 11, T. 4, No. 18, p. 658.

Charondas, Liv. 3, ch. 7, p. 192.

1 Jousse, Ord. de 1667, Tit. 8, Art. 1, p. 74.

La même doctrine prévaut sous le C. Nap. Art. 1727. Le locataire peut demander, 1e. Sa mise hors de cause, ou 2e. rester en cause et appeler en garantie son propriétaire.

2. Tropl. Louage, Art. 1727, No. 266 à 269.

Et Aubry & Rau énoncent l'opinion que "le locataire peut être mis hors de "cause s'il l'exige, encore que son locateur refuse de prendre son fait et cause."

4 Aubry & Rau, S. 366, note 28, p. 480. S. V. 37, 1, 134.

On voit par là que la question de la *mise hors* de cause n'a été résolue qu'après que le locateur eut été appelé. Mais le locateur avait été appelé et quoiqu'il ne voulut pas prendre le fait et cause de son locataire le demandeur pouvait se faire déclarer propriétaire contradictoirement avec lui, puisqu'il ne contestait pas sa qualité de bailleur et conséquemment de possesseur *animo domini*: et alors la mise hors de cause du locataire était juste et équitable et ne pouvait entraîner aucune conséquence fâcheuse pour le demandeur.

Mais, supposez que sur la simple dénonciation du locataire et même sur preuve, la cour mette ce locataire hors de cause et déboute le demandeur de son action, ce dernier n'aura plus d'autre remède qu'une action contre le locateur. C'est alors que surgit la difficulté: Ce locateur va plaider qu'il n'est pas locateur, ni possesseur, que la preuve faite par son prétendu locataire est fausse et que le jugement dans tous les cas n'est pas chose jugée à son égard. Alors que

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devra faire le demandeur? Appeler le locataire en garantie? Evidemment. Mais alors quel circuit d'actions! Ne vaut-il pas mieux suivre l'opinion de l'othier telle que formulée dans son traité du domaine de propriété, et dire que le défendeur locataire ne peut obtenir sa mise hors de cause que lorsque le demandeur a appelé en cause le locateur indiqué? Si le locateur nie être locateur, alors sur simple dénonciation de cette défense au locataire il sera obligé d'y répondre. Et ce n'est qu'après qu'il l'aura fait rejeter qu'il pourra demander sa mise hors de cause; car ce n'est qu'alors que le demandeur sera en position de faire juger sa demande contre le véritable possesseur.

Et si sur cette indication du locataire le demandeur n'agissait pas pour mettre en cause la personne indiquée, ce locataire pourrait faire fixer un délai pendant lequel le demandeur devra faire cet appel.

Dans la présente instance le demandeur a contesté l'exception du défendeur qu'il n'était qu'un locataire: il a failli sur ce point, et l'indication du défendeur du nom de son locateur est présumée vraie et oblige le demandeur à appeler en cause ce locateur indiqué.

Le demandeur avait évidemment le droit de faire cette contestation, et parcequ'il a failli dans sa preuve il ne peut pas être placé dans une plus mauvaise position que s'il eut accepté cette déclaration du locataire comme vraie. Le jugement la déclare vraie et voilà tout. Mais le défendeur n'a pas demandé sa mise hors de cause: il a produit une exception péremptoire par laquelle il demande le débouté de l'action: il a en conséquence plaidé au fond.

Le demandeur a répondu en droit à cette exception: la cour de première instance a renvoyé cette réponse en droit et maintenu l'exception sur le droit et sur le fait principalement sur la raison que le demandeur connaissait le titre en vertu duquel le défendeur possédait, en autant qu'il le lui avait dénoncé dans une action précédente.

Je crois ce jugement erronné en loi. Cette dénonciation ou indication du nom du locateur par le défendeur locataire ne doit pas se faire par une exception au fond: elle ne peut affecter en rien le fond du litige. Elle doit se faire par une exception *préliminaire*. C'est ce que M. le Juge en Chef Meredith a décidé en 1876 dans la cause de Lawlor et Cauchon, 6 Q. L. R., p. 13; 3 R. de Leg. 71.

JUGE. 1o. Que le locataire peut obtenir sa mise hors de cause, mais qu'il ne peut demander le renvoi pur et simple de l'action du demandeur.

2o. Qu'il doit faire la dénonciation du nom de son locateur *in limine litis*, par un plaidoyer *préliminaire* et non par une *exception péremptoire*.

Ce jugement a été rendu sur une réponse en droit que la cour a maintenue, à une *exception péremptoire*.

Voir 26 L. C. J. 213, C. de R.

Mais dans la cause actuelle, il y a plus encore, c'est qu'avant d'avoir fait sa dénonciation du nom de son locateur dans son *exception* péremptoire, le défendeur avait plaidé au *fond*. par une défense en droit.

The judgment is in the following terms:—

"La Cour, etc...

"Attendu que par la présente action pétitoire le demandeur réclame la propriété d'un immeuble décrit dans sa déclaration comme l'ayant acquis de Wil-

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liam Vanvliet, par acte de vente passé le 16 avril 1881 ; alléguant, le dit demandeur qu'il s'est mis immédiatement après la dite vente, en possession du dit immeuble, et que le défendeur s'en est emparé illégalement, et contre le gré et la volonté du demandeur, le ou vers le 27 de mars 1882 .

" Attendu que le défendeur a plaidé premièrement par une exception péremptoire ;

"Attendu que par sa défense en droit le défendeur a plaidé que l'action est mal fondée parce que le demandeur n'allègue pas qu'au temps de la dite vente le le dit vendeur William Vanvliet fût propriétaire de la terre en question ;

" Attendu que par son exception péremptoire le dit défendeur nie s'être emparé illégalement de la dite propriété et dit qu'il ne l'occupe qu'à titre de fermier et non à titre de propriétaire, et qu'il l'occupe à tel titre de fermier en vertu d'un bail à lui consenti le 27 mars 1882, par le nommé Frédéri[illegible], cultivateur de Williamstown, dans le Massachusetts, un des Etats-[illegible]rique, et que le dit demandeur savait que le défendeur n'occupait la dite pro[illegible]priété qu'à titre de locataire, et non à titre de propriétaire, et att[illegible] dit défendeur conclut au renvoi de la dite action ;

" Attendu que le demandeur a répliqué à la défense en droit, et a produit une réponse en droit à l'exception du défendeur, basée la dite réponse sur les raisons suivants ;

" Parce que le défendeur alléguant être un détenteur précaire ne pouvait pas demander le renvoi de l'action, mais pouvait seulement demander sa mise hors de cause ;

" Attendu que le dit demandeur a répondu spécialement à la dite exception que les allégations d'icelle étaient fausses, que le défendeur occupe réellemen[illegible] comme propriétaire et que le bail par lui invoqué n'était que simulé et fait dans le but d'empêcher le demandeur d'exercer son recours contre lui ;

" Attendu que le dit défendeur a répondu spécialement en droit à partie de la réponse spéciale du demandeur ;

" Attendu que par jugement rendu sur la dite défense en droit icelle a été renvoyée, et qu'en ce il y a bien jugé ;

" Attendu que les parties ont donné un consentement à ce que la réponse en droit du demandeur à l'exception du défendeur et la réponse en droit du défendeur à partie de la réponse spéciale du demandeur soient adjugées en même temps que le mérite de la cause ;

" Attendu que par le jugement rendu en cette cause le 30 de mai dernier, les dites deux réponses en droit ont été renvoyées comme mal fondées, l'exception du défendeur maintenue et l'action renvoyée quant à lui ;

" Attendu qu'il y a erreur dans cette partie du dit jugement ;

" Considérant qu'une personne assignée par une action pétitoire doit aux termes de l'article 1618 du Code Civil si cette personne est locataire, dénoncer sa qualité et demander congé de la demande en faisant connaître au poursuivant le nom de son locataire ;

" Considérant que telle dénonciation ne peut être faite que par exception préliminaire, et que le défendeur dans ce cas, ne peut plaider au mérite ni demander le renvoi de l'action ;

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" Considérant que d'après la pratique sous l'ancien droit, le demandeur, sur cette dénonciation, devait assigner la personne indiquée, et que le locataire ou fermier ne pouvait demander sa mise hors de cause que lorsque la personne indiquée avait été mise en cause; et que l'économie de la loi exige qu'une semblable interprétation soit donnée à notre loi en autant que si la personne indiquée contestait sa qualité de locateur, le défendeur serait appelé à justifier de la vérité de sa dénonciation dans la cause même, et que si on le mettait hors de cause avant d'avoir mis en cause la personne indiquée, il faudrait de nouveau remettre ce locataire en cause pour le faire justifier de la vérité de sa dénonciation;

" Considérant que dans la présente cause le défendeur a commencé par plaider au fond de l'action par une défense en droit, et a plaidé en second lieu par une exception péremptoire dans laquelle il demande le renvoi de l'action;

" Considérant que la réponse en droit produite en cette cause par le demandeur est bien fondée, qu'icelle réponse aurait dû être maintenue et l'exception renvoyée;

" Considérant que les parties ont consenti à ce que l'adjudication sur telle réponse en droit fut faite en même temps que l'adjudication sur le mérite;

" Considérant que par sa réponse spéciale faite à l'exception produite par le défendeur, le demandeur a lié contestation avec ce dernier sur le point de savoir si le dit défendeur était réellement locataire ou non;

" Considérant qu'il est établi par la preuve, ainsi que l'a maintenu le jugement de première instance, que le défendeur n'était que locataire, et ce à la connaissance du demandeur, et que sur ce point le demandeur n'a pas réussi dans sa prétention;

" Considérant que les parties sont également coupables dans les irrégularités qui se rencontrent dans la procédure en cette cause, et que cette cour, pour rendre justice aux parties et éviter des procédés subsidiaires, peut considérer la dite exception comme une dénonciation faite par le défendeur de sa qualité de locataire;

" Réforme, en conséquence, le dit jugement rendu le 30 mai dernier par la dite Cour de première instance; déclare que le dit demandeur n'a pas prouvé sa réponse spéciale à l'exception du défendeur, et donne acte au dit défendeur de sa dénonciation qu'il n'est que locataire, et que le nommé Frédéric Lefebvre est le locataire de la dite terre;

" Maintient la réponse en droit du demandeur à l'exception du défendeur, et déboute icelle exception en autant qu'elle demande le renvoi de l'action, n'y laissant que la partie qui contient la déclaration de la part du défendeur, qu'il n'est que locataire, et a accordé au demandeur un délai d'un mois pour mettre en cause le nommé Frédéric Lefebvre, lequel délai pourra être prolongé, si besoin est, après lequel temps le défendeur pourra demander sa mise hors de cause; avec dépens de cette Cour de Révision contre le défendeur, chaque partie payant ses frais en cour de première instance sur la contestation liée entre le demandeur et le défendeur." Judgment reformed.

Geoffrion & Co., for the plaintiff.

J. S. Messier and *Béique & Co.*, for the defendant.

(J. K.)

SUPERIOR COURT, 1883.

MONTREAL, 10TH OCTOBER, 1883.

Coram LORANGER, J.

No. 1618.

The Heritable Securities and Mortgage Investment Association vs. *McKinnon, & McKinnon*, Opposant.

HELD :—1. That an opposition to a sheriff's sale of immovables, accompanied by a judge's order, filed within the fifteen days preceding the day fixed for such sale, has the effect of legally stopping the sale.

2. That the allegations of the opposition filed in this cause were not frivolous on their face.

PER CURIAM :—Motion du demandeur que l'opposition en cette cause soit renvoyée :

1o. Parce qu'elle a été produite dans les 15 jours qui ont précédé celui fixé pour la vente, contrairement à l'art. 652 du C. P. C.

2o. Parce que les allégués de l'opposition sont frivoles à leur face.

Sur le premier point : l'article 652 est dans les termes suivants : " Toute " opposition à la saisie ou à la vente des immeubles ou rentes, doit être produite " au plus tard le quinzième jour avant celui fixé pour la vente."

Dans l'espèce, elle a été produite au bureau du protonotaire le 4 septembre, et la vente était fixée pour le 19. Un ordre de sursis avait été signé par le protonotaire ; quelques jours après l'opposant s'étant aperçu que cet ordre était irrégulier, il s'est adressé à l'un des juges de la Cour Supérieure pour faire rectifier la procédure, et a obtenu un second ordre de sursis signé par le juge. Cet ordre a été signifié le 11 septembre à l'officier du shérif avec l'opposition, et la vente a été suspendue.

Le demandeur prétend qu'il n'était pas au pouvoir du juge de donner cet ordre et conséquemment qu'il est illégal ; il invoque ce qu'il dit être la pratique généralement suivie jusqu'à ce jour, et deux précédents, l'un de la Cour Supérieure et l'autre de la Cour d'Appel que l'on trouve au premier Vol. des décisions des tribunaux, p. 154 et au 12e Vol. des mêmes rapports p. 106. Ce sont les causes Lespérance & Lespérance, et Joseph & Donnelly. Ces deux causes ont été jugées antérieurement au Code de Procédure et sous l'opération de la section 15 du ch. 85 des Statuts Refondus du Bas-Canada, dont les dispositions diffèrent de celles du Code de Procédure Civile.

La section 15 est impérative et semble en effet dénier au juge le droit d'intervention, lorsque l'opposant se trouve en dehors des délais ; il ne lui reste plus que la ressource de convertir sa demande en une opposition sur les deniers. C'est ce que la Cour d'Appel a reconnu dans la cause Joseph & Donnelly. Toutefois il faut dire que ce jugement n'a pas réglé la jurisprudence même sous l'opération des Statuts Refondus du Bas Canada ; car on trouve à la page 129 du 7me. Volume du Jurist, *in re* The Trust and Loan vs. Julien, qu'une opposition afin d'annuler à la vente d'un immeuble, produite entre les mains du shérif, dans les 15 jours qui précèdent la vente, ne peut pas être déboutée par

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une motion, et l'Honorable Juge Badgley s'exprimait ainsi: "Il ne s'agit pas "de décider sur les moyens d'opposition invoqués par l'opposant; la cour ne "pouvant prononcer sur le mérite de l'opposition qu'après contestation. Sup- "posons donc que les moyens d'opposition sont bien fondés, le juge qui l'a "accordée en Chambre dans les quinze jours qui ont précédé celui fixé pour la "vente, avait-il pouvoir de le faire? Je n'hésite pas à me décider dans l'affir- "mative; la pratique de ce District a toujours en effet reconnu au juge un "pouvoir discrétionnaire dans ce cas, et ce serait commettre souvent une grande "injustice aux parties, et leur refuser le moyen de faire valoir leurs droits."

Cette cause a été portée en appel, mais on ne paraît pas avoir donné suite à cet appel.

Mon expérience au barreau, me porte à croire que les remarques du savant juge en ce qui concerne la pratique du District de Montréal, sont exactes. Il a toujours été de pratique que la partie en retard et qui avait intérêt à arrêter la vente, put obtenir un ordre du juge à cet effet; et l'on n'a jamais que je sache, nié au juge le pouvoir discrétionnaire d'accorder cet ordre.

Mais depuis le Code de Procédure Civile, le point me paraît réglé; l'article 651 contient une disposition générale que l'on ne trouve pas dans les S. R. B. C., et qui reconnaît ce pouvoir du juge; il y est déclaré que le shérif devra surseoir à la vente sur l'ordre du juge, ou sur opposition accompagnée d'un affidavit. L'article suivant déclare, il est vrai, que toute opposition doit être produite au plus tard le quinzième jour avant la vente; mais il n'en reste pas moins certain, que l'article 651 reconnaît au juge, sans condition, le droit d'ordonner la suspension; et il n'y a en cela rien qui répugne à la saine pratique et à la justice. C'est plutôt le contraire que l'on devrait dire. S'il importe que les délais sur l'exécution soient rigoureusement observés afin que le demandeur ne soit pas inutilement retardé dans le recouvrement de son jugement, d'un autre côté, il importe également que les tiers dont les droits sont mis en péril par la saisie, ne soient pas sans raison grave empêchés les faire valoir sous le prétexte qu'il s'est présenté trop tard; et c'est au juge qu'il appartient de faire fléchir la rigueur de la loi, suivant les circonstances. Rien ne s'oppose à ce qu'il exerce dans ce cas comme dans tous les autres cas de délais, la discrétion que la loi lui accorde.

Je suis d'opinion que l'ordre du juge dans la présente cause, est conforme à la loi, et à la pratique suivie dans ce District, et il doit être maintenu.

La demanderesse a prétendu que l'opposition était frivole à sa face, et elle en demande le rejet par sa motion. Après examen de l'opposition, je dois reconnaître que l'opposant soulève une question qui ne laisse pas d'être susceptible de discussion, et sans exprimer aucune opinion pour le moment sur le point en litige, je crois que les parties doivent être renvoyées au mérite.

La motion du demandeur est en conséquence renvoyée avec dépens.

Motion rejected.

J. L. Morris, for plaintiff.

Davidson, Cross & Cross, for defendant.

(S. B.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 31ST OCTOBER, 1883.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., BABY, J.

No. 492.

LAMARCHE, APPELLANT;

AND

PAUZE ES QUAL., RESPONDENT.

HELD:—That a curator to a vacant succession has not legal quality to contest an opposition, on the ground that the deed on which it is based was executed in fraud of creditors and when the debtor was notoriously insolvent, and to ask that the deed be declared inoperative, null and void, and be set aside.

This was an appeal from a judgment of the Superior Court at Montreal, (TORRANCE, J.), rendered on the 31st January, 1882, maintaining the contestation by respondent of appellant's opposition *afin de charge*, and dismissing such opposition, with costs.

The opposition was fyled to the sale of the *fief* and seigniory of Lachènaie, which had been seized by the Sheriff of Joliette, on a judgment obtained at Montreal, by Léon Lamarche against the respondent, in his quality of curator to the vacant estate and succession of the late John Henry Pangman, who died on the 11th of November, 1880.

The reasons assigned in support of the opposition were to the following effect:—

That by notarial obligation, executed by Pangman in favor of appellant, on the 9th of January, 1879, Pangman acknowledged he owed appellant $5,000 and interest since the 1st December, 1877, at the rate of eight per cent. per annum.

That to secure payment of this debt Pangman assigned to appellant, in the form required by the statute, for the term of 15 years, to be reckoned from the 9th of January, 1879, or until perfect payment of said debt and interest, the *rentes constituées* representing the *cens et rentes* of said seigniory.

That said deed was registered on the 14th of January, 1879, and that signification of said deed had been made, under the provisions of the Statute of Quebec 38 Vic. ch. 26, by the publication by a Notary, at the different parishes in the seigniory, during two consecutive Sundays at the issue of Divine Service in the forenoon; of all which the Notary granted *acte* by deeds executed on the 21st and 22nd February, 1881. And that the *actes* of signification were registered on the 24th of February and 5th and 12th of March of the year 1881.

The appellant then alleged that no portion of either interest or capital had ever been paid, and he prayed that he should be declared to have and possess the usufruct and enjoyment of said seigniory, and to be the sole proprietor and in possession of said *rentes*, and to have the sole right to receive them until the 9th of January, 1894, or until perfect payment of said sum of $5000 and of the interest accrued and to accrue thereon, and that said *fief* and seigniory be not sold except subject to said deed of transfer until the 9th of January, 1894, or until perfect payment of said debt in capital and interest.

Lamarche, and Pauzé es qual.

The respondent contested the opposition on the ground that at the date of said deed of obligation and transfer, Pangman was notoriously insolvent to the knowledge of appellant, and that said deed was executed for the mere purpose of securing to the appellant the payment of a debt then unsecured and long previously overdue and unpaid, and of giving to appellant an undue preference over the other creditors of Pangman, and that said deed was executed in fraud of the general mass of Pangman's creditors.

That Pangman's affairs continued to grow worse after the execution of said deed, and that when Pangman died (11th November, 1880) he was so notoriously and hopelessly insolvent, and so utterly unable to pay the large sums of money he then owed, that his heirs and legal representatives were under the necessity, shortly after his death, of renouncing to his estate and succession.

That at the dates when appellant alleges he made signification of said deed of transfer, under the provisions of the 38 Vic. ch. 26, and caused such signification to be registered, the estate and succession of Pangman were to appellant's knowledge notoriously and hopelessly insolvent, and that appellant's attempt so to signify said deed and to register its alleged signification was made for the mere purpose of gaining if possible an undue preference over the other creditors of said estate and succession, and in fraud of the general mass of such creditors represented by said respondent in his quality.

That said estate and succession had ever since continued to be and still was insolvent. And that by reason of the said several premises and by law the said deed was inoperative, null and void, and ought so to be declared by the Court, and be rescinded and set aside.

The appellant answered the contestation, to the effect that Pangman was not insolvent, as therein alleged, to his knowledge.

That, on the contrary, he always believed Pangman to be perfectly solvent, and that Pangman was always considered a rich man and perfectly solvent.

That, moreover, the public always considered Pangman's succession to be perfectly solvent up to the time that it was given up and abandoned by his heirs.

The following was the judgment in Appeal:—"La Cour * * * considérant que l'intimé comme curateur à la succession vacante de feu John Henry Pangman n'avait aucune qualité pour demander la résiliation de la cession que le dit John Henry Pangman a faite à l'appelant le neuvième jour de Janvier, 1879, pour avoir été faite en fraude des droits de la masse des créanciers du dit John Henry Pangman, et que cette action n'appartient qu'aux créanciers du dit Pangman.

"Et considérant qu'il y'a erreur dans le jugement rendu par la Cour de première instance ce trente unième jour de Janvier, 1882.

"Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement qu'aurait du rendre la dite Cour Supérieure, renvoie l'action de l'Intimé avec dépens tant ceux encourus en Cour de première instance que sur l'appel."*

Judgment of S. C. reversed.

Archambault & Archambault, for appellant.

Bethune & Bethune, for respondent.

(S. B.)

* There is some confusion in the wording of this judgment, as the previous statement of the pleadings shows. (REPORTER'S NOTE.)

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 31ST OCTOBER, 1883.

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

No. 497.

WILLIAM P. MUNN ET AL.,

(*Plaintiffs in Court below*),

APPELLANTS;

AND

LEWIS BERGER & SONS (LIMITED),

(*Defendants in Court below*),

RESPONDENTS.

HELD:—Where an action was brought for the price of goods sold, and (there being no writing to establish the alleged contract) the plaintiffs endeavored to prove by verbal evidence an acceptance or partial acceptance and the exercise of acts of ownership by the defendants over the goods alleged to have been sold,—that without a memorandum in writing being produced no dealing with the goods by mere words could be proved. The true interpretation of acceptance (as used in C. C. 1235, § 4) is to consider it as an acceptance in writing, or acceptance accompanied by some act, not mere words, or that acceptance is the synonym of delivery.

The appeal was from a judgment of the Superior Court, Montreal (PAPINEAU, J.), 9th February, 1882, dismissing the appellants' action with costs.

The action in the Court below was instituted by the appellants, co-partners, doing business at Harbor Grace, Newfoundland, under the name and firm of John Munn and Company, against Lewis Berger & Sons [Limited], a body politic and corporate, duly incorporated and having its place of business in the city and district of Montreal, to recover the sum of $3,094.71, with interest thereon from 12th October, 1880.

The facts, as disclosed by the declaration, show that on or about the 27th May, 1880, the appellants, by their agents and factors, resident in the city of Montreal, Messrs. Lord & Munn, sold to the respondents from 500 to 800 barrels Munn's steam-refined pale seal oil, to arrive, at 57½ cents per gallon, cash, less 3 per cent., with the provision that the plaintiff should have the right to ship 100 to 200 barrels additional to suit the vessel, the defendants to have the option of taking the same. The delivery of the oil was not to be made until the 1st of August, and payment should be made on the 15th August, 1880, save and except in the case where the defendants should exercise the option of taking any portion of the said oil after its arrival in Montreal, when the same should be delivered to the defendants, and payment made 15 days after such delivery. The appellants alleged that in accordance with this contract they shipped, on or about 17th June, 1880, 778 casks of steam-refined pale seal oil, and that the same arrived in Montreal on or about the 1st July; That notice was given to respondents of its arrival, and that Lord & Munn were instructed by respondents through their agents, to store same as it was not then required and that they would not require it to be re-gauged. That shortly after arrival and storage of the said oil, at Montreal aforesaid, the respondents, by their manager,

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Wm. Johnson, ordered Lord & Munn to sell the said oil at the rate of 60 cents per gallon, and that Lord & Munn, acting on the said instructions, did, on or about the 14th July following, sell 5 barrels thereof at the rate of 60 cents per wine gallon, equivalent to 72 cents imperial gallon. That the respondents, then, by their said manager, instructed Lord & Munn to advance the selling price of the oil to 62½ cents per wine gallon, and afterwards instructed Lord & Munn not to sell any more of the oil at any price, but to send intending purchasers to the respondents, and that afterwards Lord & Munn, on several occasions, sent inquiring purchasers to respondents. That afterwards the respondents refused to take the said oil, and appellants tendered the same to respondents, and that upon the said refusal of the respondents the same was sold at the current market price, and a loss of $3094.71 was made, being the difference between the price of contract between appellants and respondents and the price realized by the said sale. This sum was claimed by the action.

To this action the respondents pleaded that they never purchased from the appellants the oil referred to in their declaration, nor had any negotiation with them concerning the same, and that they never contracted with the appellants, as alleged in their declaration. And they further denied all the allegations of the appellants' declaration. And, further, while denying that William Johnson ever contracted on behalf of respondents with the appellants, as alleged in their declaration, the respondents further and *d'abondant* alleged, that William Johnson was never authorised by them, and had no authority from them, to enter into any such contract on their behalf. They therefore prayed the dismissal of the action.

The case was inscribed for *enquête* and final hearing. There being no memorandum in writing in existence, the appellants endeavored to prove by verbal evidence the fact of the acceptance or partial acceptance, and the exercise of acts of ownership by the respondents over the oil so sold. They also endeavored to prove verbally the contract by witnesses, but the learned Judge who presided was of opinion that such acts could not be proved, save and except by writing, and the appellants were precluded from making any proof either of the contract, of the acceptance of the oil, or of the delivery.

From these rulings the appellant moved for leave to appeal, but the application was rejected, the unanimous judgment of the Court of Appeal being rendered as follows:—

RAMSAY, J. The action is brought by Wm. Runton Munn and Robert Stewart Munn, doing business in Newfoundland under the name and style of John Munn & Co. The declaration sets forth the transaction as being carried out by Lord & Munn, as agents of John Munn & Co., with the defendants, acting by their agent, Wm. Johnson; that Johnson knew that Lord, Munn & Co. were acting as agents of John Munn & Co., and that Johnson purchased the goods in question, barrels of steamed oil. The declaration sets forth, further, that Johnson wrote to Lord, Munn & Co. withdrawing his offer, as though it had not been accepted; that Lord, Munn & Co. demurred to this, and that then Johnson authorised Lord, Munn & Co. to sell the oil for account of defendants.

The defendants deny in the most ample manner that they ever purchased the oil, or had any negotiation with plaintiffs concerning the oil, or that they had contracted with plaintiffs, as alleged in plaintiff's declaration. By a second plea defendants specially deny that Johnson was ever authorised by them, or that he had any authority to enter into the alleged contract on their behalf. On this issue the parties went to proof, and plaintiffs produced James Lord, a partner of Lord, Munn & Co., as a witness. Without objection Lord proved that Johnson was the agent of the defendants. He was then asked to state "what occurred on the occasion of the visit of Mr. Johnson to your office (i.e., office of witness), the 26th of May, 1878?" Witness then related the propositions of Johnson, that Lord, Munn & Co. telegraphed to plaintiffs their answer, accepting, and that Lord, Munn & Co. then offered the oil as stated. —Here defendants' counsel interposed an objection "to the witness proceeding to detail the conversation, if any, which occurred between him and Mr. Johnson on this occasion, inasmuch as it is an attempt to prove by mere verbal conversation a contract for the sale of goods exceeding in value the sum of $50, without having first produced any memorandum in writing, or made any proof within the requirements of article 1235 C. C." This objection was maintained, and the ruling was excepted to.

On behalf of plaintiffs, witness was then asked: "Had you in store on account of Lewis Berger & Sons a quantity of seal oil during the course of the summer of 1880?" Objection was taken to this on similar grounds, and particularly that there was no evidence that the defendants ever had delivery of any part or portion thereof, or that the said goods had ever passed out of the possession of Lord, Munn & Co., I suppose as agents of plaintiffs. This objection was maintained.

Witness was then asked: "Did you, or did the plaintiffs in this case, deliver any oil that you had in your possession for themselves; did they employ you to act as agent for them to sell it?" The defendants made a very lengthy objection to this question. They contended it was irrelevant, unless it was intended to get witness to say that his firm held the oil for defendants. Other questions, all seeking to elicit from witness answers to show that he had received verbal instructions to deal with the oil as if it were the property of defendants stored with Lord, Munn & Co., were put, but they were all objected to, and the objections maintained by the Court, unless some writing could be produced. The witness said there was no such writing. The plaintiffs then asked the following question: "Did the defendants, by their agent, Mr. Johnson, exercise any act of ownership over the said oil so in store during the months of July, and August and September of the year 1880, and, if so, state what the said acts of ownership were." Objection was taken to this question, and the Court instructed the witness that "if there is no writing to establish the said acts of ownership he may answer." The witness said: "there is no exercise of acts of ownership in writing." The Court thereupon maintained the objection.

The ruling of the Court then amounts to this: that, without a memorandum in writing being produced, no dealing with the goods by mere words could be proved.

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From these decisions plaintiffs seek to appeal, and, as the point has been fully argued, it becomes the duty of the Court to deal with the full merits of the application. The grounds urged by plaintiffs were: Firstly, that it was not necessary under Art. 1233 C. C., to prove the memorandum in the first place. Secondly, that proof of an acceptance without a delivery sufficed to take the case out of the rule of our article, and that acceptance could be proved by parol.

The first of these objections appears to me only to raise a question of order of proceedings. It would probably be competent for a judge to admit parol evidence before the production of the memorandum in writing, if it were understood that the memorandum existed, and would be produced; but when it is not contended that any such memorandum exists it would be absurd to admit evidence which could not possibly maintain the action. The form of the declaration leaves no doubt as to the position of the plaintiffs in the present case. It is obvious that the person who drew the declaration was perfectly aware of the difficulty before him, and that he purposely set up the dealing with the goods in order to get round it by proving a verbal dealing with the goods, if it may be so described. When the Art. (1235) says no action shall be maintained without a writing, it clearly means that where there is no writing no such evidence shall be received. Else we should have evidence adduced in support of that which cannot be maintained. I am therefore of opinion that the first reason is unfounded.

The argument in support of the second reason was this: our Code, differing from the Statute of Frauds, enacts that acceptance *or* delivery takes the case out of the rule, that acceptance may be verbal, and may be without delivery, and, consequently, it can be proved by parol just as delivery may be proved by parol. If we were to give the Article this interpretation the whole rule would disappear, and proof by parol of a ratification would bind the buyer, although he would not be bound by a similar proof of the contract. It must be clear that the only true interpretation of acceptance is to consider it as an acceptance in writing, or acceptance accompanied by some act, not mere words, or that acceptance is the synonym of delivery. Our attention has been directed to some authorities, but I do not think they tend to maintain the pretensions of the plaintiffs. The acceptance in England, where, under the Statute of Frauds, there must be acceptance *and* receipt—and not, as with us, *or*—the acceptance must be an actual acceptance the intention of which is to be gathered from the outward acts of the buyer. (Agnew, p. 193) No case has been brought under our notice where mere words spoken made an acceptance. The case of Barnes v. Jevons (7 C. & P. 288) seems to be the nearest to this; but even in that case there was a taking of a person to see the engine besides the words, and the question was left to the jury whether the defendant had treated the engine as his. In summing up Baron Alderson specially notices the taking the person to see the engine.

The case then went back to the Court below, and the action was dismissed for want of proof.

The present appeal was from the final judgment, but the principal question was whether the rulings at enquête were correct.

Kerr, Q.C., for the appellants :—

The appellants respectfully contend that under the law of the Province of Quebec, applicable to a contract of this kind, parole evidence of acceptance or of delivery is legal, and in order to prove that the acceptance or delivery was made in consequence of a parole contract it is necessary in the first instance to prove the existence of the contract, and then to show that the acceptance or delivery is made in accordance with its terms.

In this instance the appellants were deprived of the right to establish by *parole* evidence either acceptance or delivery, or the existence of the contract.

The article of the Code having reference to and controlling this case is article 1235, and is in the following terms: "In commercial matters in which the sum "of money or value in question exceeds fifty dollars, no action or exception can "be maintained against any party or his representatives, unless there is a writ- "ing signed by the former, in the following cases . . . . . &c. *Upon any "contract for the sale of goods, unless the buyer has accepted or received part "of the goods, or given something in earnest to bind the bargain; the forego- "ing rule applies, although the goods be intended to be delivered at some future "time, or be not at the time of the contract ready for delivery.*"

The appellants respectfully contend that the provisions of this article merely regulate the sufficiency of the proof; that it is not in the nature of a provision requiring a *commencement de preuve par écrit*. In all those cases where sales of goods are in question, if at the conclusion of the action there is no memorandum in writing as required, and if no proof has been made of the contract, and that the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain, the appellants' action cannot be maintained, but it never was the intention of the law to provide that nothing but written evidence emanating from the parties sought to be charged should be necessary in order to prove the acceptance, or receipt, or earnest. If a party has received or accepted, or has paid earnest, it is possible to prove these facts by parol testimony, and in order to show that the particular acceptance or part receipt, or a payment of earnest was made upon a certain contract, it is necessary to prove by parol evidence, if there be no writing in existence, that such contract referred to existed. On the same principle where a person sells to another goods to the amount of $100, and delivers them, it might be maintained, that such delivery could not be proved, save and except by written evidence, and that it would be impossible to prove the contract in such a case, unless written evidence was made beforehand, either of it or of the delivery, which was a principle wholly untenable.

The appellants, therefore, maintain that they were fully justified in endeavoring by *parole* evidence to prove the contract and the acts of ownership amounting to an acceptance of the goods by respondents. In support of these pretensions the appellants refer to 2 Taylor on Evidence § 953, 50 and 61; Powell on Evidence, p. 386; Brown on Statute of Frauds, § 337; Agnew on Statute of Frauds, pp. 98-201.

Tait, Q. C., for the respondents :—

The question before this honorable Court is mainly confined to the discussion of the propriety of the decision of the Court below, as to the reception of the evidence tendered by the appellants. And the respondents respectfully contend that that

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decision was correct and should be sustained. 1. Because, by the 1235th article of the Civil Code, it is in effect provided that no action can be maintained upon any contract for the sale of goods unless there is a writing signed by the buyer, or unless the buyer has accepted or received part of the goods [illegible] anything in earnest to bind the bargain. 2. Because no writing [illegible] by the respondents or by anyone on their behalf establishing [illegible] of any contract or sale between the parties. 3. Because there was no acceptance or reception by the respondents of the goods alleged to have been sold to them. 4. Because nothing was given by the respondents as earnest to bind the bargain. 5. Because it is not competent by law for the respondents to prove a contract of sale by verbal testimony, except only in cases in which it is permitted by the above-cited [illegible] of the Code. 6. Because, by the terms of the correspondence between the appellants and Messrs. Lord & Munn, and the conversations between William Johnson and Mr. Lord, which had been proved in the case, it appeared that when Messrs. Lord & Munn transmitted to respondents the memorandum of sale stated in their declaration, dated the 28th day of May, 1880, the parties were not agreed upon the terms of the sale, inasmuch as, according to the account of the conversation given by Mr. James Lord, he was awaiting a communication from the appellants as to their refusal or acceptance of an additional condition, alleged to have been proposed by Mr. Johnson. 7. Because it appeared, by the evidence of record that Messrs. Lord & Munn and Mr. Johnson had not agreed upon the conditions of the proposed sale on the 28th day of May, 1880, when Johnson notified Lord & Munn of the withdrawal of the respondents from the negotiation.

The respondents also submit that the appellants have not placed themselves otherwise in a position to sustain their appeal. They have neither alleged nor attempted to prove that any damages resulted to them from the refusal of the respondents to receive the oil. And they have not proved the sale of the oil at the reduced rate, nor any preliminary notice or intimation to the respondents, that they intended to sell it.

RAMSAY, J. On the interlocutory judgment rendered rejecting the evidence in this case, an appeal was asked for, and the questions now raised were then fully argued. The learned counsel for the appellants has put the case very clearly before us, but we see no reason to change our opinion. As the case is fully reported, it is unnecessary for me to repeat what [illegible] in that case. Shortly, however, I may say that if a constructive acceptance or an acceptance by words, takes the case out of the operation of article 1235 (not the Statute of Frauds) then the article is valueless. As was said when the case was before us on the former appeal, one of the questions might be admissible as an interlocutory question, but as it was admitted that there was no writing to which such question could be applicable, it was useless, and, therefore, properly rejected. We are to confirm with costs.

Judgment confirmed.*

Kerr & Carter, for appellants.
Abbott, Tait & Abbotts, for respondents.
(J. K.)

*An appeal was taken to the Supreme Court.

MONTREAL, 10TH MARCH, 1883.

Coram TORRANCE, J.

No. 2745.

Allison vs. *Macdougall.*

HELD:—Where a person deposited a sum of money with a broker as margin, to be used in buying stock for purposes of speculation only, and no delivery of shares so purchased was intended, the broker's instructions being to realize as soon as a small profit could be made, and the margin being exhausted in consequence of a fall in the price of shares, the broker sold stock at a loss:—that the contract was a gaming contract, and no action would lie against the broker.

This was an action against a stockbroker in Montreal for unduly selling stock in the Montreal Telegraph Company. The plaintiff complained that he had, about the 12th October, 1881, instructed defendant by letter to purchase for him ten shares of Telegraph stock at and for the price of 127 per cent., and 20 shares of said stock for the price of 128 per cent.; and defendant promised to make such purchase, and plaintiff at his request remitted him the sum of $363.29 to enable defendant to make such purchase, and plaintiff instructed defendant to hold the shares subject to plaintiff's order, and to sell when the price should reach 133 per cent. That at divers times after receiving said sum defendant purchased for plaintiff certain shares of said Telegraph Company, and applied said sum in part payment, and did hold said shares subject to plaintiff's orders, but subsequently sold the same without notice to plaintiff; that defendant was guilty of a breach of contract with plaintiff, for which plaintiff reserved his recourse in damages, and further plaintiff had suffered damage to the amount of $363.29; that defendant had paid him $27.14, leaving a balance of $336.15, which he claimed.

The defendant pleaded that plaintiff never paid and never intended to pay the said stock or take delivery thereof, and no delivery was ever made, but the same was bought merely for speculative purposes on borrowed money, with a view to a resale as soon as a small profit could be realized, and the money to carry said stock was borrowed by defendant at his own risk, subject to the payment of interest and to his obligation to furnish and keep good to the lender a sufficient margin, to wit, 10 per cent. and upwards as security for said loan, and plaintiff was bound to supply additional money to keep good the margin and protect defendant against loss on loans on said stock, which was liable to sudden fluctuations in price; that some time before the sale of said stock plaintiff left his residence at Napanée, and did not leave his address with defendant, or appoint any one to represent him. That shortly after the departure of plaintiff the stock began to decline until the margin had almost disappeared, and defendant was threatened with serious loss by continuing to carry the stock, and he sold the stock.

PER CURIAM.—Our Code, Art. 1927, says there is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet. What was the nature of the transactions between plaintiff and defendant? They appear to have begun about the 8th February, 1881. Then plaintiff addressed defendant as follows: "I have been dealing in stocks for some three years in Montreal, and as I don't like the party who has been doing my business, and

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desire to make a change, I write you if you would act for me according to my instructions. I will give you my business as long as you do it satisfactorily. I note by the *Star* newspaper you are in the business. I will allow you same as I pay other brokers. I wish to deal in Montreal Telegraph stock only. My idea is to buy after a pretty smart decline in the stock and sell at a fair advance, not hold long. You may buy 20 shares at about 125 or better. Wire me when bought, and I will remit you ten or fifteen per cent. margin as you like. If think safe you can buy 30 shares, but sell at a fair advance and send statement. I want you to use your judgment, as I will place confidence in you." On the 16th March plaintiff wrote: "Enclosed find $65 as margin on 25 shares of Telegraph stock, which you can purchase to-morrow if an opportunity offers, but don't go over 129¾; if you can buy less, do so. You may buy 25 shares more if you think it advisable, but not over 129¾. I think it may drop lower. This will make 50 shares yet to buy as per order of to-day. I will remit you all the money you require to hold margins good should a break take place. You can sell it at about *two cents advance*, unless market *strong* and advancing. If it shows a *weakness* after the *advance takes place*, then let *them have* it and wire me as before."

Some eight months afterwards plaintiff, by letter of date 12th October, wrote as follows: "If Montreal Telegraph stock reaches 125 buy me 50 shares. You can buy 40 shares at 126, 10 at 127, 20 at 128, 15 at 129. I have lost so much I want to try and win some back if it is my luck. I want you to hold the order good, and act on it when the first opportunity offers. Hope you will be able to do something this time. Look sharp." On the 15th October, plaintiff writes: "Gentlemen, enclosed find check to cover margin on stock bought and provision in case of decline; make the interest as low as possible. If the stock goes to 33 sell it out, and we'll buy again; fill the balance of order if can at figures I gave you." On the 17th October, defendant writes: "We have your favour of 15th inst. enclosing check for $363; we note your order to sell, and will keep it before us. The rate for carrying is six per cent., and it is not likely to be increased unless the money market changes. We bought ten shares more, all we could get."

Looking at all the facts of the case the Court has no difficulty in saying that plaintiff did not intend to pay for or take delivery of the stock in question; no delivery was made, and the same was bought for speculative purposes on borrowed money, with a view to a sale, as soon as a small profit could be realized. No action lies under the circumstances. It may be added that the plaintiff was away from his residence when the stock fell, and defendant only sold to protect himself, and the remittance made by plaintiff for a margin was lost in consequence. The case of the Bank of Toronto vs. MacDougall, 28 Upper Canada C. Pleas, 345, cited by plaintiff, does not help this case.

The case of Fenwick vs. Ansell, 5 Legal News 290, cited by defendant, is directly in point.

Action dismissed.

Weir, for plaintiff.
Dunlop & Lyman, for defendant.
(J. K.)

SUPERIOR COURT.

MONTREAL, 29TH OCTOBER, 1881.

Coram TORRANCE, J.

No. 1443.

Crevier vs. *La Société d'Agriculture de Berthier.*

HELD:—That the action *quanto minoris* for redhibitory defects must, like the redhibitory action, be brought with reasonable diligence (C.C. 1530); and where the buyer of a horse pleaded such defects in answer to an action for the price brought fourteen months after the delivery of the animal, it was held too late to raise that defence.

The action was to recover $224 alleged to be due on account of the sale of a horse. The sale was made on the 15th March, 1880, for the price of $575, of which $200 was cash, $200 in a year, and $175 in two years. The amount now claimed was the first instalment with interest, and acknowledged by a note signed by the President and Secretary of the Society.

The plea was, firstly, that the Society could not be liable on the note as, by law, it could not make a note; secondly, that there was a warranty and representation at the sale that the horse was only seven years old, and that he was free from vices, whereas he was eleven, and suffered from redhibitory vices.

PER CURIAM. The Court has no difficulty in overruling the plea invoking the nullity of the note. The action is not on the note, but on the sale for a price of $575, and the note may be used as evidence of the sale, which is also abundantly proved by witnesses.

The serious question is whether the defendant has not been too late in pleading the redhibitory vices. The action was instituted in May, 1881, more than 14 months after the sale and delivery of the horse. He is kept by the Society, which claims that the price already paid, $200, is the full value of the animal, and that it should be discharged from the present claim. The evidence on the issue raised by the second plea, as to the warranty and representation, is very contradictory, but the Court has no difficulty in overruling the plea of *quanto minoris*, as invoked too late. It is not to be supposed that an action for resiliation for redhibitory vices would lie in the present case after lapse of more than a year: C.C. 1530. The action *quanto minoris* has only the same duration. "Parmi nous," says Pothier, Vente, no. 233, "l'action *quanto minoris*, pour raison des vices redhibitoires, se prescrit par le même temps que l'action redhibitoire."

Judgment for plaintiff.

Dalbec, for plaintiff.

Mousseau, Archambault & Monk, for defendant.

(J. K.)

COURT OF REVIEW, 1883.

MONTREAL, 28TH FEBRUARY, 1883.

Coram SICOTTE, J., TORRANCE, J., JETTÉ, J.

No. 812.

Connors vs. *Stewart.*

HELD:—That when a purchaser of an immoveable has reason to fear eviction in respect of a claim exceeding in amount the balance due by him to the vendor in capital and interest, and he offers before suit by the vendor to pay him such balance, provided he give the purchaser security against the apprehended eviction; and after suit deposits said balance with his plea, the action of the vendor should not be dismissed purely and simply, but he should be ordered to furnish the security asked, within a delay to be fixed by the Court, and that in default of his giving such security within the delay, his action be dismissed, and that the vendor should, under the circumstances, pay all costs. *

This was a review of a judgment rendered by the Superior Court at Beauharnois, dismissing the plaintiff's action. The facts and circumstances of the case are fully disclosed in the judgment of the Court of Review which was rendered as follows:

"La Cour, siégeant comme Cour de Révision, après avoir entendu les parties sur la demande de révision par le demandeur, du jugement rendu par la Cour Supérieure siégeant dans et pour le district de Beauharnois, le 28 avril 1882, avoir examiné la procédure et tout le dossier et avoir délibéré:

Considérant en fait, que les parties sont d'accord pour admettre le péril d'éviction à raison du douaire coutumier de la femme du demandeur, affectant la propriété vendue pour le prix de mille piastres; aussi qu'avant l'action, le défendeur a notifié le demandeur qu'il était prêt à payer la balance due sur le prix, si le défendeur purgeait l'immeuble en fournissant caution;

Considérant, en fait, que le défendeur a renouvelé, par ses défenses, ses déclarations et ses offres de payer si le demandeur faisait disparaître le péril d'éviction en fournissant caution, et qu'il a déposé $380.20, étant la balance, en capital et intérêts due sur le prix;

Considérant que le demandeur par ses réponses, a demandé qu'il fut sursis au jugement jusqu'à ce qu'il eut rapporté, purgé ou fourni caution, mais que le défendeur fut condamné aux frais, faute d'avoir fait des offres avant l'action;

Considérant que le défendeur aux termes de l'article 1535 du Code Civil, est en droit de différer le paiement du prix jusqu'à ce que le demandeur fasse cesser le trouble ou fournisse caution; et attendu que les parties étant d'accord sur ce point, le jugement aurait dû leur donner acte de cet acquiescement, et qu'il y a eu erreur dans le dit jugement en déboutant l'action purement et simplement;

Considérant que, vû les offres avant l'action le défendeur ne peut être condamné aux frais, et que la somme qu'il offre encore tant en capital qu'intérêts est insuffisante pour le garantir en cas d'éviction;

* Reporter's note:—*Vidé Contra*, as respects the claim of the vendor for interest, The G.T.R.W. Co. vs. Currie et al. 25 L. C. J. 22.

Déclare qu'il y a lieu d'infirmer le jugement du 28 avril 1882, pour donner effet à la lettre et à l'esprit de l'article 1535, et à l'acquiescement des parties à l'exécution de la vente, sous les conditions de purgée et de caution réclamées et offertes;

Condamne le défendeur à payer au demandeur la somme de $380.20, pour balance en capital, intérêts du prix de vente en question offerte et consignée par le défendeur sous la condition que le demandeur rapporte purge de l'immeuble vendu, de l'hypothèque dénoncée, ou fournisse caution aux termes de l'article 1535 du Code Civil; accorde au demandeur un délai de trois mois pour produire la purge ou fournir caution tel que demandé, sinon et tel délai expiré permet au défendeur de reprendre les deniers consignés et le demandeur débouté de son action;

Condamne le demandeur aux dépens, tant en Cour Supérieure qu'en Cour de Révision, desquels dépens distraction est accordée à M. J. J. Maclaren, avocat du défendeur."

Judgment of S. C. reformed.

Robidoux & Fortin, for plaintiff.
Maclaren & Leet, for defendant.

(S. B.)

COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 20TH SEPTEMBER, 1882.

Coram Sir A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., and BABY, J.

No. 470.

JOSEPH SAUVÉ
(*Defendant in the Court below*),
APPELLANT;

AND

LEON BOILEAU
(*Petitioner in the Court below*),
RESPONDENT.

HELD:—1. That on the election of school commissioners, as on the election of municipal councillors, it requires five electors to demand a poll (M. C. 311);

2. That an election of school commissioners which took place under circumstances which misled the voters, and prevented them from exercising their right to vote, will be annulled.

The judgment appealed from was rendered by the Superior Court, district of Terrebonne (BELANGER, J.), on the 14th of December, 1881, declaring the election of the appellant, Joseph Sauvé, to the office of school commissioner to be null, and that Antoine Ladouceur was duly elected.

The complaint was that the appellant, Joseph Sauvé, had usurped the office of school commissioner of the Parish of St. Placide, to which Antoine Ladouceur was properly entitled, and the petitioner Boileau asked that Sauvé be dis-

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possessed of the office in favor of Ladouceur. The question was whether Ladouceur or Sauvé had been legally elected. It was claimed that Ladouceur was duly elected school commissioner at a meeting held at the church door of the parish. It appeared, however, that at the time the notice for this meeting at the church door was given, notice of another meeting for the same purpose was given, to take place at the residence of Ephrem Raby. Some of the electors met at Raby's, and Sauvé was elected, a poll demanded in favor of Ladouceur being refused by the chairman. The meeting at Raby's was called by C. Raby, the newly appointed secretary-treasurer of the commissioners. The other meeting was called by one Leroux, who had ceased to be secretary-treasurer on the 7th February preceding, when he was removed from office.

Pagnuelo, Q.C., for the appellant:

L'appelant soumet que le jugement de l'Hon. Juge Bélanger doit être infirmé, et la requête de l'intimé déboutée avec dépens pour les raisons suivantes:

1o. L'élection d'un officier ne peut être attaquée à raison du défaut ou vice du titre de la personne qui a présidé, si cette personne était en possession ouverte et publique de la charge. La valeur de son titre ne peut être attaquée incidemment;—Cole, on *quo warranto*, p. 175; Symmers *vs.* Regem, Cowp. 500; Rex & Mein, 3 T. R. 598, per Kenyon; King vs. Hughes, 4 B. & C. 368, 377, 378. "Though the charter or act of incorporation prescribes the mode in which the "officers of a corporation aggregate shall be elected, and an election contrary to "it would unquestionably be voidable, yet, if the officer has come in under *color* "of right, and not in open contempt of all right whatever, he is an officer *de* "*facto*, within his sphere an agent of the corporation, and his acts and contracts "will be binding upon it," etc. Angell & Ames, *On Corp.* p. 172, ch. IX, no. 4.

2o. La requête aurait dû contenir elle-même l'objection faite au titre du défendeur; Cole, p. 190 (nos. 4 et 8), p. 182.

3o. Le requérant n'est point recevable à attaquer le titre de Cyprien Raby comme secrétaire-trésorier, parce qu'il n'est que le prête-nom de Z. Raymond et de Damase Leroux, qui eux-mêmes sont non recevables à la faire, attendu qu'ils ont participé à l'élection faite sur son avis et sous sa direction; Cole, p. 168, 174, 5; Rex & Stacy; Angell & Ames, p. 708, ch. XXI, No. 4.

4o. Le requérant est non recevable personnellement à attaquer le titre de Cyprien Raby parce qu'il l'a reconnu comme secrétaire-trésorier en lui payant la taxe spéciale imposée par le ministère du dit C. Raby.

5o. Le requérant est non recevable dans sa requête parce que Z. Raymond et D. Leroux dont il n'est que le prête-nom n'ont point payé leurs taxes générales d'école ni la taxe spéciale.

Dép. de D. Leroux.—Z. Raymond devait au-delà de $120 de taxes générales d'école.—Ch. 15 S. R. B. C. Sect. 38.

6o. Antoine Ladouceur ne pouvait être élu parce qu'il n'avait point payé sa taxe spéciale d'école, ni ses proposeurs soit chez Raby soit à la porte de l'église; S. 38 Ch. 15; 16 L. C. J. p. 173, Lawford & Robertson.

7o. Damase Leroux était légalement destitué et Cyprien Raby légalement nommé secrétaire-trésorier des commissaires d'école ; par conséquent l'avis d'élection donné par E. St-Jacques comme président des commissaires est nul ; et celui donné par C. Raby comme secrétaire-trésorier est seul valide ; il l'est encore parce qu'il était la seule personne reconnue en possession ouverte de cette charge ; 34 Vict., ch. 12, S. 6.

8o. L'élection de l'appelant a été validement faite sur la levée des mains, attendu que le poll ne peut être demandé que par cinq électeurs qualifiés ; tandis que le poll n'a été demandé que par quatre électeurs ; de plus pas un seul de ces quatre électeurs n'avait payé sa taxe spéciale, et il n'est pas prouvé qu'ils eussent payé leurs taxes générales d'école quoique l'imposition de ces taxes ait été légalement établie par l'appelant. L'imposition de la taxe spéciale est établie par C. Raby et les documents produits—celle de la taxe générale par Damase Leroux.

Sur la question de savoir s'il fallait cinq électeurs pour demander le poll, ou si trois suffisaient, l'appelant réfère aux autorités suivantes : Ca. 15, S. R. B. C., s. 37.—Si le choix des dits commissaires d'école est contesté, *trois* des "électeurs présents pourront demander un poll lequel devra être tenu suivant " les règles établies par la loi alors en force pour l'élection des conseillers " municipaux.

41 Vict., ch. 6. s. 29.—" La section 37 du dit chap. 15 se terminera comme " suit :

" Et *d'après le mode* prescrit pour les élections des conseillers municipaux " par les art. 308, 309, 310, 311, 312, 313, 314, 315, 317, 318, 319, 320, 321, " et 325 du Code Municipal, *lesquels sont déclarés faire partie du dit acte* et " devront être interprétés de manière que l'élection se fasse en un seul jour."

Code Municipal, art. 311.—" Une heure après l'ouverture de l'assemblée, s'il " a été mis en nomination plus de candidats qu'il n'y a de conseillers à élire, le président, *sur la demande de cinq électeurs* présents, procède lui-même sans délai à la tenue du poll et à l'enregistrement des voix des électeurs présents.

312.—" A défaut d'une demande de la part de cinq électeurs présents à l'effet de tenir un poll, le président proclame élus conseillers les candidats qui, dans son opinion, ont la majorité des électeurs présents ; (après avoir constaté cette majorité par la levée des mains."—*Amendé par* 41 Vict. ch. 6, s. 13)

On demande s'il faut cinq électeurs ou si trois suffisent encore.

L'objection vient de ce que l'amendement fait par la 41 Vict., ch. 6, s. 29, dit que la section 37 du ch. 15 *se terminera* par les art. 308 et suiv. du Code Municipal.

On en conclut que la Sect. 37 n'est pas abrogée.

Cette conclusion n'est pas juridique. Tout ce qu'on peut conclure des mots *se terminera* c'est qu'ils sont contradictoires avec les dispositions formelles de la 41 Vict.

La volonté du législateur de suivre les dispositions des articles 311 et 312 du Code Municipal est formelle ; *il déclare* qu'ils *font partie du dit acte*, ch. 15.

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N'est-ce pas le cas d'une loi postérieure qui n'abroge pas en termes formels la loi antérieure?" L'abrogation n'en est pas moins certaine—*posteriores leges derogant prioribus.*

Le législateur fait quelquefois des méprises plus grandes; ainsi, on trouve quelquefois dans le même statut des clauses contradictoires. C'est la dernière que l'on suit alors, comme exprimant la dernière volonté de législateur.

Potter's Dwarris, *on Statutes* p. 113, note (9).—p. 155. "If two inconsistent "acts be passed at different times, the last, (said the Master of the Rolls,) is to "be obeyed, and if obedience cannot be observed without derogating from the "first, it is the first which must give way. Every act of parliament must be "considered with reference to the state of the law subsisting when it came "into operation, and when it is to be applied; it cannot otherwise be rationally "construed. Every act is made either for the purpose of making a change in "the law, or for the purpose of better declaring the law, and its operation is "not to be impeded by the mere fact that it is inconsistent with some previous "enactment."

Voir aussi la note (5) même page.

Dwarris, Edit. anglaise, 2nde partie, ch. XI., p. 660.

"A proviso is something engrafted upon a preceding enactment. It was "held by all the Barons of the Exchequer, in the case of *the Attorney-General "vs. the Governor and Company of the Chelsea Water-works*, that where "the proviso of an act of parliament was directly repugnant to the purview of it, "the proviso should stand and be held a repeal of the purview, because it was said "it speaks the last intention of the law-giver."

Concluons donc que les dispositions des art. 311 et 312 du Code municipal doivent être suivies, et que le poll ne peut être accordé que sur demande de cinq électeurs qualifiés.

9o. Après que J. Sauvé eut été proclamé élu, le président ne pouvait plus accorder le poll, même s'il eut été demandé par cinq électeurs qualifiés; Bezières et Turcot, 2 Rev. Lég. 129. Melançon et Sylvestre, 14 L. C. J. 217.

L'appelant espère donc et a confiance que cette honorable Cour déclarera la requête de l'intimé non recevable, et au besoin mal fondée, et de plus qu'elle déclarera l'appelant dûment élu à la charge de Commissaire d'école de la paroisse de St. Placide.

Prevost & Champagne for the respondent:—

La première question qui se présente est de savoir si Damase Leroux, qui conformément à la section 6e du Statut de Québec, 34e Victoria chap. 12e, a donné l'avis de l'assemblée pour l'élection à la porte de l'Eglise, était secrétaire-trésorier des dits Commissaires, ou ne l'était pas à cette époque.

L'appelant prétend que Damase Leroux a été destitué de sa charge de secrétaire-trésorier par les Commissaires à leur assemblée du sept février précédent et qu'il n'avait aucun droit de donner cet avis.

Nous soumettons que cette assemblée du 7 février avait été convoquée dans un but spécial, pour s'occuper d'un jugement rendu contre les Commissaires en faveur d'Antoine Fortier; qu'après avoir ouvert l'assemblée sous la présidence

d'Eugène St. Jacques, président des dits Commissaires, avoir entré le but de l'assemblée dans leur registre et constaté la présence de Damase Leroux, secrétaire-trésorier, la majorité des dits Commissaires est enfrée dans une série de procédés illégaux en nommant un sécrétaire *pro tempore*, malgré la présence de Leroux, en s'occupant du règlement d'une affaire avec A. Bernard et ensuite en destituant le dit Leroux sans même le remplacer à cette séance par un autre secrétaire-trésorier.

Que le président St. Jacques ayant protesté contre cette procédure illégale et ayant refusé de signer le registre, trois des dits commissaires s'érigèrent en assemblée, mirent de côté leur président, et nommèrent un président *pro tempore* pour cette séance, et acceptèrent en bloc toutes les résolutions qu'ils avaient proposées avant le départ du président, et ensuite ajournaient leur séance au dix-neuf février. Les Commissaires n'avaient pas le droit de déposer ainsi leur président et ne pouvaient pas non plus prendre un secrétaire *pro tempore* en la présence de Leroux qui avait déjà commencé à agir comme secrétaire à cette assemblée.

La seconde question qui se présente est de savoir si, dans le cas où la destitution de Leroux serait valable, Cyprien Raby a été légalement nommé à l'assemblée du dix-neuf février et s'il avait le droit de donner l'avis de convocation de l'assemblée pour l'élection du quatre juillet.

Nous prétendons que la nomination de Cyprien Raby comme secrétaire-trésorier est illégale et que tous les procédés faits à l'assemblée du 19 février sont nuls et illégaux, cette assemblée ayant été convoquée irrégulièrement et deux des Commissaires n'ayant pas assisté à la dite assemblée.

L'assemblée du 7 février a été tenue au bureau du secrétaire-trésorier, cette assemblée a été ajournée au dix-neuf du même mois sans indiquer à quel endroit ; il est évident que cette assemblée ne pouvait être tenue ailleurs qu'au lieu où s'était tenue l'assemblée du sept février. Si la nomination de H. Pilon comme président *pro tempore* était légale ainsi que celle d'Anthime Pilon comme secrétaire *pro tempore*, ce que nous n'admettons pas, cela ne pouvait être à tout événement, que pour le temps de la séance ;—les Commissaires eux-mêmes l'ont pensé ainsi puisqu'à la fin de la séance ils ont passé une résolution pour payer une piastre au dit Anthime Pilon pour ses services de secrétaire *pro tempore*, comme il appert au procès-verbal de la dite séance du sept février.

Après la séance du sept février le dit Anthime Pilon qui avait agi comme secrétaire *pro tempore*, se rencontre à l'hôtel Bertrand avec H. Pilon qui avait agi comme président *pro tempore*, et on décide de faire l'assemblée du 19 février au domicile d'Ephrem Raby et le même soir un avis convoquant cette assemblée du dix-neuf à la résidence de Raby, fut préparé et signé par H. Pilon, président *pro tempore* et A. Pilon, secrétaire *pro tempore*, et cet avis fut signifié aux Commissaires Eugène St. Jacques et Benoit Lalonde par C. Raby, le quinze février.

Cet avis de convocation d'assemblée est radicalement nul ; H. Pilon et A. Pilon n'avaient aucun droit de le donner et les commissaires St. Jacques et Lalonde étaient dans leur droit en refusant de se rendre à cette assemblée du dix-neuf février, convoquée par des personnes qui n'avaient aucune autorité pour

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le faire; et cette assemblée ayant été illégalement tenue, il suit de là que la nomination de C. Raby comme secrétaire-trésorier qui y a été faite est nulle et illégale.

Ainsi si l'on arrive à la conclusion que la destitution de Leroux est valable, la nomination de C. Raby étant illégale, on reste avec l'avis d'assemblée pour l'élection du quatre juillet, signé par Eugène St. Jacques, président des commissaires, et ce conformément à la section 6 du Statut de Québec, 34 Vic. Chap 12, qui dit "que s'il n'y a pas de secrétaire-trésorier, l'assemblée devra être convoquée par le président."

C'est à cette assemblée convoquée par le président et tenue à la porte de l'Eglise que Ladouceur a été élu, et cette assemblée étant la seule légalement convoquée, il a certainement droit à la dite charge de commissaire.

La troisième question qui se présente est de savoir si, dans le cas où l'assemblée tenue chez Raby aurait été légalement convoquée, l'appelant aurait été légalement élu commissaire à cette assemblée.

Il est de fait que le quatre juillet au matin, la presque totalité des électeurs de la paroisse St. Patrice se trouvaient rendus au village pour prendre part à l'élection, et que la grande majorité de ces électeurs paraissaient favorables à la candidature de Ladouceur. Que St. Jacques, président des Commissaires d'écoles, aurait proposé de ne faire qu'une assemblée et se serait adressé à cet effet aux chefs du parti de l'appelant qui, après s'être consultés, répondirent qu'ils ne voulaient qu'une assemblée et qu'elle devait se faire à la porte de l'Eglise, engageant par là les électeurs à se rendre à la porte de l'Eglise, l'appelant et plusieurs de ses principaux partisans s'y rendirent eux-mêmes.

Il est établi par la preuve que cette manœuvre a été employée par l'appelant et ses partisans pour éloigner les électeurs de chez Raby, où se faisait l'élection de l'appelant dans le temps même que Ladouceur était élu à la porte de l'Eglise.

Quelques personnes, restées chez Raby, nommèrent ce dernier président de l'assemblée et l'appelant fut mis en nomination; quelques instants après des partisans de Ladouceur s'apercevant de cette élection, mirent ce dernier sur les rangs.

Avant onze heures le *Poll* est demandé par quatre électeurs; le président Raby répond que c'est trop tôt. A onze heures sonnant, nouvelle demande de *Poll* par quatre électeurs, le président répond qu'il en faut cinq; un cinquième électeur se joint aux quatre autres et demande le *Poll* avant la levée des mains et le président décide qu'il est trop tard, demande la levée des mains et proclame élu l'appelant comme ayant la majorité des électeurs présents.

Il est amplement établi par la preuve que l'appelant et ses amis ont employé le dol et la fraude pour éloigner les électeurs du lieu de leur assemblée et pour emporter l'élection; que des personnes se tenaient cachées dans la cuisine et dans la cour chez Raby avec instruction d'entrer dans la salle où se tenait l'assemblée au moment où onze heures sonneraient et sur un signal qui leur serait donné.

Il suffisait de trois électeurs pour faire la demande de poll; c'est ce que déclare la sect. 37 du ch. 15 des Statuts Refondus du B.C. qui n'est modifié que quant au mode à suivre pour telle élection quant à la tenue du poll seulement.

Cette section 37 dit: "si le choix des dits Commissaires d'écoles constaté, "*trois* des électeurs présents pourront demander un poll, lequel devra être tenu "suivant les règles établies par la loi alors en force pour l'élection des conseillers "municipaux"; cette section est amendée par la sect. 29 du ch. 6 de la 41 Vict. qui se lit comme suit: "la section 37 du dit ch. 15, se terminera comme suit: "Et d'après le mode prescrit pour les élections des conseillers municipaux, par les "articles 308, 309, 310, 311, 312, 313, 314, 315, 317, 318, 319, 320, 321, et "325 du code municipal, lesquels sont déclarés faire partie du dit acte et devront "être interprétés de manière que l'élection se fasse en un seul jour."

Il n'y a aucun doute que la demande de poll peut être faite par trois électeurs et qu'il faudra avoir recours aux articles cités du code, que pour la tenue du poll seulement: la phrase telle que conçue en y ajoutant l'addition mentionnée, dans la dite section 29, ch. 6 de la 41 Vict. paraît ne pas porter d'autre sens: "lequel (poll) devra être *tenu* suivant les règles établies par la loi alors en force "pour l'élection des conseillers municipaux, et d'après le mode prescrit pour les "élections des conseillers municipaux, par les articles 308 &c..... "lesquels sont déclarés faire partie du dit acte," c'est-à-dire en autant qu'ils ont rapport au *mode* de tenir le poll.

Nous soumettons que trois électeurs pouvaient demander le poll et à tout événement la preuve démontre qu'en troisième lieu le poll a été demandé par cinq électeurs présents, et que cette demande a été faite en temps opportun et avant la levée des mains, de sorte que cette demande ne peut pas manquer d'être suffisante quant au nombre de ceux qui l'ont faite.

L'appelant prétend que ceux qui ont demandé le *Poll* n'avaient pas payé toutes leurs taxes scolaires.

Nous prétendons qu'il n'est pas nécessaire d'avoir payé ses taxes pour être qualifié à mettre un candidat en nomination, le paiement des taxes avant de voter est suffisant; d'ailleurs, d'après la section 38 du chap. 15 des Statuts Refondus du B. C., le vote de celui qui n'a pas payé ses taxes n'est pas annulé, mais ce voteur est exposé à une pénalité.

Dans le cas actuel, il n'est pas établi qu'il existe aucun rôle de perception en force constatant aucun prélèvement fait sur les contribuables de la municipalité; il est vrai que Cyprien Ruby paraît en avoir fait un en sa prétendue qualité de secrétaire-trésorier, mais ce rôle et son approbation par trois commissaires en assemblée irrégulière ne peuvent pas valoir plus que tous les autres actes de ce prétendu secrétaire-trésorier, et que toutes les autres assemblées irrégulières de ces trois commissaires. Il n'est pas établi que les électeurs qui ont demandé le *Poll* eussent rien à payer avant l'élection, et conséquemment ils devaient être présumés ne rien devoir et jusqu'à preuve par le défendeur de quelque prélèvement légalement fait et en force au temps de l'élection. L'intimé n'était nullement tenu de faire preuve de paiement de la part des électeurs qui ont demandé le *Poll*.

En résumé, nous prétendons que la seule élection légale qui ait été faite, est celle qui a eu lieu à la porte de l'Eglise; que l'élection de l'appelant aurait été faite à une assemblée régulièrement convoquée serait encore une nullité, parce que les électeurs ont été empêchés d'y assister par dol et fraude et parce que le président Ruby a refusé injustement et illégalement de prendre l'enregistrement

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des votes qui a été démandé légalement à différentes reprises ; et nous prétendons que le jugement rendu par son Honneur le Juge Bélanger, annulant l'élection de l'appelant et déclarant le dit Antoine Ladouceur dûment élu doit être confirmé —le tout avec dépens.

RAMSAY, J. This case arises out of misunderstandings and difficulties of a Municipal Council. We have not to decide on the merits of the disagreement, but whether the appellant, Joseph Sauvé, was duly elected a school commissioner of the Parish of St. Placide, or whether he has usurped the office to which one Antoine Ladouceur was duly elected.

The suit began by a proceeding in the nature of a *quo warranto* promoted by the respondent, who declares himself an elector, and qualified to vote for school commissioners, and setting forth that Antoine Ladouceur was duly qualified to be elected, and was elected.

Both the quality or capacity of the respondent and of Antoine Ladouceur—one as elector and the other as being eligible for election—were expressly denied, and it may be well to dispose of these questions at once. It is argued that respondent is only the *prête-nom* of two persons, G. Raymond and Damase Leroux, who themselves participated in the proceedings attacked, and because he recognized the validity of the proceedings in paying the secretary-treasurer whose nomination as secretary-treasurer he now impeaches; that Raymond and Leroux have not paid their taxes, that Ladouceur was ineligible, because neither he nor his proposers had paid their taxes.

I see no evidence to disqualify these parties. Those whose names are on the voters' list are entitled to vote, unless it can be shown positively that they are subject to a disability. The evidence of this is on the party alleging the incapacity.

Substantially there is little difference as to the facts of the case. On the 7th February, 1881, it seems that there was a special meeting of the school commissioners called to decide as to whether the Board should resolve to settle the claim of the former secretary-treasurer, Mr. Barnard. At that meeting circumstances came to the knowledge of the commissioners which induced them to concur in the resolution to dismiss the then secretary-treasurer on the spot.

The resolution to dismiss the secretary-treasurer was adopted unanimously. It is unnecessary for us to form, much less to express, any opinion as to whether this act of rigor was justifiable or not. It is sufficient to say that the dismissal was accomplished, and that the former secretary-treasurer fully understood that he was dismissed. That the commissioners had the power so to deal with their officer appears to be beyond all doubt, according to law. C.S.L.C. 15, 60, § 4. Before the dismissal, one Anthime Pilon was appointed secretary-treasurer *pro tempore*. Leroux, the former secretary-treasurer, then retired, and Pilon continued to take the minutes. Mr. St. Jacques, the chairman of the school commissioners, who did not approve of these proceedings, declared he would not sign the minutes, and withdrew, refusing to take any further part in the meeting. The remaining commissioners then appointed one of themselves, Mr. H. Pilon, to act as chairman in the absence of St. Jacques (sec. 54), and the meeting then adjourned till the 19th February. This would

have been entirely within the powers derived from the common law, but it appears that the duty of the commissioners was to proceed to the appointment of a secretary-treasurer, who should give security before acting. Another complication was created by the fact that the meeting of the 4th had taken place in the former secretary, Leroux's house, and the commissioners could not decently meet there again. By the adjournment they had fixed no other place of meeting. The three remaining commissioners agreed, however, to meet at the house of Cyprien Raby, and the chairman *pro tem.* and the secretary *pro tem.* sent Mr. St. Jacques and Mr. Lalonde notice of the adjournment, and that the sitting would be held at Raby's. Neither St. Jacques nor Lalonde attended; and it is contended that this is not a properly adjourned meeting, and that it is not a special one. If it was not a properly adjourned meeting, all that was done at it in the absence of two of the commissioners was radically null. There would be no protection for the public if a portion of their representatives can bind them at hole-and-corner meetings, and it seems to me to be a dangerous irregularity to alter the place of meeting. We must not, however, sacrifice substance to form, void of any real interest. It is proved that Lalonde could not be present, and it is to be presumed that St. Jacques purposely abstained from attending, for he had a special notice to tell him where the meeting was to be held. Again there is nothing in the law to declare a meeting to be absolutely null because there was no secretary-treasurer. It is true that the form indicates that the secretary-treasurer should sign the notice, and that is the usual course, but how were these commissioners to act? The chairman abandoned his functions, and the secretary-treasurer was dismissed. Was the school municipality of St. Placide to become helpless? I think, therefore, the notice given by Anthime Pilon was sufficient, that the adjourned meeting would be held at Raby's. If that meeting was lawfully held, then Mr. Raby was duly appointed to the vacant office of secretary-treasurer, and he was the proper person to sign the summons for the public meeting for the election of a commissioner. In any case Mr. Damase Leroux had no authority or color of right to call the meeting. The question, therefore, becomes narrowed down to this, whether the meeting at Raby's on the 4th July was regular, and whether it was fairly and honestly held. As to its regularity, it is maintained that it was not called by the officer qualified, Mr. Raby,—that even if he had a right to call the meeting a poll was regularly demanded, and refused on the ground that it was not demanded by five electors,—that it only required three electors to demand a poll; that in effect five electors did demand a poll.

The appellant contends that Raby was duly appointed secretary-treasurer; that at any rate he held the office *de facto*; that five electors are required to demand a poll effectively, and that only four did in effect demand a poll.

The nomination of Raby has already been dealt with. The difficulty as to whether five or three electors are required to demand a poll arises in this way: —By sect. 37, C. 15, C. S.L. C., it is provided: "Si le choix des dits commissaires d'école est contesté, trois des électeurs présents pourront demander un poll, lequel devra être tenu suivant les règles établies par la loi, *alors en force* pour l'élection des conseillers municipaux."

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The 41 V., c. 6, s. 29, then adds: "Le section 37 du dit chap. 15 se terminera comme suit:

"Et d'après le mode prescrit pour les élections des conseillers municipaux, *par les articles 308, 309, 310, 311, 312, 313, 314, 315, 317, 318, 319, 320, 321 and 325 du code municipal, lesquels sont déclarés faire partie du dit acte,*" etc.

The article 311 of the Municipal Code then formally declares that five electors must demand a poll, otherwise it is the duty of the president to declare the person elected who has the show of hands. This is of course directly contradictory to the provision of sec. 37 C.S.L.C., and it comes to be a question whether a demand of three electors is sufficient. I think the evidence fails to establish that more than four electors demanded a poll. The official return so states the fact, and it is perfectly proved that this was the pretension of the presiding officer at the time. It was no afterthought. It was then for respondent to prove that really five electors demanded a poll, and this I think he has failed to do, his testimony being contradicted in the most positive way. We are, therefore, obliged to decide the effect of sect. 37 C.S.L.C. and art. 311 M.C.

It seems to me impossible to arrive at any other conclusion than this, that it requires five electors to demand a poll, whatever rule of interpretation we apply. First, it was evidently intended to assimilate the election of commissioners to the election of municipal councillors. Second, the five are mentioned in an amendment made a portion of the former Act, and which naturally overrides the first enactment. And as a third reason, the poll is a privilege or exception to the ordinary mode of election by show of hands, and therefore the presumption is in favor of the greater re[illegible] I think, then, that these objections are unfounded.

But another question arises, and that is whether, in carrying out the law, there has been good faith, or rather, I should say, whether, owing to the contentions of the members of the council, rendered embarrassing by irregularities, there has not been what amounts to a surprise of the electors which has had really the effect of depriving them of their right to vote.

I am very far from wishing to impute to the contending parties the malice they readily attribute to one another. It is easy to understand how mistaken zeal influences people perfectly honest, and who are in an instant converted into blind partisans. This has probably been the case here. The majority of the councillors felt naturally aggrieved at Mr. St. Jacques' conduct—they had excellent reason to be still more annoyed at Mr. Leroux—and they thought themselves justified in adopting every opportunity of upsetting their plans. So far they might be justified, but they could not be justified in dealing in such a way as to prevent the electors from exercising their right to vote. This they in effect did. The meeting at Raby's in July was unusual, and particularly inexpedient under the circumstances. Then, the want of a fifth to demand the poll was a quibble, for the president of the Raby meeting knew perfectly well that a crowd of electors was in the vicinity, come expressly to vote. It was his duty, therefore, to have used a little discretion, and to have avoided the mystery in which he evidently intentionally indulged. I am therefore to reverse, and that

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thout costs. My reason for not allowing costs is that which formerly pre- d in Parliament. A contest of this sort is *pro bono publico*, if not mali- cious; and in this case I think there was probable cause for the institution of these proceedings and for the defence.

The judgment of the Court is as follows:—

"La Cour, etc.

"Considérant que l'assemblée tenue à la porte de l'église de la paroisse de Placide, le 4 juillet 1881, n'a pas été duement convoquée par aucune personne autorisée à ce faire, et, qu'en conséquence, la prétendue élection du nommé Antoine Ladouceur, pour agir en qualité de Commissaire d'Ecoles pour la dite paroisse, est nulle et illégale;

"Considérant que l'assemblée tenue dans la maison de Ephrem Raby, le même jour de la même année, a été duement convoquée, et que les électeurs ont été induits en erreur par le fait que les deux assemblées ont été convoquées simultanément, et pour le même but, et ont été, en conséquence de cette erreur, privés de l'exercice de leur droit de voter à l'élection d'un Commissaire d'Ecoles;

"Et considérant que l'élection de Joseph Sauvé comme Commissaire d'Ecoles pour la dite paroisse de St. Placide a été faite par surprise, et en violation des règles de l'équité et de la bonne foi, qui doivent être observées en semblable cas;

"Et considérant qu'il y a erreur dans le jugement rendu en chambre à Ste. Scholastique le 14e jour de décembre 1881, qui déclare le dit Antoine Ladouceur dûment élu, renverse le dit jugement;

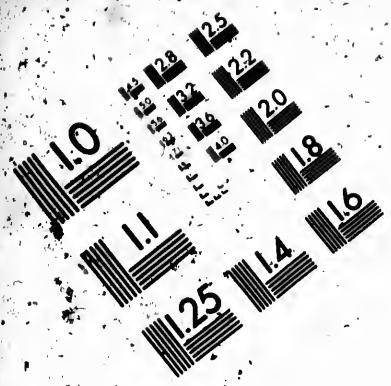
"Et prononçant le jugement que le dit juge aurait dû rendre, déclare l'élection du dit Antoine Ladouceur et du dit Joseph Sauvé irrégulière, nulle, et de nul effet, et la casse et met à néant, chaque partie payant ses frais, tant en cette cour que dans la cour de première instance; et en outre, cette cour, en vertu des pouvoirs qui lui sont conférés, par acte passé dans la 44e et 45e année du règne de Sa Majesté la Reine Victoria, ch. 19, ordonne qu'une élection ait lieu samedi, le 7me jour d'octobre prochain, étant le quinzième jour juridique, à compter de la date de ce jugement, suivant la loi pour élire un Commissaire d'Ecoles pour la dite paroisse de St. Placide, pour remplacer le dit Sauvé dont l'élection est annulée, et que Zotique Lalonde, écuier, maire de la municipalité de la dite paroisse de St. Placide, soit nommé, ainsi qu'il l'est par le présent jugement, pour présider à la dite élection.

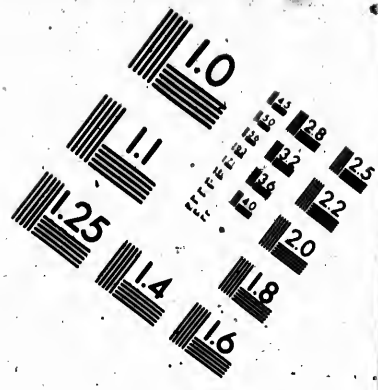
Judgment reversed.

Pagnuelo & St. Jean, for appellant.

Prévost et Champagne, for respondent.

(J. K.)





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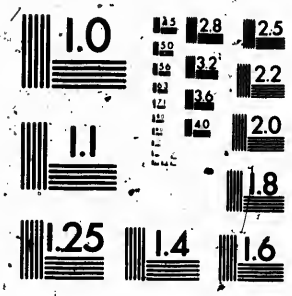

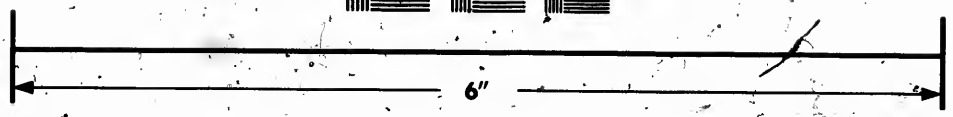

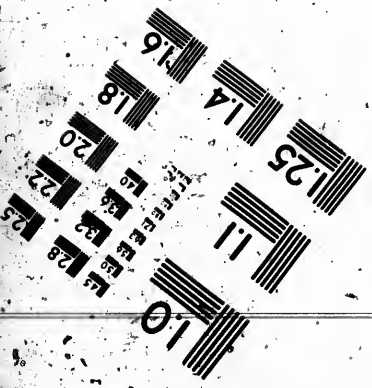

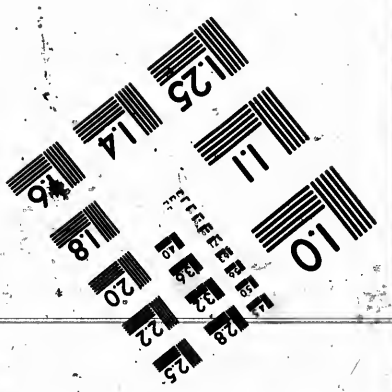

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COURT OF QUEEN'S BENCH, 1882.

MONTREAL, 27TH MAY, 1882.

Coram DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 453.

THE CONSOLIDATED BANK OF CANADA,

(Claimants in the Court below,)

APPELLANTS;

AND

THE MERCHANTS BANK OF CANADA,

(Contestants in the Court below,)

RESPONDENTS.

HELD:—That a letter of guarantee given to a Bank, securing the payment of notes discounted by said Bank for certain firms mentioned, did not bind the guarantors to a Bank constituted by the amalgamation of the said Bank with another Bank.

RAMSAY, J.—This case comes up on the contestation of a claim on an insolvent estate. The City Bank accepted a letter of guarantee from two gentlemen, who thereby bound themselves jointly and severally to and in favor of the said Bank for the full payment of such notes of this firm which have been or hereafter may be discounted by the Bank, thereby making themselves and each of them "as fully liable and bound for the same as if each of them had individually made each and every of said notes." Later, the City Bank and the Royal Canadian Bank became amalgamated by Act of Parliament under the name of the Consolidated Bank of Canada, and the new bank, believing itself protected by this letter of guarantee, continued to discount the paper of the firm therein named. The drawers became insolvent, as also the gentlemen who signed the letter, and the claim by the Bank was on the estate of one of the signers. This claim respondent contested by saying the letter of guarantee was to the City Bank and not to the Consolidated Bank, and therefore it does not apply. The argument is that *cautionnements* are to be strictly interpreted. But it is answered the City Bank has not lost its identity, and at any rate this is not *cautionnement* but a joint and several obligation.

There is nothing in the wording of the statute to help us over this difficulty. The rights and property of the two Banks are transferred to the new. But the rights are evidently only those existing at the time of amalgamation about which there is no question in this suit. Under the authorities of the English law the case appears to be very clear, that, for no equitable consideration, can one party take advantage of a guarantee given to another. So, where a bond is to one and he forms a partnership with another, the co-partnership cannot take advantage of the security. "Where there is the least difference between the condition and the breach, the surety will not be bound," says Degny, C. J. "It is not Wright's money that is unaccounted for, but the money of Wright & Company," said Gould, J., in the same case, Wright & Russell, 2 Wm. Bk. 934. And where a partner retires the remaining partners cannot take advantage of the bond to the old firm, Strange & Lee, 3 East, 484. This rule was adopted in a

The Consolidated Bank of Canada, and The Merchants Bank of Canada.

case in this Court : Henault & Thomas, 1 Rev. Leg. 706 ; Nor can a partnership after it becomes incorporated take advantage of a bond to the old partnership, Dance & Girdor, 1 B. & P. New Cases, 34.

The case of Metcalfe & Brown (12 East, 404), cited on the other side, avowedly turns on the interpretation of the terms of the bond, and refers to Barclay & Lucas as being defensible on the same ground. In Pease & Hirst there was a joint and several note payable to order to give credit to A, at a certain banking house, and it was held that the note being payable to the full members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking house. All the old cases are to be found in Watson on Partnership, p. 112 ; my copy is of a very old edition, but the cases are to be found Chap. III. ; also Collyer § 613, where it is admitted that Barclay & Lucas is no longer law.

But it was contended that the rule of the civil law is somewhat different, and we were referred to Pothier, Obl. 385. But I think that authority supports the principle of Metcalf & Bruin, namely, that if the security be to representative persons it passes to their successors, and I cannot see that it indicates any substantial difference between the civil law and the English common law. So far as the question under consideration goes article 1935 C. C. seems to be absolutely conclusive.

But another consideration was pressed upon our notice in reply. It was argued that this was not a bond of surety, but that it was an actual, joint and several obligation of Messrs. Mulholland & Baker, along with Bartley & Co. and Cleghorn & Co., to be parties as promissors on their notes.

It is difficult to realize the distinction or its effect, if once established. Mulholland was certainly not one of the promissors, he was not a party to the note (2344 C. C.) His contract not being a principal one, but an accessory contract, I cannot understand that it can be other than a *cautionnement*, Pothier Tr. de Nantissement, No. 1. He must either be a principal or a *fidejusseur*, Pothier Obl. 365.

But even if there were room for a distinction, or that we could hold Mulholland as party to a note he had not signed, of what use would it be to appellants ? It would amount to this, that Mulholland was bound to pay paper discounted by a bank which did not exist, that is, he was bound to do something on a condition which never did or could happen.

In appellant's factum there is an appeal to equity. There is no equitable question to be considered between appellants and respondents.

I am to confirm.

MONK, J., dissented.

Judgment confirmed.

Ritchie & Ritchie, for appellants.

R. Roy, Q.C., Counsel.

Lacoste, Globensky & Bisaillon, for respondent.

(J.K.)

SUPERIOR COURT, 1883.

MONTREAL, 21st APRIL, 1883.

Coram TASCHEREAU, J.

No. 1629.

Bigonesse es qual. vs. *Brunelle.*

HELD:—In an action of damages by the father of a minor for rape, where the case was sustained merely by the evidence of the girl, and there was counter evidence to the effect that the girl's character was equivocal, that the action could not be maintained.

The plaintiff brought the action as the father of Josephine Bigonesse, a minor, who, it was alleged, had been violated by the defendant on the 3rd of December, 1881. The outrage, it was said, was committed late in the evening, while the girl was crossing a field about three arpents from her residence, in front of a barn belonging to the defendant.

The action was not brought until the girl was in an advanced stage of pregnancy, and on the 5th September, 1882, a child was born.

The defendant alleged that the charge was wholly unfounded.

At the trial the girl herself was the only witness brought up to prove the alleged rape, and there was nothing whatever to corroborate her statement. She said that the defendant, on the evening in question, seized her and forcibly had connection with her. She made no complaint at the time, nor until long afterwards.

The following was the judgment of the Court:—

"La Cour, etc....

"Considérant que le témoignage non corroboré de la soi-disante victime d'un prétendu viol ne peut en règle générale suffire, soit au civil, soit au criminel, à la constatation légale du crime imputé, surtout lorsqu'il y a de fortes présomptions contre le caractère, l'honnêteté et la chasteté de l'accusatrice;

"Considérant que l'imputation portée par Georgiana Bigonesse, fille du demandeur, contre le défendeur en cette cause, accusant ce dernier de l'avoir violée et connue charnellement le ou vers le 3 décembre 1881, ne repose sur aucun autre témoignage que celui de la dite Georgiana Bigonesse elle-même, et n'est rendue vraisemblable par aucune preuve de circonstance et par aucune présomption légale et raisonnable dans la cause;

"Considérant qu'il est établi par plusieurs témoins que la dite Georgiana Bigonesse a fait preuve, en diverses circonstances, de malhonnêteté, de légèreté coupable et même d'immoralité dans sa conduite, ce qui rend suspect son témoignage rendu en cette cause, et laisse au moins place à un doute raisonnable dont le défendeur comme partie accusée, doit avoir tout le bénéfice;

"Considérant que pour ces motifs, l'action en dommages-intérêts, portée par le demandeur, père de la dite Georgiana Bigonesse, contre le défendeur, ne peut être accueillie;

"Maintient la défense et renvoie l'action avec dépens distraits," etc.

Action dismissed.

Lacoste, Globensky, Bisaillon & Brosseau, for the plaintiff.

Geoffrion, Rinfret & Dorion, for the defendant.

(J.K.)

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

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" :—Where it was stipulated by a, that a steamship, then in England, should "with all convenient speed sail and proceed to Montreal, to arrive there *between opening of navigation*, 1879, &c.," and the vessel arrived at Montreal 18th May, navigation having been open 1st May; the stipulation as to time was not a condition precedent, and no date being specified, the arrival of the vessel on the 18th May was within the terms of the contract, more especially as the defendant, when notified that the vessel had sailed for Liverpool on 1st May, made no objection on the ground of delay. (Hall vs. McShane, S. C.) 187

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COMMERCIAL TRAVELLER :—*Vide* WAGES.

COMPENSATION :—*Vide* COSTS.

COLLOCATION :—*Vide* MORTGAGE.

CONSTABLE :—*Vide* PRACTICE.

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COSTS :—The, due on a judgment may be legally paid to and compensated by a debt due by the attorney of record of the party to whom such costs are awarded, notwithstanding that such costs have not been awarded by distraction to the attorney, in the absence of proof that he had paid his attorney's costs. (Kilgour vs. Harvey et al., and Logan, opposant, and Kilgour, opposant, and Logan, Contestant, C. of R.)..... 138

COUPONS :—On motion of the owner of bonds with *coupons* attached, the Court will order such of the *coupons* as are not in litigation to be detached by the clerk of the Court and delivered over to the party moving. (The Montreal, Portland and Boston R. W. Co., appellant, and La Banque d'Hochelaga, respondent, Q. B.)..... 164

CURATOR *to a délaissement*:—*Vide* PRACTICE.

" *to a vacant succession*:—A has not legal quality to contest an opposition, on the ground that the deed on which it is based was executed in fraud of creditors and when the debtor was notoriously insolvent, and to ask that the deed be declared inoperative, null and void and be set aside. (Lamarche, appellant, and Paneé *es qual.*, respondent, Q. B.) 347

CUSTODY OF CHILD:—The mother has an absolute right to the charge of a child aged 12 years (the father being dead), unless it be established that she is disqualified by misconduct, or is unable to provide for the child. (Exparte Ham for *habeas corpus*, Q. B.) 127

CUSTOMS:—Notice of claim for goods seized by the customs authorities must be given by the owners in writing within one month from the day of seizure. (Lawrence vs. Ryan, S. C.) 289

DAMAGES:—Justices of the Peace, acting within the limit of their authority and without malice, are not liable in damages for an erroneous judgment. (Roy vs. Paré et al., C. of R.) 11

" :—*Vide* SLANDER.

" :—*Vide* PRACTICE.

" :—*Vide* LIBEL.

" :—EVIDENCE.

DEMURRAGE:—*Vide* CHARTER PARTY.

" :—When the Charter Party stipulates that the vessel shall receive prompt despatch, and it is proved that delay in loading was caused by want of coal and not by any delay arising from the vessel getting her turn, demurrage will be recoverable, notwithstanding the provision in the charter party that the vessel shall take her turn and suffer any delay consequent thereon. (Elliott et al., appellants, and Lord et al., respondents, P. C.) 333

DIVORCE:—Where parties were married and had their domicile in New York, but the husband afterwards established himself permanently in Montreal, a decree of divorce subsequently obtained in New York by the wife (the husband appearing and not contesting the divorce suit) has no binding effect in this Province. (Fisk, appellant, and Stevens, respondent, Q. B.) 228

" :—The parties, in such a case as above, being still husband and wife, the latter could not sue her husband here for an account of her separate estate which had been placed in his hands for administration, without proper authorization; the absence of which may be urged in a plea to the merits. (Do.) 228

ENDORSERS:—*Vide* PROMISSORY NOTES.

EVIDENCE:—In an action for goods sold, the plaintiff cannot, in the absence of written proof of the contract, prove by verbal testimony an acceptance or partial acceptance of the goods as if delivered. (Munn et al., appellants, and Berger et al., respondents, Q. B.) 349

" :—An action of damages, by the father of a minor girl for rape will not be sustained on the mere unsupported and uncorroborated evidence of the girl herself, and specially so in the face of evidence that her character was equivocal. (Bigonesse *es qual.*, vs. Brunelle, S. C.) 372

EXCEPTION *à la forme*:—*Vide* PRACTICE.

" " " :— " BAILIFF'S RETURN.

EXEMPTION FROM SEIZURE:—Bail dresses are not exempt from seizure under Art. 556 of the Code of C. P. (Doutre, appellant, and Sharpley et al., respondents, Q. B.) 25

FORFEITURE:—*Vide* WAGES.

FREIGHT:—The master of a ship may recover freight by action brought in his own name, even when the bill of lading is not signed by him, but by the agents of the owners of the vessel. (Bickerdike, appellant, and Murray, respondent, Q. B.) 320

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GAMBLING CONTRACT :—The buying and selling of shares of stock, on margins, as a mere speculation, and without any intention on either side of actual delivery of the stock, is a gambling contract, and consequently, no action will lie for anything connected therewith. (Allison vs. Macdougall, S. C.)..... 355

HABEAS CORPUS :—*Vide* CUSTODY OF A CHILD.

INCIDENTAL DEMAND :—*Vide* PRACTICE.

INSANITY :—*Vide* PRACTICE.

INSCRIPTION *en faux* :—An application to inscribe *en faux* against the certificate of the Prothonotary regarding the posting of a report of distribution will not be granted after the report has been homologated, in favor of an opposant, who knew of the *faux* complained of prior to the judgment homologating the report. (Pangman vs. Pauzé & Robertson, opposant, and Lamarche, opposant, S. C.)..... 140

INSURANCE :—Where, after a fire, the insured notified the insurance company of other insurances upon the same property, and the agent of the company thereupon furnished the insured with a printed form upon which to make a claim for him, and appointed valuators to value the same, and submitted the estimation of the damage caused by the fire to the arbitration of persons named by themselves and the insured, the company thereby acknowledged the existence and validity of their policy as a valid and binding contract, and waived any and all objections which they might otherwise have urged, founded on the want of notice of the other insurances effected in other companies. (La Fonderie de Joliette, appellant, et La Compagnie d'Assurance de Stadacona contre le feu et sur la vie, respondent, Q. B. 194

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LAWYER'S LETTER :—The cost thereof can be recovered by the creditor from his debtor (Michaels vs. Plimsull, C. C.)..... 29

LEASE :—Where premises leased are partially destroyed by fire, and it is proved, that they form one establishment extending from one street to another, and that the retention of the portion not destroyed (in the possession of a sub-tenant) would cause grave inconvenience to the owner, and that the exigencies of commerce and of tenants required that the property should be entirely rebuilt and extend from street to street, the owner has a right to obtain the resiliation of the lease and sub-lease; reserving to the sub-tenant his recourse for damages. (Penny et al. vs. The Montreal Herald Printing Co., & Cochenthaler, *mis en cause*, S. C.)..... 83

" :—A transfer of, need not be registered, except as a protection against other transferees. (Baylis et al., appellants, and Stanton *es qual.*, respondent, Q. B.)..... 203

LETTER OF GUARANTEE :—A, given to a Bank, securing the payment of notes discounted by said Bank, for certain firms mentioned, does not bind the guarantors to a Bank constituted by the amalgamation of the said Bank with another Bank. (The Consolidated Bank of Canada, appellant, and The Merchants Bank of Canada, respondent, Q. B.)..... 370

LIBEL :—An action lies for libel in a pleading. (Hall, appellant, and the Mayor etc. of Montreal, respondents, Q. B.)..... 129

" :—Where a newspaper publishes that a party was a freemason, during an election at which such party is a candidate, and the statement is proved to be untrue and had the effect of preventing persons from voting in his favor, he is entitled to recover damages (assessed in the present instance at $400.) (Lareau vs. La Compagnie de l'Imprimerie de la Minerve, S. C.)..... 336

LOAN :—A, to a person not in trade, is not a commercial matter, and is not, consequently, prescriptible by the lapse of five years, and the taking of a *bon* therefor is not a novation of the debt. (Macdonald vs. Dillon, S. C.)..... 214

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MORTGAGE:—*Vide* REVOCATION.

" :—Hypothecary creditors have no privilege on the rent of the property subject to their mortgage, received by the assignee of the mortgagor or *détenteur*, for the period between the date of the assignment and the sale of the property. (Dupuy vs. McClanaghan, C. of R.)..... 61

" :—It is not competent to hypothecary creditors, who have not been collocated in a judgment of distribution duly homologated, of the monies arising from a sheriff's sale of the real property hypothecated in their favor, to sue to recover from a party alleged to have been illegally collocated in such report, on the ground that, according to the Registrar's certificate attached to the Sheriff's return, such party ought to have been so collocated, and that plaintiffs should have been collocated for the amount of their demand preferentially to him. (McDonell et al. vs. Buntin, S. C.)..... 73

" :—Where a hypothecary creditor, who is first in rank, cedes his right of preference on the monies arising from the sale of a portion of the property hypothecated, in favor of another hypothecary creditor, who is only third in rank, such creditor having first rank cannot afterwards claim to rank for his full claim, without deduction of the monies received under said sale, to the prejudice of a hypothecary creditor, who is second in rank, in the distribution of monies arising from the sale of the balance of said property. (Pérodeau vs. Quintal & Parent, cr., collocated, & Préfontaine, contestant, C. of R.)..... 74

" :—Where an obligation and mortgage has been executed by a wife assisted by her husband (described as acting as well in his own name as for the purpose of authorising his wife) and by a curator to a substitution, as obligors, and the circumstances establish that the wife alone was really the borrower (the husband and curator being parties merely to authorize the transaction), the wife will be condemned to pay the amount of the obligation. (Francis et al., vs. Bousquet et al., C. of R.)... 115

MUNICIPAL CORPORATIONS :—Have a right to pass by-laws against nuisances hurtful to public health. (Exp. Pillow et al., for *certiorari*, and The City of Montreal, respondent, S. C.)..... 216

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" " " :—An opposition to a sheriff's sale of immoveables, accompanied by a judge's order, fyled within the fifteen days preceding the day fixed for such sale, has the effect of legally stopping the sale. (The Heritable Securities and Mortgage Investment Association vs. McKinnon, & McKinnon, opposant, S. C.)..... 345

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PLEDGE :—The, allowed to be deposited in lieu of suretyship, under Art. 1963 of the Civil Code may consist of a hypothec on real property. (Pangman vs. Pauzé, & Robertson, opposant, and Pangman et al., petrs, S. C.)..... 147

PRACTICE :—In an action for slander alleged to have been uttered in 1881, where the defendant pleads he did not utter the slander then *or at any other time*, and the proof established utterance in 1879 and 1880, the variance is not material. (Denis vs. Theoret, C. of R.)..... 12

" :—*Vide* EXEMPTION FROM SEIZURE.

" :— " LAWYER'S LETTER.

" :—A defendant is not entitled to take advantage of an irregularity in a writ of *saisie arrêt* affecting the validity of the summons of the *tiers saisi*, but of which he does not complain. (La Banque Molson, appellant, and Lionais, respondent, Q. B.)..... 40

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PRACTICE :—An entry, by which a writ returnable on the 24th was entered as returned on the 26th, may be shown to be a clerical error, particularly when there is evidence from the record itself that the entry was the result of an error. (Do.)..... 40

" :—*Vide* SUIT ON SUIT.

" :—*Vide* MORTGAGE.

" :—An opposition *afin d'annuler* may be dismissed on motion, when, on its face, it cannot be maintained. (Felton, appellant, and Bélanger et al., respondents, Q. B.)..... 79

" :—Where a lessor prematurely sues in ejectment for non-payment of rent, and, pending the suit, files an incidental demand *for* damages owing to not having got possession of the leased premises, the incidental demand will be held to be a complement of the principal action, and the allegations of the incidental demand will avail to justify the conclusions of the principal demand for ejectment. (Donaldson, appellant, and Charles, respondent, Q. B.)..... 87

" :—The plaintiff, who has made option of a trial by jury by his declaration, cannot withdraw without the consent of the adverse party. (Heyneman vs. Davis, S. C.)..... 108

" :—When the copy of the writ of summons served on a defendant differs from the original, the plaintiff should be allowed, on motion to that end, after the filing of an exception *à la forme*, to serve a new and correct copy. (Bourdon *et vir* vs. Picard et al., C. of R.)..... 139

" :—The Court of Review will reverse a judgment refusing to grant such a motion; and, where it is evident that the difference between the writs is of a trifling character, they will grant costs to the moving party in both courts. (Do.)..... 139

" :—*Vide* INSCRIPTION EN FAUX.

" —— " PLEDGE.

" :—Where a tutor is sued by his ward, when of age, to render an account, and he pleads that he has been always willing to do so; but asks that the action be dismissed with costs; and at the same time prays *acte* of the production of an account filed with the plea, the plea will be dismissed, and the defendant ordered to file his account purely and simply in due form. (Wood & ux. vs. Wilson, Q. of R.)..... 149

" :—A seizure of "all the right, title and interest" of the defendant in and to certain real estate described, under and by virtue of a deed of sale, of which a full description is given, is illegal and in violation of Arts. 632, 637, 638 and 648 of the Code of C. P., and the defendant has a legal interest in pleading such illegality. (Carter vs. Molson, & Molson, opposant, S. C.)..... 151

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" :— " CAPIAS AD RESPONDENDUM.

" :— " PRIVY COUNCIL.

" :— " COUPONS.

" :—A constable, sued for damages arising out of an act done by him in the performance of his official duty, is entitled to notice of action under art. 22 of the Code of C. P. (Wilhelmy vs. Brisebois, C. C.)..... 175

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:—The Court may, in its discretion, and when sufficient cause is shown, extend the delay within which security may be given by creditors posterior to a creditor collocated in a report of distribution, for the value of a life rent under Art. 1914 C. C., even after the delay fixed by the judgment homologating the report has elapsed. (Pangman vs. Pauzé, and Robertson, opposant, and Pangman et al., petrs., S. C.)..... 182

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" :—The incapacity arising from insanity only begins from the date of the interdiction, and up to that time the interdict remains, as regards third persons, at the head of his patrimony and preserves the gestion thereof; and third persons, not having quality to demand the interdiction, are entitled to serve all necessary notices and significations on the interdict prior to his actual interdiction. (Symes & *vir.* vs. Farmer, and Farmer, cur., opposant, S. C.) 185

" :—When the change of *status* of a party to a suit only occurs after the proceedings by way of execution against him have commenced, such proceedings may continue, notwithstanding such change of *status*. (Do.)... 185

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" :—A person over 70 years of age is not exempt from imprisonment for contempt of Court. (Ross et al. vs. O'Leary, & O'Leary, petr., S. C.)..... 220

" :—Where several plaintiffs are each claiming a right against the same defendant, or where several defendants are sued separately by the same plaintiff, and it appears there is but a single question on the determination of which all the suits must depend, the Court may, in its discretion, grant an injunction to stay proceedings upon the several contestations until the question involved therein shall be determined in an action brought specially for the purpose of testing it. (The North British and Mercantile Fire and Life Ins. Co. et al. vs. Lamb *es qual*, S. C.)..... 222

" :—*Vide* DIVORCE.

" :—Where a party inscribing in Review fyles a *désistement* from his inscription, after appearance and *factum* have been fyled by the respondent, and after the inscription on the role for hearing, the respondent is entitled to full fees, as in a case settled before hearing. (Milloy vs. O'Brien, and Bury et al., Assignees, and Milloy, petitioner, C. of R.)..... 289

" :—*Vide* BAILIFF'S RETURN.

" :—When an immovable has been sold, under an execution issued out of the Circuit Court, not returned as of course into the Superior Court, a writ of possession can only be asked for in the Superior Court. (Evans vs. Hurtubise, and DeBerczy *adjudicataire*, C. C.)..... 294

" :—When a tenant is sued in a petitory action he cannot ask that the action be dismissed but only that he may be dismissed from the cause when the lessor has been brought into the case. And if the lessor designated denies that he is lessor, the tenant, on notice of such defence, must prove the truth of his declaration. And such indication must be made by preliminary plea. (Dupuis vs. Bouvier, C. of R.) 339

" :—*Vide* OPPOSITION AFIN D'ANNULER.

" :—CURATOR *to a vacant succession.*

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" :—In renewing registration against cadastral lots, an error as to the name of the possessor of the property will not invalidate the procedure (Do.)..... 81

" :—It is not necessary to re-register a transfer of a hypothecary claim against the cadastral number (Do.)..... 81

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" :—The action is properly directed against the purchaser, notwithstanding that he may have abandoned the property *en justice*, and a curator have been appointed to the *délaissement* (Do.)..... 218

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RENT :—*Vide* MORTGAGE.

" :—Where a tenant in good faith has paid ten months' rent in advance, and his landlord has become insolvent before the expiration of the term so paid in advance, and the tenant has remained in possession of the premises, the payment is valid, and may be invoked by the tenant when sued in the name of the assignee of the insolvent, for rent from the date of the assignment. (Dupuy vs. McClanaghan, C. of R.)..... 61

" :—When the, is payable on the 1st of May, it cannot be sued for on that day. (Donaldson, appellant, and Charles, respondent, Q.B.)..... 87

" :—*Vide* PRACTICE.

" :—Taxes, undertaken to be paid by the tenant, are part of the rent, and are, consequently, subject to the five years' prescription. (Ouimet vs. Robillard, S. C.)..... 227

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" " :—A, cannot be contested after it has been duly homologated, even by authority of a judge. (Pangman vs. Pauzé, and Robertson, opposant, and Lamarche, contestant, S. C.)..... 181

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" " :—*Vide* PRACTICE.

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" :—Purchasers, in a sale of coal, with the option of taking the coal at the weight stated in the Bill of Lading or of having it re-weighed, who accept it without re-weighing, and weigh it privately on their own scales, without notice to the vendors, and mix it with other coal, forfeit their rights in respect to a deficiency, and are bound to take the coal at the weight stated in the Bill of Lading. (Do.)..... 14

" :—*Vide* EVIDENCE.

" :—*Of stocks* :—*Vide* GAMBLING CONTRACT.

" :—When the purchaser of an immovable has reason to fear eviction in respect of a claim exceeding in amount the balance due by him to the vendor in capital and interest, and he offers before suit by the vendor to pay him such balance, provided he give the purchaser security against the apprehended eviction; and after suit deposits said balance with his plea, the action of the vendor should not be dismissed purely and simply, but he should be ordered to furnish the security asked, within a delay to be fixed by the Court, and in default of his giving such security within the delay, his action be dismissed. And the vendor should, under the circumstances, pay all costs. (Connors vs. Stewart, C. of R.)..... 358

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" " :—In an action of, the defendant cannot, under any circumstances, be examined as a witness, to prove the plaintiff's case. (Ducharme vs. Loyselle, S. C.)..... 145

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" " :—The, has no jurisdiction or authority in law to set aside a discharge granted to such secretary-treasurer, but such discharge must be set aside by a competent tribunal under the provisions of 40 Vic. ch. 22, sec. 36, as amended by 41 Vic. ch. 6, s. 19. (Do.) 109
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fine for selling without license. (Exp. Edson for *certiorari*, and The Corporation of Hatley, respondent, S. C.) 312

" :—A Municipal Corporation cannot prohibit the sale of intoxicating liquors within the Municipality. (Do.) 312

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