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*RUSSELL & LEFRANÇOIS.*

The judgment of the Supreme Court in this case was rendered on the 11th January, 1883, but as yet no report of it has seen the light. The proceedings on the appeal to the Supreme Court present some peculiarities which it is desirable to make known beyond the precincts of the modest retreat where the highest of our courts makes known the results of its vigils.

In its passage through the very inferior tribunals of this province, the case was one purely of evidence. The question to be decided was whether an eccentric old man, formerly a pilot, was insane when he made a will leaving almost the whole, or nearly the whole, of his property to a woman, who was married to him publicly and whom he believed to be his wife, and who for all that is known in this case was his wife. The person excluded by this will was a niece who had lived with the testator till after his marriage, and whose principal pretension in the suit was that her uncle had made a will in her favor not four weeks before the one she complained of, that he was perfectly sane when he made the former and insane when he made the latter will. Her second proposition was that she was an heir at law. By a judgment pronounced by Chief Justice Meredith and showing all his well known care and discernment, the will was maintained. The niece appealed, and the judgment was maintained by the Court of Queen's Bench, the Chief Justice alone dissenting. From this judgment the niece appealed again. The case was heard by the Supreme Court towards the end of 1882. The Court, composed of Chief Justice Ritchie, Strong, Fournier, Taschereau and Gwynne, JJ. (the two first dissenting), reversed the judgment of the two Provincial Courts, and rendered the following judgment:

"Considering that in the judgment rendered by the Superior Court for Lower Canada, sitting at Quebec, in the District of Quebec, on the 2nd of May, 1880, there is error;

"And considering that in the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), rendered at Quebec on the 4th February, 1882, on the appeal of the said Elizabeth Russell from said judgment of the Superior Court, there is also error;

"This Court did order and adjudge that the demand in intervention of said Elizabeth Russell, and the *moyens* of intervention filed and of record in this cause, and the declaration of the said Elizabeth Russell against the said Julie Morin, be amended and be henceforth held and taken to be amended for all lawful intents and purposes whatsoever, by adding to each of them in the record the allegations following, that is to say:—

"That the said will of the 27th day of No-
" vember, 1878, and the universal bequest
" therein made to Julie Morin, are also null
" by reason of error, the said William Rus-
" sell having made such will and the said
" universal bequest, because he believed that
" the said Julie Morin was his lawful wife,
" when in truth the said Julie Morin was
" not then his lawful wife," and by adding also to the conclusions of the said paper-writing in the record, a demand that the universal legacy made to the said Julie Morin by the said will be set aside and annulled.

"And this Court, proceeding to render the judgment which the said Superior Court, exercising original jurisdiction, *ought to have rendered*, and which the said Court of Queen's Bench for Lower Canada, upon the appeal of the said Elizabeth Russell, *ought also to have rendered*, did order and adjudge that the said appeal of the said Elizabeth Russell should be and the same was allowed, and that the judgments aforesaid should be and the same were reversed, and that the contestation by the said Julie Morin of the demand in intervention of the said Elizabeth Russell should be and the same was dismissed, and that the said intervention of the said Elizabeth Russell should be and the same was maintained, and that the conclusions thereof should be and the same were granted with costs of the said Superior Court against the said Julie Morin.

"And this Court did further order and adjudge that the action of the said Elizabeth Russell against the said Julie Morin should be and the same was maintained with costs against the said Julie Morin."

Without entering into the particular merits of this decision, the result of the litigation is unsatisfactory, and even disquieting. In the first place it was confidently stated in Quebec early in December, 1882, that is to say, more than a month previous to the rendering of the judgment, that the appeal would be successful. The knowledge of this secret may have been obtained surreptitiously, but it is unfortunate, to say the least of it, that an accident should have occurred which gives room to suspect an exchange of confidence between the partisans of the interesting and disinherited niece, and those who were to be her judges.

The next disturbing element of the judgment is, that it presents the spectacle of four judges overwhelming seven on a pure question of evidence, and particularly one where the burden of proof was on the appellant. Of course the theory of the law is that the last judgment is presumed to be right, and that the decision of the majority is to be considered as infallible as the unanimous finding of the whole Court. It is impossible there should be any other theory, but people cannot be set at ease by telling them that it is convenient they should be satisfied. It is impossible to prevent an illogical public from saying, "we know that convenience and not "superiority dictates the selection of judges "to some extent and decides almost entirely "in what court they shall sit." They will not believe that the echoes of the preponderating voice are a bit more authoritative at Ottawa than in some rural district, or that the scarlet and ermine adds a tittle to the discriminating powers of the judge. Again, there is a sixth judge, who might have sat and who ought to have sat; and it is quite possible that if he had been in his place the judgment would have been the other way. We have therefore the judgment of two courts reversed, three to two, with the opinion of one member of the Court suppressed.

No importance is to be attached to the argument that the case was one of evidence, and that therefore it should not be touched. It is more than clear that if the evidence is submitted to a court of appeal the judges are bound to consider it, and it is only to waste time for the three judges to tell us indirectly that they are now aware they fell into an egregious error when they gave Mr. Gingras $3,000 for the end of his finger. Everybody already knows they were wrong, notwithstanding the theory of authority. If, then, the majority was convinced that the courts below had misjudged the evidence, they were bound to reverse. When it is said courts do not readily reverse on questions of fact, reference is made to an operation of the mind and not to a function of the Court. Unfortunately the three judges of the Supreme Court thought themselves justified in ordering the appellant's intervention to be amended by adding the allegation that the bequest was null from error, that it was made to the testator's wife, Julie Morin, whereas she was not then his lawful wife. The power to rectify mere errors by amendment is very beneficial, and it should be extended as much as possible; but nobody ever heard of a whole cause of action being introduced in an appeal to bolster up the appellant's case, or indeed anywhere without giving the party an opportunity to meet the allegation. The Supreme Court could not know judicially that Julie Morin was not the wife of William Russell, and legally speaking there is no evidence of the fact.

In face of a proceeding so utterly at variance with all ideas of fair-dealing and so contrary to the usages of courts, it is difficult to escape from the conclusion that the amendment indicates want of a very firm faith in the justness of their decision as to the case before them.

The power to amend which the Supreme Court, acting as a Court of Appeal, claims exceptionally to possess, is based on a Statute which, by the peculiarity of its phraseology, is remarkable, even amidst the curious remains of our legislative literature. It is in these words: "At any time during the *pending* of any appeal before the Supreme Court, the Court may, upon the application of any of the parties, or without any such application, make all such amendments as

may be necessary for the purpose of determining the existing appeals, or the real question or controversy between the parties *as disclosed by the pleadings, evidence or proceedings.*" 43 Vic., c. 34, s. 1. We may perhaps make a shrewd guess at what is meant by "the pending" of an appeal, but it is impossible to understand, what need there is for an amendment of what is already disclosed by the pleadings, evidence or proceedings. The majority of the Supreme Court evidently thought it was a license to add a totally new cause of action. In their haste to come to the rescue of the appellant, the learned judges never stopped to enquire whether it was within the powers of Parliament to make a law allowing the Supreme Court to introduce a totally new cause of action into the proceedings. The power is to create a Court of Appeal; it is not a function of an appeal court to supply issues that are not pleaded. The so-called amendment is a misnomer, it amended nothing, it created a pretension which was not even hinted at in the pleadings. Further, this violent proceeding is attempted to be justified by a "motive" which is not in accordance with fact. The amendment was not made because the Superior Court or the Court of Queen's Bench was in any error as to the question of law. It was made to give a broader basis to the judgment of the Supreme Court.

R.

## NOTES OF CASES.

### COUR SUPERIEURE.

MONTRÉAL, 30 novembre 1883.

*Coram* PAPINEAU, J.

MÉNARD v. LUSSIER & al.

*Paiement—Mise en demeure—Offres réelles—Absent.*

JUGÉ:—*Que lorsque le paiement doit se faire en la demeure du créancier et que le créancier décède avant de recevoir son paiement, le débiteur ne peut déposer le montant dû entre les mains du protonotaire et poursuivre les créanciers pour sa décharge, mais qu'il doit mettre légalement les héritiers du créancier en demeure de se rendre au lieu convenu pour y recevoir leur paiement.*

*Que s'il y a des absents parmi les héritiers, le débiteur doit se prévaloir de l'acte des dépôts Judiciaires, Québec,* 1871, 35 *Vict.*

Le demandeur aurait emprunté, en 1878, de feu Demoiselle Cordélia Lussier, une somme de $500, payable dans un an en la demeure de la créancière, à Varennes.

La créancière mourût l'année suivante laissant les défendeurs pour héritiers. Le demandeur, en 1881, voulant s'acquitter, se rendit au lieu convenu, ayant alors constaté le décès de sa créancière, il déposa d'abord le montant dans une banque, puis en cour et intenta une action contre les héritiers pour obtenir une décharge.

Les défendeurs plaidèrent que le paiement devait se faire en la demeure de feue Cordélia Lussier, et qu'ils n'avaient jamais été mis en demeure de se rendre à cet endroit pour recevoir leur paiement, et que le demandeur n'avait pas fait d'offres réelles, ni au lieu convenu, ni aux défendeurs personnellement.

La cour rendit le jugement suivant:

"La cour, après avoir entendu les parties, tant sur la motion des défendeurs pour faire rejeter du dossier la preuve faite par le témoin Brais du paiement et des offres ou tentatives d'offres au domicile de Demoiselle Cordelia Lussier, que sur le mérite, etc.;

"Attendu que cette preuve de paiement et offres par le dit Brais se trouve comprise dans une déposition contenant d'autres faits qu'il était permis au demandeur de prouver par témoin, la dite motion n'est pas accordée, mais le témoignage restera au dossier pour valoir ce que de droit seulement, et les frais d'icelle motion suivront le sort de la cause.

"Et adjugeant sur le mérite:

"Considérant que le demandeur a consenti l'obligation du 13 février 1878 en faveur de Demoiselle Cordélia Lussier pour la somme de $500 avec intérêt du taux de sept pour cent l'an, qu'il s'est obligé par son acte passé devant Mtre A. H. Bernard, notaire, de rembourser au bout d'un an, en la demeure de la dite créancière, qui demeurait alors au village de Varennes, et que les parties au dit acte ont fait élection de domicile en leurs demeures actuelles pour l'exécution du dit acte;

"Considérant que le demandeur n'a pas payé le capital de la dite obligation au temps

et au lieu convenus dans le dit acte, et qu'il n'a payé qu'une année d'intérêt, savoir, celle finissant au 13 février 1879 ;

"Considérant que la dite créancière est décédée dans le courant de mai 1879, et que les défendeurs sont ses représentants ; mais que le fait de son décès n'a pas pu avoir l'effet de changer la convention des parties que le paiement serait effectué au lieu déterminé par cette convention qui fait la loi des parties ;

"Considérant qu'il est prouvé que Félix Lussier, l'un des défendeurs et héritiers de la dite créancière Cordélia Lussier demeurait encore, au temps de l'institution de la poursuite au lieu où le paiement devait se faire ;

"Considérant que le demandeur n'a pas prouvé avoir fait des offres réelles au lieu convenu pour le paiement, et qu'il n'a pas assigné les défendeurs à venir y recevoir le paiement de leur créance, mais qu'il les a assignés à venir le recevoir ailleurs qu'au lieu convenu, c'est-à-dire au Greffe de cette Cour, où ils ne sont pas tenus de se rendre pour recevoir leur argent ;

"Considérant que pour ceux des défendeurs dont le domicile est en dehors de la Province, le demandeur ne s'est même pas prévalu de l'avantage, que la loi qui donnait de déposer et consigner entre les mains du Trésorier de la Province, et que son action est mal fondée, la cour l'en déboute avec dépens distraits à Maîtres Barnard, Beauchamp & Barnard, avocats des défendeurs ; sauf au dit demandeur à se pourvoir." *

*Pelletier & Jodoin*, pour le demandeur.

*Barnard, Beauchamp & Barnard*, pour les défendeurs.

(J.J.B.)

## SUPERIOR COURT.

MONTREAL, February 7, 1884.

*Before* TORRANCE, J.

GILMAN v. ROBERTSON et al.

*Injunction to restrain from voting on shares—Discretion of Court.*

*In determining an application by a shareholder for an injunction, the Court will look to the circumstances of the case, and adopt the course which is most for the advantage of the whole body of shareholders. So, where a shareholder asked for an interim order to restrain persons from voting on certain shares, and it appeared that the shares had been held by the defendants for more than a year, to the knowledge of the petitioner, an injunction was refused, more especially as the petitioner had a remedy by quo warranto if he were wronged by an illegal vote.*

This was an application for an injunction. Plaintiff had instituted an action to have 338 shares of stock in the Royal Canadian Insurance Company, transferred by Kay to Robertson in trust on the 31st December, 1881, and by the latter to Arthur Gagnon on the 30th December, 1882, and by said Gagnon on said last mentioned date to said defendants and others, declared to have still due payable and unpaid arrears of calls thereon which were payable before any of said transfers were made, and to have defendants as transferrees of said stock with knowledge of the facts, declared, *inter alia*, to be shareholders in arrears of calls on stock and not entitled to vote. A meeting of shareholders was called for 7th February, and it was asked from the Court that an order go enjoining defendants not to vote on the stock held by them, or at any rate on the 338 shares derived from Kay. The evidence of Mr. Gagnon shows that the transfer from Kay to Robertson was without money consideration. The consideration was that Robertson should hold until the shares should realize so much on account of interest. Robertson took them in trust. They were afterwards transferred by him to Gagnon for $15 per share, and by him transferred to the defendants on 31st December, 1882. These were all directors before the transfer from Kay and cognizant of the transfer from him, except Benjamin Ross and Sise. Plaintiff also knew of the nature of the transfer from Kay to Robertson at or about the time it was made, and approved of it. He also knew of the subsequent transfers.

PER CURIAM. The last transfers were made on the 31st December, 1882, more than a year ago. That is to say, that plaintiff has been quiescent upwards of a year and now beginning his action, which may or may not be well founded, for we have still to discuss the merits, he asks for an interim injunction de-

* Confirmed in Review, 31 Jan., 1883.

priving the defendants of their rights of possession of this stock which they have held with his knowledge during this period and doubtless voted upon. I do not prejudge plaintiff's rights, I am not in a position to decide them on the single deposition of Mr. Gagnon, but it is my duty to use a wise discretion as to whether this interim order should be made, which deprives parties of a possession and enjoyment which they have had undisturbed with the knowledge of plaintiff so far as the evidence goes. See Kerr, Injunctions, p. 16; pp. 482, 483, [551, 552]. I would further remark on the complaint of Mr. Trenholme that the company did an illegal act in taking the mortgage from Kay, that the transaction was not the lending of money which the charter forebade where the borrower was a director or shareholder. It was rather the taking of security from a debtor who was unable to pay, and the transfer of stock from Kay was probably commendable for the same reason. I would here emphasize a remark of Mr. Kerr just now read, that in determining the question, the Court looks to the peculiar circumstances of each case, and will, as a general rule, adopt that course which is most for the advantage of the whole body of the shareholders. A high French authority referring to these interim proceedings (1st vol., Bonjean, 2), says that the administration of justice in France is more repressive than preventive. What do the equities here demand? If something is done at the meeting to-day by which a director is elected by a vote which should not have been cast for him, it will be easy and very summary for a *quo warranto* to give redress. I do not think the case now before the court, demands its interference by injunction.

Of course, I say nothing as to the rights of the petitioners in the action itself. I see here the possession of the defendants at any rate since the 31st December, 1882, to the knowledge of petitioner. Let the position of the parties remain as it is until adjudication unless some other cause of disturbance arise.

Injunction refused, costs reserved.

*N. W. Trenholme* and *A. W. Atwater*, for petitioner.

*J. J. Maclaren*, *L. N. Benjamin* and *C. A. Geoffrion*, for defendants.

## SUPERIOR COURT.

*Before* Torrance, J.

Montreal, February 11, 1884.

Baxter v. The Union Bank of Lower Canada.

*Service of Summons—Joint Stock Company.*

*Service of summons on a Bank or other joint stock company should be made at its chief place of business.*

Per Curiam. The question here was the merits of an exception *à la forme.*

The defendant had been served at its branch office in Montreal upon its agent, to answer a claim arising out of a transaction there. It objected that it should have been served at Quebec, even to answer in Montreal.

By its charter, 29 Vic., c. 75, s. 17: "The "chief place or seat of business of the Bank "shall be in the city of Quebec, but the directors may open and establish in other cities, "towns and places in this Province, branches "or offices of discount and deposit of the "said Bank," &c. By C. C. P. 61, "Service upon a joint stock company may be made at its office, speaking to a person employed in such office, or elsewhere upon its president, secretary or agent." By C. C. P. 63, "Service "upon a body corporate is made in the "manner provided by its charter, and in the "absence of such provision, in the manner "prescribed in the two preceding articles." The codifiers on C. C. P. 61, refer to 23 V. c. 31, an act respecting the Judicial Incorporation of joint stock companies for certain purposes. S. 55 of this act says, "Service of all "manner of summons or writ whatsoever "upon the company may be made by leaving a copy thereof at the office or chief "place of business of the company, with any "grown person in charge thereof, or elsewhere with the president or secretary "thereof, or if the company have no office or "chief place of business," &c.

It is plain that the operations of the Bank outside of Quebec are limited to discounts and deposits, and it seems reasonable that a matter of such importance as a suit should at once be brought under the notice of the chief authorities who are at Quebec. That can best be done by serving them at Quebec.

C. C. P. 61 speaks of service at its office. Surely that means the chief office, looking at the reason of the rule or the words of the statute referred to, namely 23 Vict., c. 31. It is not accurate to conclude that the office intended by C. C. P. 61 is an office wherever they have a branch or agent. Again, let us look at the case from another point of view. If the service at Montreal is good as regards the writ of summons, the service there of a rule to answer interrogatories on *faits et articles* should be good. The defendant should answer with one day's notice, but the Montreal agent has no power to make such answer. The directors in Quebec must authorize the answer, C. C. P. 224, and in order to have time to answer, the rule should be served at Quebec. If service of the rule at Quebec is necessary, surely the service of the summons at Quebec is necessary too. *Toupin* v. *La Compagnie des mines de St. François*, 5 Rev. Lég. 209, appears to be in point.

Exception maintained.

*Greenshields, McCorkill & Guerin* for plaintiff.
*Lunn & Cramp*, for defendant.

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SUPERIOR COURT.

MONTREAL, February 13, 1884.

*Before* TORRANCE, J.

TAYLOR et al. v. BROWN, and AUDENRIED et al., T. S., and THE FEDERAL BANK OF CANADA, opposants.

*Garnishment—Insolvency of defendant.*

*Judgment on the declaration of a garnishee operates a judicial assignment to the plaintiffs, and an opposition subsequently filed by another creditor, alleging insolvency of the defendant (as of date of opposition), and asking that the moneys be paid into Court is insufficient, and will be rejected on motion.*

This was a motion by plaintiffs to reject the opposition of opposants.

The opposants by their opposition set forth that on the 31st October, 1883, the defendant was condemned to pay to opposants the sum of $1,510.72 and costs; that on the 28th December, 1883, judgment was rendered in the present cause declaring an attachment made by plaintiffs in the hands of the garnishees, Gershom Joseph, Horace Joseph, the Singer Manufacturing Company, and John Creilly, good and valid, and ordering them to pay over to plaintiffs the sums of money by them declared to be due by them to the garnishees, Audenried, Brown & Co., who were the same as the defendant: That on the 4th January, 1884, judgment was rendered, declaring the attachment made by plaintiffs in the hands of J. D. Nutter & Co., good and valid, and ordering said Nutter & Co. to pay the money in their hands due defendant to plaintiffs; that defendant was now insolvent and unable to pay his debts; that by reason of said insolvency, opposants were entitled to share in said moneys which should be paid into court and distributed according to law. Prayer accordingly.

PER CURIAM. It is to be observed here that the allegation by opposants of insolvency does not go further back than the date of the opposition, namely, the 10th January, 1884, and the judgments against the garnishees are of date the 28th December, 1883, and the 4th January, 1884, being anterior dates. The seizure by plaintiffs and transfers by the judgments against the garnishees should therefore operate and be efficacious in favour of plaintiffs. The plaintiff is preferred, C. C. P. 602, saving the case of insolvency and privileged claims, and insolvency does not appear before the 10th January. Further, by C. C. P. 625, the judgment on the declaration of the garnishees is equivalent to a judicial assignment to the plaintiffs. On the face of the opposition, therefore, the rights of the plaintiffs should prevail and the motion be granted.

Opposition rejected.

*Macmaster, Hutchinson & Weir*, for opposants.
*Hatton & Nicolls*, for plaintiffs.

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SUPERIOR COURT.

MONTREAL, February 13, 1884.

*Before* TORRANCE, J.

STEPHEN et al. v. THE MONTREAL, PORTLAND & BOSTON RAILWAY CO., and BARLOW, intervener.

*Procedure — Intervention in injunction suit — Delays.*

*Where the principal action is of a summary nature the proceedings on an intervention therein are governed by the same rules.*

This was a motion by petitioners to reject the inscription for evidence and hearing by default as premature and irregular.

PER CURIAM. The proceedings by petitioner are of a summary nature under C. C. P. 1000 *et seq.* and 1003. The usual delays for appearance and pleading do not apply. The petitioners contend that on the intervention the usual delays do apply. Against this pretension it is said that the intervention being an incident in the summary proceedings for injunction must be governed by the same rules. The accessory must follow the principal. *Accessorium regulatur secundum principale. Accessorium sequitur principale.* It would be intolerable if the intervener introducing himself into the record could have the effect of entirely altering the procedure and so deprive the case of its summary character. The case of the *Merchants' Bank* v. *The Montreal, Portland & Boston Railway Co.*, and *Ingram*, guardian, and *Shepherd*, intervener, decided by this Court and confirmed in review, is an entirely different case. The intervener there introduced himself into the record to protect his rights against the plaintiff, and there the ordinary procedure was observed as between him and plaintiff.

The demand by plaintiffs in that case was instituted under the ordinary procedure, and properly the intervention followed the same rules. Here in the present case, the exceptional procedure governs the petitioners and all the parties, because it is an exceptional case. In the present case the intervener is in the exercise of his legal rights, and his inscription should stand.

Motion rejected.

*J. L. Morris*, for intervener.
*James O'Halloran, Q.C.*, for petitioner.

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## CIRCUIT COURT.

RICHMOND, January 21, 1884.

*Before* BROOKS, J.

ROBERT ALLEN et al. v. THE CORPORATION OF RICHMOND.

*County Council—Rescission of procès-verbal of road.*

*A county council cannot, by mere resolution without notice, amend or rescind a procès-verbal establishing a highway.*

Petition to set aside resolution of council rescinding action taken previously, to wit, on 13th December, 1882, homologating procès-verbal of Ferry Road.

PER CURIAM. It would appear that a petition of certain ratepayers in Richmond County, asking that a road called the Ferry road should be homologated, was submitted to the County Council on 20th November 1882. That Wm. Brooke was appointed special superintendent to report upon the petition at next session of Council and lay out and open the road. That on the 13th December, 1882, said William Brooke did so report and produced a *procès-verbal* of said road, declaring it a county road. That it was then resolved by motion in said Council that said report and *procès-verbal* be homologated, and that the said road be declared a county road. Matters remained in this condition, except that public notice was given of said homologation, until the next general meeting of the County Council, held on 14th March, 1883 (there having been a special meeting held on the 19th February, 1883), when the minutes of the December meeting were read and confirmed, and subsequently a resolution was passed by which, after refering to the previous action of the Council with regard to the Ferry Road, it was resolved upon the casting vote of the Warden (who also voted) that the action then taken be rescinded.

Certain ratepayers being dissatisfied with this proceeding have, under the provisions of articles 698 and 100 of the Municipal Code, petitioned to have said resolution of 14th March last declared illegal and null and set aside, alleging the main facts briefly, to wit, the petition for the road, the appointment of special superintendent, his report and *procès-verbal*, its homologation and notice thereof, and alleging that the resolution of the 14th March was null and void, and the County Council had no right to pass such a resolution, and could not as they attempted to do, without notice and without the formalities required by law, rescind their previous action. That no such formalities were observed and

consequently the proceedings were null, and asking to have it so declared.

To this respondents plead, first, by exception *à la forme*, alleging several reasons, but in substance two grounds only which were relied upon at the argument:—

1st. That the petition was not sufficiently *libellée* (art. 700 M. C.)

2nd. That no substantial injustice had been alleged.

As to the first the facts are simply stated; the establishment by *procès-verbal* of a road in which Petitioners say they are interested, "its closing" by resolution, it is alleged without notice and without any of the formalities required by law. The question as far as this objection goes becomes simply a legal one. Do the grounds sustain the conclusion? If true, I think they do. What I am under this called upon to declare is, under the statement of the petition (and this cannot be extended or other grounds urged): Was the action of the Council illegal or not?

As to the second ground it is not in my opinion necessary, even under the omnibus saving clause of M. C. 16, which requires the allegation of substantial injustice if it appears that an illegal action had been taken by the Council; as, for instance, if in this very case it was necessary to give notice and amend or annul with the same formalities as had been taken to establish the road a mere resolution would come under the latter part of art. 16. I therefore dismiss the exception *à la forme*.

The respondents have pleaded to the merits:—"You are not municipal electors and all our proceedings are regular and legal, the resolution was legally passed," &c.

Now in this case I have nothing to do at present with the legality or illegality of the first proceedings. I am not called upon to examine them in any way. I have simply to say, 1st. Have the petitioners a standing in this court as municipal electors which enables them to prosecute it? Respondents say not, because they have not proved directly that they are British subjects or have paid their taxes. The Secretary-Treasurer of the Municipality has been examined and swears that they are municipal electors. I think though this evidence is general that in the present case, where the objection is raised by respondents only at the hearing and under the general issue, and they do not cross-examine or in any way attempt to show want of status, it is sufficient under the pleadings.

Then we come to the second ground; Was the proceeding legal? Can the Municipal Council by resolution annul a *procès-verbal* establishing a road?

Article 460 M. C. declares what powers they may exercise by resolution; 526 and 527 the only sections referring to roads and it is there stated that every Local Council may by by-laws order the opening, construction and maintenance of public roads or bridges, widening, altering, or change of position of roads or bridges. Query—Does this apply to County Councils?

In this case it is immaterial, as in no event does it give power to close roads established by *procès-verbal*, by resolution; while on the other hand Art. 810 says, every *procès-verbal* may at any time be amended or repealed by another *procès-verbal* drawn up in the same manner, on petition by the parties interested, or under order of the Council. 810 *a*. Every *procès-verbal* may be amended by the Council by by-law. Is power given anywhere under the Code to rescind or amend a *procès-verbal* by resolution without notice? If so, I have been unable to find it, and many years ago, for example, in the case of the Wellington Street extension in Sherbrooke, I advised the closing of the road by the same formalities by which it had been homologated as the only means of doing it, and so it was done.

The Council cannot, *ex mero motu*, by a simple resolution close the highways of the county or rescind their own former acts.

The Petition is therefore granted and the resolution annulled with costs against respondents.

Since preparing the above my attention (in the course of an argument relating to the same matter in another Court) has been directed to a decision of the Court of Queen's Bench, which fully sustains the position I have taken with regard to the nullity of the resolution attacked. (*Holton & Aikins*) 3 Q. L. R. 289.

*Maclaren & Leet*, for Petitioner.
*H. B. Brown*, for Respondents.