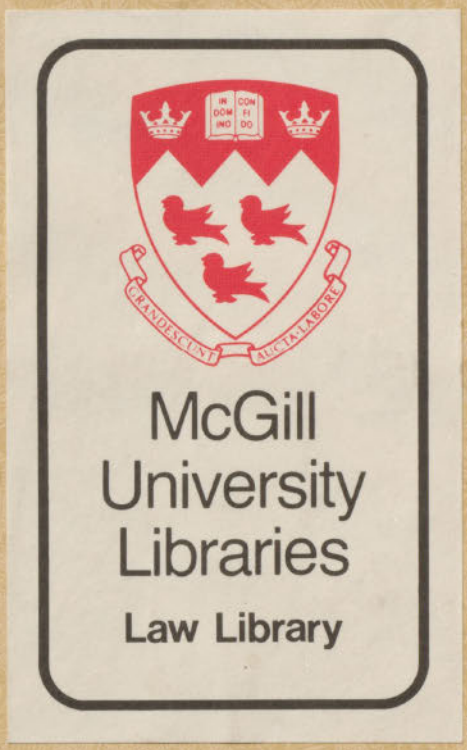
McGILL COLLEGE MOOT CLUB



Montreal, Tuesday,
November 9th 1916.

The first meeting of the executive of the moot court was held this afternoon in the meeting room of the Law Undergraduate Society, with Mr. J. H. Beauchamp in the chair. Dean Lee, who had kindly consented to attend, gave some valuable points as to how a moot trial should be conducted. The Chairman then read the case, which had been prepared by Hon. Judge Greenshields, and which was to be the subject for the first moot trial. E. Budyk, Law '16, and T. J. Kelly, Law '17, are to act for plaintiff, while J. P. Chabonneau, Law '16, and Frank Common, Law '17 are to look after the defendants interests. It was decided that the case be heard before Hon. Judge Greenshields on November 19th, 8 P.M. at the Strathcona Hall.

The meeting was then adjourned.

Respectfully submitted,
Lazarus Phillips.

Montreal, Thursday, November 11th, 1915.

Law Men to Argue an Interesting Case.

AT STRATHCONA HALL

Hon. Judge Greenshields, of the Supreme Court, Has Consented to Hear the Case.

The moot court, or mock court as it is more generally called, is to be revived amongst the Law men, and its first session will be held in Strathcona Hall on the evening of Friday, Nov. 19, at 8 p.m. The credit for this re-establishment is due J. N. Beauchamp, Law '16, and president of the Law Undergraduates, who first made the proposal and undertook all the necessary work in connection with it. With him in the chair the meeting held Tuesday evening completed arrangements and gave out the following case for argument:

B.—Plaintiff.

vs.

A.—Defendant.

A. the owner of a lot of land bearing the cadastre No. 85, signs the following document, dated June 1st, 1915 and on that date delivers same to B:—

"I, the undersigned, A., give to B. or any other person assigned by him the option on my property, cadastral No. 85, for the sum of $1,000.00, payable on the passing of the Deed of Sale. This option to expire on the first of November, 1915."

On the 15th of July, 1915, before B. has communicated in any way with A., but still having the option in his possession, A. writes to B., withdrawing and cancelling said option.

B. answers refusing to acquiese in such cancellation, and on the first of September, declares in writing, that he accepts the option, desires to exercise the same, and offers the purchase price to A., and demands a Deed to the property.

A. refuses. B. thereupon institutes an action against A. renewing his tender of the purchase price of the property and demands a title.

H. Budyk, Law '16 and T. J. Kelly, Law '17, are acting for the plaintiff, and J. P. Charbonneau, Law '16, and Frank Common, Law '17, for the defendant.

Hon. Judge Greenshields has consented to have the case heard before him.

The senior counsels will have 15 min. each to speak, the junior counsels, 10 min. each. With 4 min. for the plaintiff's counsel to reply.

The meeting will be conducted more in the form of a debate than of a real court trial. Anyone who is at all interested is invited to attend.

Refreshments will be served.

Montreal, Tuesday,
November 23rd, 1910.

The first moot trial of the term, which was held this evening, at the Strathcona Hall, was a marked success. The case was argued in most interesting fashion by both sides, and afforded not only pleasure, but also food for thought to all those who were present. Hon. Justice Greenshields, who heard the case, reserved the announcement of his decision to a near future date. Among those present were Dean Lee, Dr. Mahler and Prof. Schroeyer.

Refreshments were served after the trial, the meeting breaking up about 11 P.M.

Respectfully submitted,
Lazarus Phillips.

Montreal, Wednesday.
November 24th
1915

MOOT COURT IS REAL SUCCESS

Interesting Case is Well Argued by Future Lawyers.

JUSTICE GREENSHIELDS

No Decision Was Rendered, Judgment Being Reserved Until Next Tuesday.

The first Moot Court for the present session of the Faculty of Law received a good start last evening when a well-contested case was argued by four of the law students. Room B, Strathcona Hall, was the scene of the argumentation upon which Hon. Justice Greenshields, of the Supreme Court, presided.

Many of the members of the Faculty, including Dean Lee, Dr. Marler, Prof. Surveyer and Prof. Howard, attended, as well as most of the law students and a few outsiders.

J. N. Beauchamp, president of the Law Undergraduate Society, opened the evening with a few words in regard to the revival of the Moot Court, giving Dean Lee the credit for this revival.

H. Budyk, Law '16, senior counsel for the plaintiff, opened the case with a resume of the facts and an argument along the lines that a tacit consent had been given to the contract, substantiating his arguments with many quotations from reliable authors, but was frequently questioned by the Judge as to his interpretation and stand on these citations.

P. Charbonneau, Law '16, senior counsel for the defendant, did not for a moment admit that there had been consent, either express or tacit, arguing that more than mere receipt of the document was needed for a valid acceptance.

T. J. Kelly, Law '17, junior counsel for the plaintiff, was brief in his remarks, but went straight to the heart of the question and argued that the mere fact of a signed document being delivered presumed a previous knowledge of the document, and therefore its mere physical acceptation constituted a valid consent, and therefore a binding contract was formed.

Frank Common, Law '17, junior counsel for the defence, denied the allegation of the junior counsel of the other side in respect to the presumption of previous knowledge of the contract, and went on to uphold the arguments advanced by his confrere.

H. Budyk replied at length, dealing with the arguments of the defendant's counsel, especially upon the subject of consent.

His Honor refused to render a decision until next Tuesday. He summed up the case and presented the nucleus of the question in one sentence. Although he did not give an official opinion, from the remarks which he did make it would be concluded that he favors the defendant's views and would dismiss the action taken by A.

Dean Lee gave a short address, and thanked the Hon. Justice for his kindness in being present.

Dr. Marler would not say anything, because he said his opinions were directly opposite to those of the Justice, and that he would therefore allow him to render his decision first.

E. F. J. Coughlin, Law '16, moved a vote of thanks to the Hon. Justice and members of the faculty who attended, which was seconded by F. W. Hackett, president of Law '17.

Refreshments were served, and the meeting broke up about 11 p.m.

Montréal, Wednesday, December 1st 1915.

THE DECISION IN MOOT TRIAL

Hon. Justice Greenshields Rendered Decision Yesterday.

ACTION IS DISMISSED

No Real Action Exists, But a Personal Action Could Have Been Taken.

Yesterday afternoon Hon. Justice Greenshields rendered his decision in the case heard before him last Tuesday, November 23rd. The judgment, which follows, is very complete, and evidently the Honorable Justice has taken great pains with the case.

Interviewed yesterday evening, the counsel for the defendant, of course, were much pleased with the result. The counsel for the plaintiff were not beaten, they said, as they intended to institute a personal action for damages suffered by their client. The judgment follows:

In determining this case, careful attention should and must be given to the wording of the document or instrument upon which the plaintiff bases his claim.

I am not greatly interested, and indeed very little troubled, with the name that may be given to the document; in fact, for the purpose of my judgment, I hardly consider it necessary to take part in a baptismal ceremony.

I am much more interested in the thing than I am in the name.

A was the owner of a certain lot or land; he was willing, perhaps even anxious, to sell it at a price. B may have been at the same time willing to buy, but at the moment was not in a position to give effect to his willingness or desire to buy; or B may have been of the opinion that, although he did not wish to buy, but at some future time might change his mind and desire to purchase the property in question.

A communicated verbally to B his willingness and desire to sell his property, and evidenced his statement by the instrument in question. In effect he tells B: "I am willing to sell you my property at any time within the next six months for a specific mentioned sum." He signed the document and handed it to B, who took it in silence without any disclosure as to what his intentions were or whether or not he would ever avail himself of the power or opportunity he then possessed of buying A's property for a fixed and determined sum of money.

A and B parted and never met or communicated with each other until A wrote B in effect, telling him that he had changed his mind, and that it was not his intention to sell his property at the price mentioned or at any other price, and, without more ado, stated that he cancelled and put at end his previous declaration of willingness as evidenced by the writing then in the possession of B, and up to that time in full force and effect.

B, upon receipt of this notice or communiation, drew A's attention to the fact that the delay within which his rights existed had not relapsed, and refused to acquiesce in or consent to the summary destruction of his rights under the instrument.

A received B's communication without comment, and B thereupon, and still within the six months' period, notified A that he proposed to exercise the right and power given him; that he proposed to buy A's property, offered him the money and demanded a title to the property.

The offer of the money did not meet with acceptance, and the demand for title met with refusal.

Thereupon B launched the present action. His statement of claim sets forth the instrument calling it an "option." He adds the affirmative allegation of its acceptance, the tender of the price, the demand for title, failure of compliance on the part of A, and concludes for a condemnation against A, accompanying a deposit of the price, to pass the title to him, and in default, that judgment be rendered, and when registered should avail as a valid and complete title in B's favor to A's property.

A defends, admitting the signing and delivery of the instrument; in voidance alleging affirmatively its revocation before acceptance; asserting his full right to revoke before acceptance; points out and alleges entire

lack of consideration accompanying the delivery of the instrument, and prays for the dismissal of the demand.

B in reply traverses A's right to cancel during the lifetime of the document, and joins issue upon the other grounds of defence.

The document has been variously called an "option," a "promise of sale," and "agreement of sale."

Forgetting for the moment these names, let us consider what the document is.

I take it that the owner of land may do at least three things: 1. He may sell his land. 2. He may give an agreement or promise to sell his land at a future time; and, 3. He may give what for lack of a better name, I should call an option on his land.

The first is the actual transfer by valid title of the land from vendor to the vendee; dispossessing the vendor of the ownership in this land; vesting the ownership in the purchaser, and giving, if not the actual possession, at least the right to demand possession to the purchaser.

The second is an agreement to be put into a contract at a future date, and when the condition is fulfilled, the agreement is changed into an actual completed sale.

In no sense under our law can it be called a sale, if no possession has been granted. At most, it is preliminary to the sale, and if a breach or rupture occurs, it will never result in a sale.

The third, which we have called "option," is neither the first nor the second; it is neither a sale nor is it an agreement of sale. The most the owner does is to agree with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not, certainly, then sell his property; he does not agree to sell his property, but he does sell something, viz., the right or privilege to buy at the election or option of the other party.

As has been well said, the party receiving such an option does not then get land, nor an agreement that he shall have land, but he does get something of value, that is, the right to call for and receive land if he so elects within a certain time.

The owner parts for a specified and determined time his right to sell his land to the whole world except to the other party for a limited period. The other party receives from him the right to elect to buy; in other words, as was once said, and since oftimes approved of in such contracts, two elements exist—first, the offer to sell, which does not become a contract until accepted; secondly, the completed contract, actually then completed to leave the offer open for a specified time. If this be the correct view of what that document under consideration really means, then I should say that A contracted with B, not to sell his property to any person except B for a time certain and fixed.

If that contract possesses all the elements of a valid contract, then it must stand; if it does not, it is like other contracts, void and voidable.

Now, there is one thing certain. A received no consideration whatever; he contracted to remove his property from the market for a specified time; he sold and divested himself of his right to deal with his own property during a certain period of time, and that without consideration.

I take the following to be a fair and correct statement of the law, whether it be the English, French or Canadian law:

As in the case of other contracts, there must be a consideration for the option or agreement, unless the document or instrument under seal is in a jurisdiction which renders a consideration unnecessary. An offer to sell land though accompanied with an agreement to leave it open for a specified time for acceptance, if such agreement is not supported by valuable consideration, is not a contract at all. It is a mere offer to sell, which may be withdrawn at any time before it is accepted, even though the time allowed for acceptance has not expired; but, of course, it is changed into a binding contract of sale if accepted, according to its terms, during the time specified and before it has been withdrawn.

Under our law, I cannot believe it could be successfully contended that a document, such as the one under consideration, even with registration, would confer on the holder any real right in or about the property against which it was registered, and to which in its terms it refers. The most it right, and that personal right could could create would be a personal right, and that personal right could not be preserved or conserved by registration.

The effect of registration in this province, with all its complications, is not as a general rule to create rights or obligations where none existed between parties; registration may preserve them; registration may give priority to one right over another, but, speaking generally, registration does not create or add to real or personal rights.

Now, if the document in question conveyed or created any real rights,

then its effect would be to lessen the proprietor's ownership in his property, neither of which, I should say, it can be contended successfully under our law, takes place.

Much and insistent reference has been made to the jurisprudence in France largely based on the enactments of the great Code Napoleon; as also to the comments made by learned writers upon that jurisprudence and upon that Code enactment.

I freely concede that in what is called by our jurists, "Civil law," as distinguished from other branches of the law, and I am not responsible for the distinction or for the name, much consideration should be given and profound respect accorded to French jurisprudence and to the words of learned French commentators.

When our Code enactments are simlar to the French Code, and their interpretation open to question, much assistance can be obtained from the utterance of these learned men. But where a difference exists between our law and that of the French Code, and the words of our Code are clear, little assistance can be had from comments on the French code, and no comments are in reality necessary.

When our codifiers were dealing with Art. 1476 of the Code of Civil Procedure, which reads: "A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise of sale," the codifiers knew what was contained in Art. 1589 of the Code Napoleon. The only comment of the codifiers is as follows: "The article" (i.e., 1476), says the codifiers, "exposes the rule of our law with respect to the promise of sale. Art. 1589, C. N., changes that rule by declaring the promise to be equivalent to sale; but there seems to be no sound reason for recommending a departure from our article as submitted."

Art. 1589 of the Code Napoleon reads as follows (translation): "A promise of sale is equivalent to a sale when both parties have agreed upon the thing and the price."

All that means, then, is, that if the parties have agreed upon the thing forming the subject matter of the promise, and if they have agreed upon the price of sale, then there is a sale. And all the French writers were face to face with this provision in making their comments. They were dealing with a code which recognizes what is called a unilateral contract.

With profound respect, I think it is a misnomer.

Our Code nowhere uses the expression "unilateral contract."

Do not mistake my meaning. There may be a unilateral debt, and I use the word "debt" in its general and largest sense; there may be a unilateral obligation. I may be bound towards another to construct a fence, and that debt may be collected; that obligation may in law be enforced. I may be compelled to build that fence, but to call that a "unilateral contract" is a misnomer. I may offer to do something, and if that offer is timely accepted, it becomes, what the French code calls a "bilateral contract."

But if I simply make an offer to do something and receive no consideration for making that offer, there is no contract, and to call it by that name is a misnomer. A contract of sale must result in our laws from a meeting of minds; until they do meet, there is no contract.

Now, what I have referred to as "an option" is with us of comparative recent growth; it certainly did not come from France. Formerly, and until recent years, it found its application rather to the sole of moveables, and those of a limited kind or description.

I will venture to say, for instance, that Mr. Pothier or Mr. Larombiere never bought an "option" on the Chicago wheat market, or on the London Stock Exchange.

In this city, within the last few years, "options" on real estate were daily, if not hourly, bought and sold, and there was a real and binding contract made every time one was bought or sold, and that contract has a valid consideration, and there was a proper legal subject matter of contract, and, as I have already said, the subject matter of that contract was the proprietor's agreement, that he would withdraw his property from sale to the whole world for a definite period, except to the very person who bought and paid for the right to buy his property at a fixed price within that given time.

I, therefore, hold that the instrument invoked by the plaintiff is not a contract enforcable before acceptance; without acceptance there is no contract. It is a mere offer to do something without consideration, and I hold, without hesitation, that it is revocable at the will of the giver at any time before acceptance, subject, however, to any rights the receiver of the offer may have under another provision of our law, but not under the provisions of our law referring to sale.

And this brings me to the final and further consideration of the latter part of Art. 1476. It says, after reciting, "that the creditor may demand his deed" (of course his demand is an acceptance) "and in default the judgment of the court will be a good and valid deed," or, adds the article, "he may recover damages according to the rules contained in the title of 'Obligations'."

Now, this article as a whole makes no further provision than is to be found in one form or another in most scientific systems of law. It is found in English law under the name of "Specific Performance." It is found in the French law almost in similar terms; but it presupposes and assumes the existence of a contract, the specified performance of which can be enforced.

If a creditor under a contract wishes the contract enforced specifically performed, he may demand it if capable of specific performance; if not, or if prefers his other relief or remedy, he may take an action in damages. His claim for damages is founded on the well-known principle of law of "Obligations," that, in general terms, he, who is under contractual obligation to do, or not to do, and violates his obligation, and that violation is the direct cause of damages, the damages may be recovered.

But that article, in my opinion, is entirely without application to the present case. There was no contract to be specifically performed between A and B up to the time of the revocation of the instrument; therefore, there was no damage resulting from a breach of contract.

On what principle, then, could B recover damages from A, if any, indeed, are in law recoverable?

I take it to be this:

If I offer or promise to sell my property to another for a fixed price within a limited time, and that time is fixed and certain, that other person is entitled by law to assume that I will implement my offer, or stand by my promise, and if that other, relying upon good faith, makes poset et demarches—is put to reasonable expense directly resulting from that belief, and I—to use an expression which is certainly not judicial—go back on my promise or offer, a strong case would exist for the recovery of these expenses, but not on the principle that the contract had been violated.

But this opinion is not necessary for the decision of this case.

Upon the whole, I conclude and determine, that the revocation by A was complete and effective; that he was well within his rights in so doing; that when B purported to accept the option or offer, it was non-existing, and no resulting took place between the parties; that on the day of the institution of his action there was no contract, the specific performance of which could be demanded.

I, therefore, hold that the defendant's plea to the action and demand of the plaintiff is well founded. I maintain his plea, and I dismiss the plaintiff's action with costs.

If you are curious to see an interesting case, which is not entirely on all fours with the present case, but has a certain resemblance, you will find it reported in the 51st Vol. of the Canada Supreme Court Reports, at p. 603.

It is regrettable that there is not more unanimity among the judges of our highest court, while the individual expression of opinion is always valuable and interesting, yet the judgments lose something in weight as a matter of filled jurisprudence.

A meeting of the committee, appointed to make arrangements, for the coming moot court, was held this afternoon in the meeting room of the Law Undergraduates' Society

JUDGMENT IS IN FAVOR OF THE PLAINTIFF

Mr. Justice Greenshields Renders His Decision.

MOOT TRIAL NOW COMPLETED.

Both Sides Presented Their Case Clearly and Win the Justice's Praise.

Instead of lecturing to the students of the second and third year yesterday, Mr. Justice Greenshields delivered his judgment of the Moot Trial which was held recently, and over which he presided. A number of the first year students were present to hear the reading of the judgment. The facts, as admitted by both parties, were substantially as follows:

"A," a French subject resident in Paris, marries in Paris "B," also a French subject, and also resident in Paris. They lived together for a number of years in Paris, and then moved to Montreal, without any avowed intention of abandoning their French domicile or acquiring a new domicile in the Province of Quebec. "B" takes an action before the Superior Court of this Province, praying that she be declared separate as to bed and board, from "A."

Query—Has our Court jurisdiction to grant the prayer of her action?

The judgment follows:

"Unlike the usual judicial decisions, I am asked to answer this question, not so much upon my own conviction as to what the law is, but rather upon the merits of the very able arguments submitted to me pro and con by the learned Counsel representing the respective parties.

My task is at once rendered more easy, but not the less somewhat embarrassing.

It is difficult to eliminate or exclude from consideration one's own opinion and consider in the abstract the arguments as submitted.

Let it be well understood, that my decision will cast no reflection upon the submission of the Counsel who do not succeed in their pretension.

The case was very clearly and ably presented, and I think it merits much, and has received some consideration and slight elaboration from me.

It will be at first, and at once, noticed, that the question is not purely and simply a question, as to what law should be applied in determining the right of the plaintiff to obtain the relief sought; in other words, is the Court without jurisdiction ratione materie to hear the plaintiff at all? Is the Court absolutely closed to her? If it is open to her, there might arise the question as to the law of what country application would have to be given in determining her suit. It might be that the contract having been made in France, the lex loci contractus should apply, and that the defendant might plead, as a matter of fact, the law of France, and having proved it, as a matter of fact, the Court might have to give effect to that law.

But that is not the question in the present case; the question here is, whether the Court of the Province of Quebec is competent to hear any complaint whatever with respect to the violation by the defendant of his obligations resulting from a French marriage.

I should accept as a fair statement of the matter, that made by the learned Counsel for the plaintiff, viz.: If our Code provisions are clear upon the subject, then the matter must be decided according to those provisions, and not otherwise.

The Legislative authority of this Province, in matters over which it has legislative authority, is the master of the jurisdiction of its Courts, and whatever effect a judgment of the Court given jurisdiction might have in another country, the Legislature certainly has power to confer jurisdiction, so far as the territory of this Province is concerned, to its Courts.

But notwithstanding this, and in view of the serious controversy between the learned Counsel as to the meaning of our Code enactments, it might be in order, and even necessary, to consider very briefly the law of England and the law of France on the subject.

As to the law of England, the following appears to me to be a fair statement: To grant a divorce and complete dissolution of the marriage tie—to change the status of persons from married to single—requires an English domicile, with limited exceptions: 'But,' says Foote, in his book on International Jurisprudence, at p. 123—'It appears settled in England that for purposes of judicial separation, as distinguished from divorce, matrimonial residence not amounting to domicile, is sufficient. This seems founded upon considerations of the

necessity of protection and assistance in cases where mere police protection is inadequate. Some difficulty may arise as to what will amount to 'residence' for this purpose; but it is suggested that the jurisdiction will be assumed in all cases where the husband and wife are actually living within the jurisdiction otherwise than as mere travellers or birds of passage. It would appear clear that decrees for judicial separation pronounced by Courts other than those of the domicile, can have no extra territorial operation, and will only remain effective so long as the spouses,—or at any rate one of them,—remain within the jurisdiction.'

I have no doubt that under the English law the English Courts would assume full jurisdiction to entertain the suit of the plaintiff.

Now, as to the law of France.

Under the Code Napoleon we do not find exactly the same provision as in Art. 6 of our Code. It is Art. 3, which reads (translation), 'Laws of police and public security bind all those who inhabit the country. Immoveables, even those owned by foreigners, are governed by French law. The law as to personal status and capacity bind French citizens even when living apart."

Now, the expression, 'Laws of police' has been defined to mean, laws made for the observation of personal liberty laws as to property and as to public order. (Aubrey et Rau, Vol. 1, p. 81).

The modern French law, as far as I can judge from the arguments made before me in this case, and the authorities submitted, is, that if two foreigners marry in their own country, according to the laws of that country, but then and now living in France, but never having acquired a French domicile, the French Courts would assume and have jurisdiction to declare the parties separated as to bed and board.

At one time, the French Court would not grant divorce, for the simple reason that divorce was not at one time recognized, and it was considered against public morality and public order.

But while the French Court would assume jurisdiction in the matter, the French Court would apply the law of the domicile (lex domicilii), which, in the case I cite would be also lex celebrationis — the law where the marriage was celebrated.

I would state the modern French law on the subject as follows: The rights of the woman as a wife are regulated by foreign law when her husband is himself a foreigner; that is to say, the French Court would entertain the demand of the wife and assert her rights as a married woman against her husband, if she were resident in France, although a foreigner, and if her husband were resident n France, and also a foreigner, but in determining her rights, the laws of their domicile and of their matrimonial domicile would be inquired into and effect would be given to that law when proven. In other words, her rights would be determined by the law of her country, and not according to the law of France. I refer to Cubain in his book on the Rights of Women (Droits dé Femmes) in Civil and Commercial matters, No. 674.

Therefore, in France, I conclude the French Court would assume jurisdiction to deal with the complaint of the wife in this case if the case were before a French Court, but might deal with it in a manner different from our Court. But that is of no interest in the present case, as we are not dealing with what law would be applied, but whether there is an absolute lack of jurisdiction.

Now, I do not propose to deal further with the French or English law, but proceed at once to the consideration of our Code enactments.

It is urged by the learned Counsel for the defendant, that the whole matter is settled and determined by Art. 96 of our Code of Procedure, as read in conjunction with Art. 1099.

Art. 96 is found in chap. 10, and has for its caption—'Place of instituting actions.' That clearly refers to the place in the Province of Quebec where actions should be instituted.

Art. 1099, which is new, and was not in the old Code, is found in chap. 49, which has for its caption—'Separation between consorts.'

Art. 96 reads: 'In an action for separation from bed and board, or for separation of property only, the defendant must be summoned either before the Court of the domicile of the husband, or if he has left his domicile, before that of the last common domicile of the consorts.'

Art. 1099 reads: 'No suit for separation from bed and board can be brought except within the jurisdiction stated in Art. 96 of this Code.'

Now, let us deal with Art. 96.

For the purpose of administering our laws, the Province of Quebec is divided into judicial districts, and as a general statement, the jurisdiction of the Courts of each district is territorial; it is limited to the territory covered by the district.

The article provides, that if either the husband or wife wishes to institute an action in separation as to bed and board, or as to property only, the tribunal or Court competent to hear that case is the Court of the domicile of the husband.

If the word 'domicile' means 'legal domicile' it is quite unnecessary to mention the domicile of the husband, because there is only the legal domicile of the husband and no other. The wife has no domicile separate from her husband; she may have a residence; but 'if the husband has left his domicile,' says the article: What does that mean? if it means, has left his legal domicile, then he must have acquired another, because by the fiction of law a man is never without a domicile; and why should the article say, 'if he has left his domicile' something else might be done.' If the article intends by the word 'domicile,' 'legal domicile' as distinguished from 'residence,' then the article would be complete by saying in an action for separation as to bed and board, the defendant must be summoned before the domicile of the husband, because he always has a domicile, and he has it at the very moment of the institution of the action; he may have changed his domicile, but he still has one.

But the Article proceeds: if he has left his domicile, then the defendant may be summoned before the Court of the last 'common domicile.'

Again I say, the argument of Counsel convinces me, that if the word 'domicile' means 'legal domicile,' as distinguished from 'residence,' then the expression 'the last common domicile of the consorts' means nothing at all. There is no such a thing as the common legal domicile of the husband and wife. The wife has no domicile to make common with her husband. There is a common 'residence.'

Now I take the meaning of this article to be, to illustrate if the husband is residing in the district of Quebec, the wife must summon him in this action before the Court of that district; but if he had left the district of Quebec, and was no longer residing there, and his residence, even if it were unknown, and the husband and wife had previously occupied a common domicile or residence in the district of Quebec, then he could be summoned before the court of the district of Quebec; if he had left the district of Quebec—deserting his wife, for instance, and had taken up his residence in the City of Montreal, then I have no doubt, in like manner, he could be summoned, and should be summoned, before the Court of the district of Montreal.

All this leads me to the statement, that the word 'domicile' means 'residence,' and does not mean 'legal domicile' as well understood and defined in International law.

Support is found for this statement in many of the subsequent Articles of our Code of Procedure:

Art. 98: "In actions in warranty and in continuance of suit, the defendants are summoned at the place where the principal action was brought, wheresoever their domicile may be.'

Clearly this means 'residence.'

Art. 100: 'In every real or mixed action the defendant may be summoned before the Court of his domicile, or before that of the place where the object in dispute is situated.'

If a foreigner were residing in the City of Montreal, and an action were to be taken against him in connection with some real estate situated in the district of Quebec, he might be summoned before the Court of Honolulu he might be ummoned before the Court at Montreal; and surely it would not be pretended that this Article meant that he might be summoned before the Court of Honolulu if he happened to be a Japanese, and his domicile of origin was Japanese; if it meant that the Article would be utterly meaningless. What right have our Legislators to say, that a Japanese may be summoned before a Court in Japan.

Art. 101: 'When a real action has for its object an immoveable or immoveables situated partly in one district or circuit and partly in another, the suit may be brought in either, or in the district or circuit where the defendant has his domicile.' Clearly it means his 'residence.'

Art. 102: 'In matters of succession the parties are summoned before the Court of the district where the succession devolves, if it opens in the Province of Quebec, otherwise before that of the place where the property is situated, or of the domicile of the defendant, or any one of the defendants.' See Article 122.

In Art. 103 we see the word 'residing' introduced. If there are several defendants residing in different districts, etc.

It would have been better, I think, if the word 'residence' or 'residing' had been uniformly adhered to.

I take it, therefore, that the Articles of the Code of Procedure in no way affects the jurisdiction of our Courts generally, viewed from the viewpoint of International law; but the Art. 96 and succeeding Articles simply purport to deal with the jurisdiction of the different courts of the different districts within the territorial limits of our Province.

Now, coming to Art. 6 of the Civil Code: I read par. 3 only:—

"The laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there.'

The law of marriage, or the law governing husband and wife, is a law relating to persons. Marriage is recognized as a union; call it a 'civil contract' or call it by any name you

choose, it is recognized as a tie or lien which creates certain rights, and gives rise to certain obligations. These rights are recoverable by an action before the civil Courts. These obligations, in like manner, are enforceable before the Courts, just as obligations arising from any other contract are enforceable by the Courts.

We find then, residing in the Province of Quebec, two persons with a foreign domicile, who have contracted a foreign marriage; they are mutually bound to each other; they are each debtors to the other for certain obligations arising from that union; they are each the creditor of the other for certain recognized and enforceable rights flowing from the fact of marriage.

For the purpose of this opinion, and for that purpose only, I call that a civil contract. If it is a misnomer, it is certainly a contract recognized by the Civil Courts.

Now if A and B in the present case were not husband and wife, but were (as A and B are) foreigners residing in the Province of Quebec, and they had entered into a contract in Paris, by which each was bound towards the other, for the fulfilment of certain obligations, and became the possessor of certain enforceable rights, our Courts in this Province, without doubt, would have full jurisdiction to enquire into that contract, and would have full jurisdiction to determine the rights and obligations of the parties under that contract.

It is not necessary for me to say, for the purposes of this opinion, but I do say—that probably in determining the rights of the parties, our Courts would apply the law of the lex loci contractus.

If there had been a breach of that contract by one of the parties, and such breach was reparable in damages, I see no reason why our Courts would not have jurisdiction to award damages.

Now, in the case before us, if by the law of France the husband is bound to support his wife, and is not entitled to beat his wife on pain—for the omission of one and for the commission of the other—of giving rise to an action in separation as to bed and board; supposing that is the law of France, as it is our law, and these two people are living in our territory, and the husband omits to do what he should do, and what he contracted to do, and he does what he is not entitled to do, and which he contracted not to do, I see no good reason why our Courts have not jurisdiction to enquire into and determine the respective rights of the parties, under the circumstances disclosed and proven before the Court.

If our Courts lack jurisdiction in this matter, then the condition would be created, that two foreigners, resident in Montreal, and having made a civil or commercial contract in their foreign country, each has recourse the one against the other for the fulfilment of that contract or a punishment for its breach, but the man who contracts marriage in a foreign country and brings his wife to reside in Montreal may violate every condition of his contract and be absolutely immune from attack before our Courts.

It is generally, I think, conceded, that under the circumstances of the present case, as in the case stated, our Courts would have jurisdiction to order the payment of alimony to the wife from her husband. The obligation to pay alimony is born of the contract of marriage—is born of the fact of marriage; it is no more serious an obligation than that to refrain from beating his wife. The wife is given relief by the jurisdiction of our Courts in the one, but is denied any relief in the much more serious breach of the other.

By our law, and by the law of most civilized countries, the wife is bound to follow her husband wherever he goes; he is bound to receive and succor her; if he leaves France for Montreal, she follows him; he refuses to receive her; he refuses to do anything that he should do, and he does everything that he should not do, and she is utterly helpless, so far as applying to our Courts is concerned; if she leaves him and goes back to France, it will be said she deserted her husband, and she may forfeit her matrimonial rights everywhere and anywhere.

In other words, if our Courts have no jurisdiction over husband and wife living within the territorial jurisdiction of our Courts, because these people are foreigners, then there will be a condition of practical anarchy existing with respect to a certain number of persons, not things or immoveables, but persons who are within the territorial limits over which our Courts have jurisdiction.

I am of opinion that the plaintiff's Counsel have sustained the jurisdiction of our Courts, and for the purpose of answering the Query, I hold that the weight of argument is in favor of the lady. Our Court has jurisdiction to enquire into her grievance, and I express no opinion as to what law should govern our Court in the determination of the question.

Both parties expressed themselves as satisfied with the decision of the Judge, and the defendant Counsel declared that no appeal would be entered. Mr. Justice Greenshields remarked that the costs, as usual, were against the husband.

For plaintiff—Messrs. Rose, Phillips and Cloutier.

For defendant — Messrs. Myerson, Dillon and Bridgeman.

SATURDAY, JANUARY 15, 1876.

TABLE OF OFFICIAL PRECEDENCE.—Lately the Toronto *Globe* published the table of precedence to be observed on occasions of state ceremony in this country. It is as follows :

1. The Governor-General or officer administering the Government.
2. Senior officer commanding Her Majesty's troops within the Dominion, if of the rank of a General, and officer commanding Her Majesty's naval forces on the British North American Station if of the rank of an Admiral.
3. Lieutenant-Governor of Ontario.
4. Lieutenant-Governor of Quebec.
5. Lieutenant-Governor of Nova Scotia.
6. Lieutenant-Governor of New Brunswick.
7. Archbishops and Bishops, according to seniority.
8. Members of the Cabinet (Dominion), according to seniority.
9. The Speaker of the Senate.
10. The Chief Judges of the Courts of Law and Equity, according to seniority.
11. Members of the Privy Council *not of the Cabinet*.
12. General of the army or navy serving in the Dominion, but not in chief command.
13. The officer commanding Her Majesty's troops in the Dominion if of the rank of Colonel, and the officer commanding Her Majesty's naval forces, if of equivalent rank.
14. Members of the Senate.
15. Speaker of the House of Commons.
16. Puisne Judges.
17. Members of the House of Commons.
18. Members of the Executive Councils within their Province.
19. Speaker of Legislative Council within his Province.
20. Members of Legislative Council within their Province.
21. Speaker of Legislative Assembly within his Province.
22. Members of the Legislative Assembly within their Province.

Next to the Lieutenant-Governor of New Brunswick, there would now come the Lieutenant-Governor of Prince Edward Island. Whether the Lieutenant-Governor of Manitoba or the British Columbia Governor would take precedence next after the Governor of the Island Province, will have to be decided when the occasion arises to test the important question.

FACULTY OF LAW

Case for Moot Court.

In the Court of Appeal.

Brown vs Jones.

Brown is a fine art dealer of Toronto. On Saturday, the 2nd October, he received from Messrs. Robinson & Co. of New York a letter offering him a picture by Romney for $4,500 provided he telegraphed his acceptance by Monday the 4th. On Monday Jones lunched with Brown who told him of the offer and said he intended to accept. As Jones was leaving the house after lunch, Brown wrote the message on a telegraph form and handed it to Jones, asking him to send the telegram in time to reach New York by 5.00 p.m. Jones promised to do so, but forgot all about the matter until the following morning.

At 5:15 p.m. Robinson & Co. sold the picture to another purchaser for $4,800. In the course of Monday afternoon Brown, assuming himself to be the owner, had contracted to sell it to one of his own customers for $5000. In order to fulfil this contract he had to purchase the picture from Robinson's client, to whom he had to pay $5,500. Jones was not informed until later of the contract made by Brown on Monday afternoon.

The learned trial judge directed the jury that the plaintiff was entitled to their verdict if they found that his loss was caused by the defendant's negligence, and that the measure of damages (if any) would be the difference between the sum which the plaintiff would have had to pay under the original offer and the sum at which he could have purchased the picture independently of that offer on the same day. The jury returned a verdict for the plaintiff for $300, and judgment was entered accordingly.

Appeals by both parties are entered from this judgment. The defendant claims that he was entitled to judgment on the ground that the statement of claim disclosed no cause of action. The plaintiff appeals on the ground that the learned judge misdirected the jury on the question of damages, and contends that the defendant was liable to pay the whole loss which was caused to the plaintiff by his negligence in failing to send the telegram.

Their case will be argued by two counsel on each side, to be elected by Course 'B' students from among their own number. Professors Smith and Mackay will act as judges, and the court will be held in the Law Library at a date to be arranged.

MOOT COURT.

The plaintiff is a farmer who, in accordance with his custom, turned out his horse to find its own way home by road, a distance of several miles. On the way it passed a waggon, loaded with bags of wheat, which the defendant had left unattended by the roadside. The horse broke open the bags and ate such a quantity of wheat that it died.

At the trial the plaintiff recovered damages for the loss of his horse. The defendant appeals.

The case will be argued on Thursday, the 16th November, at 2.30 p.m. Professor Mackay will preside.

Counsel for the defendant (appellant)

Mr. Seman and Miss Heneker.

Counsel for the plaintiff (respondent)

Mr. Taylor and Mr. Carberry.

MOOT COURT

In the Court of Appeal — Brown v. Jones

Judgment

The point to be determined in the present case is whether a man who gratuitously undertakes to send a telegram for a friend, and then forgets to do so, is liable for the loss that ensues, and, if so, to what extent.

We wish to make it clear in the first place that the liability of the defendant, if it exists at all, must be founded upon tort and not upon contract. To hold that there is a consideration in the present case would be to strain the doctrine of consideration beyond anything that is warranted by previous decisions and would in fact be tantamount to saying that there is no need for consideration, in any real sense of the word, in order to make an agreement binding. The defendant's liability must therefore be judged by the standard of duty which the law imposes upon a gratuitous agent and by nothing more.

A number of cases bearing upon the liability of gratuitous agents have been cited to us in the course of the argument, and the law as applied in these cases may be summarised as follows. In the first place, a gratuitous agent cannot be held bound to enter upon the discharge of his duties at all. He is quite at liberty to revoke his promise as soon as he has made it or indeed at any time before he has actually undertaken his commission. Furthermore, even when he has actually entered upon his duties,

he cannot be required to attain to any special standard of skill or diligence. On the other hand, he is bound to exhibit the same degree of ordinary care and diligende which the average prudent man maintains in the ordinary affairs of life.

The defendant's counsel admitted this liability, but argued that the defendant had never actually entered upon the performance of his agency. In this contention we are unable to concur. It seems to us quite clear that the defendant began to execute his commission as soon as he left the plaintiff's presence with the telegraph form in his pocket. From that moment the plaintiff acquired a right that the defendant should exhibit ordinary care in the discharge of his duties and should be liable for any injury to the plaintiff's ~~property~~ interests caused by a failure to exhibit such ordinary care.

In a number of cases, beginning with the classical case of Coggs v. Bernard in 1703 (2 Lord Raymond, 909) gratuitous agents have been held liable for injury caused to the corporeal property of their principals. There seems no reason why the same rule should not be equally applicable to incorporeal interests, and the language of Lord Holt in Coggs v. Bernard clearly supports this view. Lord Holt says at p.918:-"If a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable." The same rule has been laid down from time to time in later cases. In the present case, at the time when the defendant failed to send the telegram, the plaintiff had a

right to purchase and re-sell the picture. Of course the offer might have been revoked by the vendor before acceptance, but in fact it was not so revoked.

definite ~~proprietary interest which was~~ injured by the defendant's negligence. ~~He~~ Furthermore, the plaintiff had acquired a right under a binding contract with a third party to the sum of $5000, on condition that he should deliver a certain picture. This condition he was prevented from fulfilling by the defendant's fault, and for this injury to his interests we are of opinion that he can hold the defendant liable.

The next question is that of the measure of damages. Up to 6-00 p.m. the plaintiff could have bought the picture for $4500. At 6-15 it was sold to another customer for $4800. In the mean time the plaintiff, imagining himself to be the owner, had contracted to re-sell it to one of his own customers for $5000. In order to fulfil ~~this contract he purchased the picture from its new owner~~ who charged him ~~$5000~~ $5500.

Under instructions from the learned trial judge the ~~jury~~ jury awarded the plaintiff $300. This direction to the jury appears to have been based upon the analogy of an action for failure to deliver goods sold, where the measure of damages is the difference between the contract price and the market price. The plaintiff appeals from the judgment for $300, and claims $1000, which figure he obtains by adding the $500 profit he might have made to the $500 by which he is out of pocket.

Since this action is founded upon negligence and not upon contract, it seems clear to us that the measure of damages must be governed by the rules applicable to actions in tort. That is to say, the defendant is liable for the net value of the property which the plaintiff

has lost through his negligence. In estimating the value of this property we are entitled to take into account the price which another purchaser had agreed to pay him for it. In France v. Gaudet (1871)LrR.6 Q.B.199, the defendant was sued for the conversion of certain champagne which he should have delivered to the plaintiff under a contract of sale. The wine was of a brand not procurable elsewhere, and the plaintiff had contracted to re-sell it to a third party. The Court held that the price which the third party had undertaken to pay must be reckoned in estimating the value of the goods converted. See also The Argentino(1888), 13 P.D.189, affirmed in 14 App.Cas. 519.

On the other hand it has been repeatedly held that profits and losses of a speculative or uncertain kind cannot be considered in estimating the value of property which has been injured by the defendant's tort. In this case the plaintiff's loss is aggravated by the fact that the picture has got into the hands of a purchaser who will not part with it for a less profit than £700. This is of course a misfortune to the plaintiff, but it is not the kind of loss which could have been foreseen with reasonable certainty, and therefore he cannot charge it to the defendant.

We are of the opinion that the defendant's appeal fails and must be dismissed. The plaintiff's cross-

appeal must also be dismissed in so far as he asks that judgment be entered for him for $1000. At the same time the judgment under appeal must be varied to the extent of substituting $500 for $300 as the amount of damages which the defendant is directed to pay.

The costs of the trial will be paid by the defendant. Each party will bear his own costs of the appeal.