WM. DARLING.....APPELLANT;

AND

ROBERT BROWN ET AL.....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Loan by a non-trader to a trader—Prescription—Arrears of Interest—Acknowlegement of debt, what sufficient.

In 1858, W. D., senr., opened a credit of $584, in favor of his daughter I. D., with W. D. & Co., a commercial firm in Montreal consisting of the appellant and one T. D., W. D. & Co. charging W. D. senr., and crediting I. D. with that amount. In 1860, W. D., as sole executor of the will of D. D., credited I. D. in the books of W. D. & Co., (appellant at that time being the only member of the firm), with a further sum of $800, the amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., together with entries of interest in connection with the said items, were continued from year to year. An account current was rendered to I. D. exhibiting details of the indebtedness up to the 31st December 1861. After 31st December 1864, the firm of W. D. & Co. consisted of the appellant and his brother T. D. In December 1865 another account was rendered to I. D. which shewed a balance due her at that time of $1912.08. The accounts rendered were unsigned, but the second account current was accompanied by a letter, referring to it, written and signed by the appellant. I. D. died, and in a suit brought by G. T., her husband and universal legatee, to recover the $1912.08 with interest from 31st December 1865:

Held:—1. That a loan of moneys, as in this case, by a non trader to a commercial firm is not a "commercial matter" or a debt of a "commercial nature"; that, therefore, the debt could be prescribed, neither by the lapse of six years under *Consolidated Statutes of Lower Canada*, ch. 87, nor by the lapse of 5 years under the *Civil Code of Lower Canada*, but only by the prescription of 30 years.

Whishaw v. *Gilmour* (1) approved.

(1) 15 L. C. R., 177.

PRESENT: The Chief Justice and Ritchie, Strong, Taschereau, Fournier, and Henry, JJ.

2. That, even if the debt were of a commercial nature, the sending of the account current accompanied by the letter referring to it signed by the Appellant would take the case out of the Statute.

3. That the prescription of five years against arrears of interest, under Art. 2250 of the *Civil Code of Lower Canada*, does not apply to a debt, the prescription of which was commenced before the *Code* came into force.

4. That entries in a merchant's books make complete proof against him.

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) dated the 22nd day of June, 1876, affirming a judgment of the Superior Court for Lower Canada, sitting at Montreal, dated the 19th day of June, 1875.

This suit, instituted on the 5th of October, 1871, and returned on the 20th October, 1871, was brought by George Templeton, as the universal legatee of his deceased wife, Isabella Darling, to recover from William Darling and Thomas Darling, $1,912.08, with interest since the 31st day of December 1865.

The plaintiff alleged, that William Darling and Thomas Davidson, carried on trade and commerce as co-partners under the name and style of William Darling and Co., from 1st January 1854 to 30th April 1860, from which time their business was continued by William Darling, under the same name and firm, to the 31st December 1864, when he and Thomas Darling became copartners, from which date they carried on trade and commerce under the name and firm of Wm. Darling & Co., which last firm assumed all the assets and liabilities of the business.

That on the 31st December 1861, William Darling, individually, and as having been a copartner with Thomas Davidson, and as having carried on trade and

commerce alone under the name and firm of Wm. Darling & Co., was indebted to Isabella Darling in the sum of $1,640.07 for moneys received and collected for and on account, and to and for the use, benefit and behoof of said Isabella Darling, and for money loaned and advanced to the firm and to William Darling individually, and for interest; which William Darling had promised to pay, with interest, since 31st December 1861. That on the 26th March ,1862, he rendered to Isabella Darling an account current exhibiting in detail the amount of his indebtedness, commencing 3rd March 1858 and ending 31st December 1861, made up with interest each year, whereby he acknowledged to owe $1,640.07, with interest since 31st December 1861; and on the 6th December 1865, William Darling & Co., composed of William Darling and Thomas Darling, rendered to Isabella Darling another account current, commencing 31st December 1861, and ending 31st December 1865, whereby they acknowledged to owe her $1,912,08, subject to the payment of interest.

That the said Isabella Darling, on the 1st day of April, 1871, made and executed her last will and testament in holograph form, bequeathing to the plaintiff the whole of her property, and appointing him sole executor; and that on the 2nd of May, 1871, the said Isabella Darling executed in the presence of witnesses another will similar to, and confirmatory of, the first.

The defendants severed in their defence.

William Darling, by his first plea, attacked the validity of the two Wills set up in the declaration, but as one of these Wills is admittedly good, and has been so declared, the other having been set aside, no further reference need be made to it.

By his second plea, William Darling admitted that

about the 3rd March, 1858, an entry appeared in the books of Wm. Darling & Co. of $584, and another of $800 on the 14th April, 1860, to the credit of Isabella Darling, but denied that these sums were due to her, or that Wm. Darling & Co. were bound to her by said entries, to which, he alleged, she was not a party, nor that there was any privity of contract with her respecting them, nor any interest promised thereon. That the entries were unauthorized and Isabella Darling had received more money, goods and value than the amount so credited. That in the absence of any promise or undertaking in writing, or otherwise, the prescription of five years applied especially to all interest, and the whole matter being commercial, the prescription of five years applied also as well to capital as interest, by which all recourse was barred.

By a third plea, he opposed to the demand the prescription of six years.

By a fourth plea, Appellant pleaded compensation for the board and lodging of said Isabella Darling from 1st September 1858, to November 1862, at the rate of $300 per annum.

There was also pleaded the general issue. The answers and replications were general.

The alleged indebtedness of the defendants was based, as appears from the evidence, upon the two sums, one of $584 and the other of $800, (mentioned in the second plea) to which Isabella Darling was alleged to be entitled under the following circumstances:—

In 1858, Isabella Darling paid to her father William Darling, senior, then residing in Edinburgh, the sum of £120 stg., equal to $584. William Darling, senior, opened a credit in her favor with William Darling & Co., for this sum, so that the firm charged William

Darling, senior, with that sum and credited Isabella Darling with the same amount.

Under the will of David Darling, a brother of William and Isabella Darling, made the 9th October 1856, a sum of $800 was bequeathed to Isabella, and a similar sum was bequeathed to each of his other sisters Margaret and Grace. Of this will William Darling was sole executor, and probate of it was granted to him on the 2nd of June, 1857. One of the assets of the estate of David Darling was a mortgage for £1,000, bearing interest on its face at 12½ per cent. This was set aside by the executor for the £200 devised to each of the three sisters. $800 were credited to Isabella Darling, and interest at 12½ per cent. on that amount was also from time to time credited to her.

It was alleged, on behalf of the appellant, that litigation arose with a subsequent mortgagee, both as to the real amount advanced on this mortgage, and the rate of interest: that finally a compromise was effected, by the executor accepting $1,000 for the mortgage, out of which had to be deducted the expenses of the suit; and that in fact, therefore, the appellant never received the $800 on account of Isabella Darling, nor interest at the rate mentioned.

It is in evidence, however, that accounts current were made up every year, beginning with 1858, showing the balance at the credit of Isabella Darling. In 1858 and 1859, the £120 stg. with interest, and also interest on the $800, at 12½ p. c. less ½ per cent. for collection appear; and among the entries in the account current for 1860, there is, in addition to a like credit for interest, a credit of the sum of $800. These entries, with interest at 6 per cent. making yearly rests, and charging cash, goods, &c., were con-

tinued yearly, and a balance struck. At the end of 1861, this balance was $1,640.07, and, at the end of 1865, $1,912.08, the amount sued for.

These accounts were taken from the books of William Darling and Wm. Darling & Co. and were headed "Miss Isabella Darling in acct., and int. 6 p. c. per an., with William Darling & Co." They were not signed; but William Darling wrote Isabella Darling a letter which, the Plaintiff alleged, accompanied and referred to the account current rendered on the 6th December, 1865, and the relevant portions of which are as follows;

"MONTREAL, 6th Nov., 1865.

"DEAR ISA,—I did not get your letter till three weeks "after it was written, and I now send you the statement "of your account. There was an amount paid to Morgan "but I do not know whether it should be charged to "you or to my father, and I have omitted it altogether "from your account and from his. * * * * * * * * *

"W. DARLING."

George Templeton died March 28th, 1875, and the suit was continued by Robert Brown, Charles Proctor, and Adam Darling, as his executors.

The Superior Court dismissed the action as against Thomas Darling, holding that there was no privity of contract between him and Isabella Darling and that the investment of the moneys in the firm was an act between William Darling and the firm, with which Isabella Darling had nothing to do, and rendered judgment against William Darling for $1,661.23 with interest from the 31st December, 1862. This judgment the Court of Queen's Bench for Lower Canada (Appeal

side) affirmed with costs, (1) and the Appellant then appealed to the Supreme Court of Canada.

The principal questions submitted in appeal were:

First.—Whether legal and sufficient evidence was adduced of William Darling's indebtedness for the amount in which he was condemned?

Second.—Whether the remedy for interest beyond five years was barred and prescribed by the lapse of five years before action brought?

Third.—Whether the matter in question was commercial, and whether the remedy for capital and interest was barred by the lapse of five years before action brought?

Fourth.—Whether the remedy was barred and prescribed by the lapse of six years before action brought?

Fifth.—Whether the plea of compensation for board and lodging was established by the Appellant?

January, 18th and 19th, 1877.

Mr. *Cross*, Q.C., Counsel for the Appellant:—

There are two entries of credits, which appear in the books of Wm. Darling & Co., but without any basis or actual indebtedness; the first, as the result of certain trading and commercial exchanges with Wm. Darling, sen., Merchant, of Edinburgh, and the second, as a collection of a commercial liability. Isabella Darling was no party to these entries. The first account was rendered on 26th March, 1862; the second account was rendered on 6th December, 1865: the alleged indebtedness is of 1861, and interest dates from then. The evidence shows the entries made in the books to have been incorrect and unauthorized, and the accounts referred to in Plaintiff's declaration were not written or signed, or in any way authorized by Appellant.

(1) See case as reported in 21 L. C. Jur., 92.

With regard to item £120, William Darling and Thomas Darling prove beyond a doubt that no value was received by them. The first entry in the books was a legitimate transaction at the time; the father was advised of a credit of £120, and it was entered in the books. It was subject to revocation by William Darling & Co. until Isabella Darling availed herself of it, and her recourse upon William Darling, sen., was at no time interrupted.

This claim, either for capital or interest, is barred and prescribed by the lapse of more than five years before action brought; and also by the lapse of six years.

Respondents allege that the indebtedness is due by Wm. Darling & Co., as merchants and co-partners. The claim is of a commercial nature, and is based upon the alleged rendering of a commercial account by a mercantile firm. The interest entered as received on the mortgage is 12½ per cent. That amount has never been received; the entry was erroneous and can be explained. Moreover, this amount not having been collected, and there having been no privity of contract with Isabella Darling, her claim for the amount is against the estate of David Darling, and not against the Appellant.

Now, if the claim can be considered commercial in its nature, there can be no doubt about the application of the law of prescription or limitation of actions. The Court *a quo* held that the transaction was merely a loan on the part of Isabella Darling to Wm. Darling, whilst by the proof there is nothing to shew that Isabella Darling made a loan of the two sums to Wm. Darling & Co. On the contrary, it is shewn that the first item is an exchange of money between William Darling, sen., and Appellant, and that the second is nothing else than a collection of money, and both are

of a commercial nature. The evidence resorted to is similar to that given in a commercial transaction, and Appellant is entitled to apply all laws of prescription which he has invoked.

The case of *Whishaw* v. *Gilmour* (1), relied upon by Respondents, is not in point, and can hardly be admitted as a precedent, even to establish that a loan by a non-commercial person to a commercial firm is not of a commercial nature. If it was a loan, Appellant contends that it was a mercantile one, and as it is urged strongly against him that the entries made in the books created a novation, I submit that the engagement must be considered (having been entered into by him as a merchant), as mercantile. Once you establish the transaction to be a commercial matter at all, you must apply the short prescription.

The following points and authorities were also referred to by the learned Counsel:

Civil Code, L.C., Art. 1233, 1243, 1245, 1235, 2267, 2270. With regard to novation and delegation: *Civil Code, L.C.*, Art. 1171, 1172, 1174.

As to Commercial Jurisdiction—how established: *Edict* of the King of *France*, of the year 1563, establishing Consular Courts, as cited in the case of *Pozer* v. *Meiklejohn* (2); the case of *Pozer* v. *Meiklejohn* (3), and particularly the concluding remarks of Sewell, C. J. (4); *Lalonde* v. *Rolland* (5); *Morrogh* v. *Munn*, (6); 10 and 11 Vic., c. 11. See preamble as well as secs. 1 and 2. This Statute does not exclude accounts between merchants, as does 21 James I., c. 16. New promise by stated account, therefore, insufficient unless signed.

(1) 15 L. C. R., 177; (2) Stuart's R., 122, note*; taken from L. C., Den., 369; (3) Stuart's R., 122, note*; (4) Foot of p. 124; (5) 10 L. C. Jur., 321; (6) Stuart's R., 44.

Commercial acts, as such, give jurisdiction to the Consular Courts, whether the parties be merchants or not: *Bédarride*, Jurid. Com. p. 116; *C. N.* Arts. 631, 632; *Bédarride*, Jurid. Com. p. 128; *Bravard Veyrières*, Droit Com. t. 1, p. 52.

A loan is commercial as regards the merchant borrower: *Goujet et Merger*, Dict. de Droit Com. *vo.* "Acte de Commerce," t. 1, p. 26, nos. 12 and 14; *Sebire et Carteret*, Encyclopédie de Droit *vo.* "Commerçant," "Commerce," t. 1, p. 47.

Acts, when done by merchants, presumed to be mercantile: *Pardessus*, Droit Com, t. 1, pp. 84, 86; *Goujet et Merger*, Dict. de Droit. Com., *vo.* "Acte de Commerce," t. 1, p. 26, no. 9.

Exchange operations are commercial as regards all parties to them: *Namur*, Cours de Droit Com., t. 1, p. 47; *Pardessus*, Droit Com., t. 1, p. 44, no. 28; *Orillard*, Tribuneaux de Com., nos. 338, 339 and 340; *Bédarride*, Droit Com. Comment. du Code de Com., t. 1, p. 34, no. 28.

Agencies also: *Namur*, Cours de Droit Com., t. 1, p. 47; *Pardessus*, Droit Com., t. 1, p. 70, no. 42; *Orillard*, Tribuneaux de Com., p. 303, nos. 338, 339 and 340.

Accounts current between merchants: *Pardessus*, Droit Com , t. 1, p. 90, part of no. 52.

To whom the plea of prescription belongs: *Civil Code*, *L. C.*, Art. 2,208.

For interruption or new promise: *Angell* on Limitations, cap 20, no. 211; *Bowker* v. *Fenn* (1).

As to date of letters, &c: *Civil Code*, *L. C.*, Art. 1,226.

In question of prescription, the party should not be interrogated to draw inferences from his answers: *Alauzet*, Code de Com., t. 3, p. 598, no. 1,562.

New law of prescription should be retroactive:

(1) 10 L. C. Jur., 120.

Mailher de Chassat, Retroactivité des Lois, t. 2, pp. 293, 298.

As to interest recoverable: *Civil Code, L C.*, Art. 1,077. The first credit of interest is prior to 22 Vic., c. 85, and while 16 Vic., c. 80, was in force.

Mr. *Edward Martin*, Q. C., of the Ontario Bar, followed on behalf of the Appellant :—

The first item in the accounts was with the firm, but the one of $800 is due by David Darling's estate, and Wm. Darling is not proved to have been present, or had knowledge of the entering of this item in the accounts, and is not bound by such entry.

Re the Commercial Bank Corporation of India and the East. (1) *In re Family Endowment Society.* (2) *Williams* on Executors. (3) *Re India and London Life Assurance Company.* (4)

The transactions were of a commercial nature :—

Cons. St. of L. C. (5) *Waring* v. *Cunnliffe.* (6) *Fergusson* v. *Fyffe.* (7) *Exparte Bevan.* (8) *Crosskill* v. *Bower.* (9) *Rhodes* v. *Rhodes.* (10)

This case is distinguishable from *Whishaw* v. *Gilmour* (11) The declarations in the two cases were different, and the case of *Whishaw* v. *Gilmour* went on demurrer for want of allegation of debt being of a commercial nature.

The compound interest was not recoverable: *Civil Code of L. C.*, Art. 1078; *Waring* v. *Cunliffe.* (12) The account not being signed, could not take the case out of the Statute; and the letter, being of a different date, could not be connected with the account, *Clark* v. *Alexander* (13); nor could the entries in the books be

(1) 16 Weekly Reporter, 958; (2) L. R. 5 Chy. Ap., 118; (3) Vol. 2, par. 1,243; (4) L. R. 7 Chy. Ap., 651; (5) C. 82, s. 17-18; c. 83, s. 26; (6) 1 Ves., 98; (7) 8 C. & F., 121; (8) 9 Ves., 223; (9) 32 Beav., 86; (10) Johns., 653; 6 Jur., N. S., 600; (11) 15 L. C. R., 177; (12) 1 Ves., 98; (13) 8 Jur., 496.

deemed sufficient to take the case out of the Statute; *Bush* v. *Martin*, (1); *Morgan* v. *Rowlands*, (2); *Hyde* v. *Johnson* (3).

Mr. S. *Bethune*, Q. C., Counsel for the Respondent:—

The principal question in this case is whether it comes under the Statute of Limitations. As to the prescription of five years (even if the debt claimed were one of "a commercial nature") it cannot by any possibility apply, as it is a new prescription created by the *Code*, which came into force on the 1st August, 1866, long after the dates mentioned in the accounts current; and under Article 2270, "prescriptions begun before the promulgation of this *Code* must be governed by the former laws. The case of *Bowker* v. *Fenn* (4), relied on by Appellant comes under the short prescription mentioned in the *Code*. This decision has been overruled by a decision of the Court of Appeal last term, 22nd December, 1876, in the case of *Walker* v. *Sweet* (5), which shows how a prescription may be interrupted by any acknowledgement.

As the provision of law relied on by the Appellant in support of his plea of prescription of six years is that contained in chapter 67 of the *Consolidated Statutes of Lower Canada*, the Respondents answer, that the debt sued on is not a "commercial matter," and consequently does not fall within the Statute. In this case William Darling is sued individually as well as in his capacity of a member of the firm of William Darling & Co. The evidence in this case has been taken under the *Code of Civil Procedure*, Article 251; and as to what proof can be made out of the books of a merchant for and

(1) 2 H. & C., 311; (2) L.R. 7 Q. B., 493; (3) 2 Bing. N. C., 776; (4) 10, L. C. Jur., 120; (5) 21 L. C. Jur., 19.

against himself, I will refer to *Pothier* on Obligations no. 723.

Art. 2250, *Civil Code, L. C.*, cannot be invoked as against arrears of interest, inasmuch as the prescription of the debt had commenced prior to the passing of the *Code*.

The Respondents further contend that, even if the debt sued on can be regarded as a commercial matter, the rendering of the account current of the 6th December, 1865, the letter of the Appellant of the 6th November, 1865, and the entries in the Appellant's books down to as late as the 30th September, 1871, as proved in Court, clearly took the case out of the Statute; the action having been returned into Court on the 20th October, 1871.

The legacy of $800 was clearly recoverable from the Appellant. He was the sole executor of David Darling, and when the legacy was past due and payable under the will, he credited Isabella Darling and debited the estate with the amount.

As to whether the transaction was non commercial *quoad* Miss Isabella Darling, the learned Counsel referred to the following authorities:

Pardessus, Droit Com., nos. 5, 20, 48, 49, 50, 52, p. 5 to 89; *Goujet et Merger*, Dict. de Droit Com. *vo.* "Acte de Commerce" pp. 24, 25, nos. 1, 2, 4, 5 and 6; *Devilleneuve et Massé*, Dict. du Contentieux Commercial *vo.* "Acte de Commerce," p. 15, no. 153; *Dalloz*, Dict. *vo.* "Acte de Commerce," nos. 4, 5, 6; *Bédarride*, des Commerçants, &c., nos. 26, 27, 246, 247, 248; *Bravard et Veyrières*, Droit Com. pp. 51, 56, 236, 237, 322; *Orillard*, Compétence des Trib. Com., no. 245; *Sebire et Carteret* "Encyclopédie de Droit, *vo.* "Commerce," nos. 204, 207, *Whishaw* v. *Gilmour* (1).

(1) 15 L. C. R., 177.

Mr. *Cross*, Q.C., in reply :—

The entries made with reference to the $800 were merely for the purpose of measuring the extent of interest Isabella Darling should have in the mortgage, and it is in evidence that Appellant did not get the money, and as to the other entry it is evident that it is a commercial transaction. If Mr. Darling, Sen., had advised Appellant, that he had drawn a bill of exchange in order to credit Miss Isabella Darling with the amount, the Respondents could not contend that the transaction was not a commercial one ; in this case evidence of an exchange by the opening of a letter of credit has taken place, and is equivalent to a bill of exchange.

JUNE 28th, 1877.

The CHIEF JUSTICE :—

The principal item composing the original claim in this matter arose in this way. Isabella Darling, the Testator, and William Darling the Defendant, were brother and sister. Isabella resided with her father in Scotland ; Defendant resided in Montreal, Canada. Isabella had about £100 in money, which she wished invested. It appears from a letter written by William Darling to Isabella, dated 1st September, 1857, that Isabella contemplated visiting Canada to relieve Mary, William's wife, in her household duty, as she intended visiting Scotland. On the 4th of January, 1858, William wrote a letter in answer to one from her, with reference to the £100. He said, "Your best way will be to keep "it until I give you notice that I have invested the "money ; I will advance the amount, and, after having "done so, will ask you to pay the money over to my

"father on my account." In the account current of William Darling & Co.. of Montreal, with William Darling, Esquire, of Edinburgh, to 31st December, 1858, is entered February 27th, 1858: To cash from Isabella, £120; and in the account current (produced in the cause) of Miss Isabella Darling, in account, interest at 6 per cent., to 31st December, 1858, with W. Darling & Co., is entered March 3rd, 1858, "By cash to William Darling, sen., £120 sterling." A balance is struck at the expiration of the year, and of every year thereafter, according to the accounts current produced, showing a balance (in which this £120 sterling and the interest thereon is included) on the 31st December, 1865, of $1,912.08 Under the will of David Darling, a brother of William and Isabella, made the 9th October, 1856, £200 currency was devised to each of his sisters, Margaret, Grace and Isabella. Probate was granted to William Darling, sole executor of the will, on the 2nd of June, 1857. In the account current already referred to, showing the balance on 31st of December, 1858, Isabella Darling is credited 14th April, 6 months' interest on $800, at 12½ per cent., less ½ per cent. collection $51.74; a similar amount is credited October 14th of the same year; in the account current for 1859, on 14th April, a credit entry of a similar amount is made, and another entry on 14th of October of same amount. In the entries on the account current for 1860, on the 14th of April, there is a credit of a like sum of $51.74, and on the same day D. Darling's legacy of $800. These entries, with interest at six per cent., making yearly rests, charging cash, goods, &c, are continued in the accounts current produced to the last one in which the balance is brought down to the 31st December, 1865, as already mentioned, the amount due Miss Darling being

$1,912.08. The account current filed, which is first in date, shows the account from March, 1858, to 31st December, 1861, is dated 26th of March, 1872, and shows a balance of $1,640.07. That showing the state of the account from January, 1862 to 31st December, 1865, when the balance of $1,912.08 is shown, is dated Montreal, 6th December, 1865. They are transcripts from the entries in the books of W. Darling & Co. This suit was instituted on the 5th October, 1871, and was returned into Court on the 20th day of the same month.

There was evidence offered with a view to showing that William Darling was not aware of the entries of the items in the books of the firm, and that the credit of the legacy of $800 to Isabella, and the charging the estate of David Darling with the amount of the legacy to Isabella in the books, was not made on the authority of William Darling. The statement dated 26th March, 1862, Thomas Darling said, was made up by him, and the items in the books were entered by him, and he was not aware that William knew what he had done. He (Thomas) was aware of the fact that Isabella was entitled to the legacy of $800. The entry as to the cash paid William Darling, Senior, and the two items of interest of $51.74 each, were in the books before he made up the full statement of 26th March, 1862. The statement was made out because Isabella asked him to make a statement of what she termed her fortune, he at that time being the book-keeper of the firm of William Darling & Co. The statement of account dated 6th December, 1865, was made out by Defendant's book-keeper, Ross; he did not know by whose directions but he said he must have been directed to do so by some one. He did not recollect what he did with it after it was made out. The balance made up to 31st December, 1865, and as shown

in that account, was $1,912.08 due Isabella. The Plaintiff produced a letter signed by William Darling, dated Montreal, 6th *November*, 1865, addressed to his sister. It contains the following paragraph; "I did not get "your letter till three weeks after it was written, and "I *now send you the statement of your account.* There "was an amount paid to Morgan that I do not know "whether it should be charged to you or my father, "and I have omitted it altogether from your account, "and from his. I will send you a corset if I can get "one with the articles ordered in your letter from "Mary, and which are not sent, because the expense "would be more than they are worth. Perhaps there are "some other articles you wish: if not, I will send them "by express to Orillia." It was urged on behalf of the Plaintiffs, that in this letter the month in the date was by mistake, written November instead of December, and the statement of account referred to in it was the account made out by Ross, dated the 6th December, 1865. Both William Darling and the book-keeper, Ross, were very closely examined on this matter, and failed to give any satisfactory explanation as to what statement of account was referred to in William Darling's letter. That account undoubtedly existed in William Darling & Co's books—books connected with his business and to which he had constant access, and in it were charged against Isabella, from time to time, cash, goods, paid for furs, for box to pack piano, and very trifling amounts, such as goods, T. Davidson, 22 cents. In the absence of any satisfactory explanation, the judges in the courts below were of opinion that the statement of account referred to and sent in that letter was the one dated 6th December, 1865. Isabella, of course, was well aware that

she had an account with William Darling & Co., and the letter, dated 6th November, would warrant the inference that she had written for a statement of her account. He seems to apologise for not sending it before. He says, "I did not get your letter till three weeks after it was written, and I now send you *the statement* of your account." At this time Isabella was not living in Montreal, but somewhere near Orillia, in the Province of Ontario. An attempt was made to show that these entries which were made in William Darling's books, and which remained there so long, showing a large balance due to Isabella, were entirely a mistake; the first attempt to put the matter right by cross entries and the "*magic power of book-keeping*" was made after this action was commenced. In the meantime, Isabella Darling had married George Templeton, and in the marriage contract between them, dated 9th August, 1870, her property is referred to as wearing apparel, jewellery, trinkets and paraphernalia, the sum of about *two thousand four hundred dollars in the hands of William Darling & Co.*, &c., &c. William Darling was examined as to this contract. He says the amount to Isabella's credit on 1st January 1871, was $2,535.10. He says he was spoken to about it, but he could not say if he ever saw the contract. In answer to the question if he had not informed Mr. Hunter, the Notary, who prepared the contract, that the sum of about $2,400, the property of Isabella Darling, was then in the hands of William Darling & Co., he answered, "I am quite satisfied I never gave Mr. Hunter, or anybody else, any information of that kind. I may have stated that there was such an amount to the credit of Isabella Darling, but subject to all the adjustments I have stated in my previous evidence. As to the language that is used

there, it is not my language." He was asked, "is it not a fact that the information, such as it was, was derived from conversations between you and Mr. Hunter, the Notary?" He answered, "it may have been." Isabella Darling having married, died on 13th May, 1871; this action was instituted on 5th October, 1871. George Templeton died 28th March, 1875, and the suit was continued by his executors. The fair inference is, that William Darling, about the time of his sister's marriage, was aware that a considerable amount stood to her credit in the books of William Darling & Co., and no steps whatever were taken to rectify any errors, if they existed, until after the commencement of this action. As to the principal items of £120 sterling, equal to $584, and the $800, the devise of David Darling, I fail to see how there are any errors to correct. Isabella had a little money that she wished invested in this country, which she contemplated visiting soon. Her brother intimated to her that he would be looking out for an investment for her, and when he found one he would make it, and told her she could then pay the money to his father, on his account. Before he advised her as to an investment, she paid to his father, to his credit, the £120 sterling. That amount is charged in the books of William Darling, of Edinburgh, to Wm. Darling & Co., Feb. 1, 1858, as cash from Isabella; £120 is credited to her 3rd March, 1858, by cash paid to William Darling, sen., £120—$584—and this item is contained in the accounts rendered to Isabella, and down to the commencement of this suit. Isabella is made aware of the fact—has enquired as to the state of her account—has had statements rendered to her, and in the last one sent to her the balance brought down includes this item and the interest. I think we must assume, under the evidence, that William

Darling knew what was in his own books, and how the account which he sent Isabella in his letter of 6th November was made up, as I can come to no other conclusion than that the account of the 6th December was sent in the letter dated 6th November. William himself is as much bound by the account as if he had signed it at the bottom, or as if he had annexed it to the letter, and it had been verified by witnesses as the account annexed and referred to in it. Having recognized the payment by her to William, sen., on his account, having charged this amount to William, sen., and credited the amount to her, I fail to see how there was any error to be corrected, or how there could be, without her consent, any re-charging, because William, sen., may or may not have paid W. Darling & Co.

Then, as to the legacy, as I understand the law, until an executor or any other trustee acknowledges to hold money which comes into his hands intended for another as the money of the devisee, or *cestui que trust*, he cannot be sued at law for it; but when he sets it apart as the money of the devisee, and charges the estate of the testator with it, and credits the same to the devisee, then it is money had and received to the use of the devisee. Now, in the case before us, this appears to have been done. On the 14th April, 1860, Isabella Darling was credited with D. Darling's legacy, $800, and the estate of David Darling was debited, 31st May, 1862, with the legacy of $800, and interest at 12½ per cent., to 14th April, 1860, and 6 per cent. from 14th April, 1860, to 12th September, 1861, $67.73. So here was debiting of the estate of the testator with the legacy, and a crediting of it to the legatee, and an account rendered afterwards allowing interest on it.

It seems to me this enables the legatee to sue the executor for money had and received.

There may be some question how far the interest credited at 12½ per cent. is proper to be considered as accruing from the legacy, and as belonging to the legatee. It is stated that there was a mortgage owned by David Darling's estate, which, it was thought, would bear 12½ per cent. interest, and this was set aside for the £200 devised to each of the three sisters, and when the interest was paid at this high rate, it was credited to Isabella for her $800, but subsequently, in a proceeding in Chancery, the Court would not allow this excessive interest, and it was reduced to 6 per cent. by considering the excess as paid on the principal. Notwithstanding this, and the compromise that was effected, the amount still remained to the credit of Isabella Darling in the books of William Darling & Co. until after the commencement of this suit.

Perhaps a defence might have been raised as to the excess of interest beyond 6 per cent. credited as the first four or five payments of interest, if it had been shown that the estate of David Darling had really lost the excess. I do not understand that question to have been specially raised in the Court below. The broad question as to William not being liable for the legacy is what was discussed, and that, I think, was properly decided against him. There is no question raised as to the solvency of the estate of David Darling, so there can be no pretence for retaining any portion of the legacy to pay debts. As to interest, the general rule is that the legacy bears interest from the time it is payable, but if the executor uses the funds of the testator for his own business or purposes, the rate

of interest will be affected thereby (1). It does not clearly appear at what time David Darling died. His will is dated 9th October, 1856, and the probate is dated the 2nd June, 1857. The legacy to Isabella is payable one year from the death of the testator. The first interest on the $800 is credited on the 14th April, 1858, for six months, at 12½ per cent., $51.74, and there are five of such payments credited. There is some mistake in this, for six months' interest, at 12½ per cent., does not amount to $51.74. If the question had been discussed in the Court below, and it had appeared that the funds of the testator were only bearing 6 per cent. interest, or that the sum credited to Isabella was too much by 6 per cent., the claim might have been reduced by about $130, and the interest thereon, according to the mode of calculating by the account rendered, and, perhaps, that would be the correct mode to treat this matter now.

Assuming, then, that the transaction is to be considered as binding, is it to be considered as one of commerce or non-commercial. If non-commercial, the entries in the books of Darling & Co., the statement of the account of the 6th December, 1865, and the letter enclosing the same, are sufficient evidence of the indebtedness to bind William Darling, and if commercial, equally so.

The next question is as to the statute of limitations. If the transaction is non-commercial, then it is conceded on all hands, as I understand, that the claim is not barred by prescription. If the matter is to be considered as one of commerce, then is the Plaintiff's claim barred by the Statutes of Lower Canada or by the provisions of the *Civil Code*? The 2270th article of the *Code* reads: "Prescriptions begun before the

(1) 1 Williams on Executors, 1284-1288.

promulgation of this *Code* must be governed by the former laws." The *Code* came into operation on the 1st August, 1866, and the statement of account to which the letter of William Darling refers is dated 6th December, 1865, from which day the prescription began to run. According to the literal wording of the *Code* it does not apply, and the case must be governed by the former laws.

Under the *Consolidated Statutes of Lower Canada*, in force until the *Code* was promulgated, it was enacted (1) that "no action of account, or upon the case, nor any action grounded upon any lending or contract without specialty, shall be maintainable in or with regard to any commercial matter, unless such action is commenced within six years next after the cause of such action." Under sec. 2 it was provided that "no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the next preceding section, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made, or contained by, or in some writing, to be signed by the party chargeable thereby."

Is the acknowledgment put forward on behalf of the Plaintiff sufficient? I think it is. The account is in writing; it purports on the face of it to show the indebtedness of William Darling & Co. to Isabella Darling; the amount is stated to be, as made up to the 31st December, 1865, $1,912.08 The evidence, I think, as already stated, leads to the conclusion that Isabella wrote William Darling, asking for the statement of her account, and in the letter, purporting to be dated 6th of November, 1865, *he sends her that very account*, saying "I now send you the statement of your account." Taking

(1) Cap. 67, sec. 1.

both together, both being in writing, and the letter signed by him, I think this sufficiently complies with the statute. Suppose the account current had been continued over half a sheet of paper, and the letter had followed immediately after the striking of the balance, and then had been signed by the Defendant at the end of the letter, would there be any doubt that the Statute would have been complied with? Or, as already suggested, suppose they had been attached together with a ribbon and the ends sealed, with William Darling's seal unbroken, would it not be said that the two papers were incorporated together? If sent together, which I do not doubt they were, may they not be considered as one document for the purposes of the Statute? I think they may. In *Hartly* v. *Wharton*, (1) where Defendant was an infant when goods were sold to him, it was sought to make him liable on a written promise of ratification under Imperial Statute 9th George IV, chap. 14, sec. 5. The written document was in the form of a letter, but was not addressed to any one and contained no date. Lord Denman, in giving judgment, said, "there is no date to the writing, the Act requires none, but only a promise or ratification made by some writing, signed by the party to be charged therewith. Then it is urged that the party to whom the promise was made is not named. That I do not think necessary If such a promise were in a letter the address would be evidence, and if that were in an envelope evidence might be given to connect the two, and so evidence may be given for or to whom the written acknowledgment was made by delivery or otherwise." So here we connect the letter and the statement of the account by evidence, and thus connected together they are an admission of

(1) 11 A. & E., 934.

the balance due signed by William Darling. The later cases seem to sustain the view that you may use another document or paper referring to the contract to make it binding under the statute of frauds. In a recent case, a learned judge said----" On the document itself there must be some reference from one to the other, leaving nothing to be supplied by parol evidence, except the identity, as it were, of the document," *Peirce* v. *Corf*, (1); *Buxton* v. *Rust*, (2). If the object of the Statute be taken into consideration, I can hardly conceive a more satisfactory way of acknowledging an amount due than the rendering of an account showing the balance, and a letter accompanying it. saying----" I send you a statement of your account "; and this in reply to a written request to send it. Here there is nothing transacted by "parole" between the parties. It is all in writing; all the act of the party to be charged therewith. Suppose the account had only been running five years, and Isabella had been in Montreal and asked William Darling for a statement of her account, and one had been made out showing a balance due her of $1,000, and this, though not signed, had been handed her by William Darling, there is no doubt if she had sued William Darling within a month for that balance, and had proved just what has been stated, she would have recovered as for the admitted balance of the account. She could not have recovered after the six years, because the admission is not in writing. But, being sent in a letter signed by him, it then became an admitted balance under his signature, and so taken out of the Statute----see *Baumann* v. *James*, (3). There is a very late case as to an acknowledgment taking the case out of the Statute in the Exchequer

(1) L. R. 9. Q. B., 217; (2) L. R. 7 Exch., 282; (3) L. R. 3 Ch. Ap., 509; Maxwell on Statutes p. 262.

Division before Baron *Cleasby* in *Skeet* v. *Lindsay* (1). It was argued at some length, and many cases were referred to. The learned Baron adopted the language of *Mellish* L. J. in the case of the *River Steam Co.; Mitchell's claim* (2). "There must be one of these three things to take the case out of the Statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or, *secondly*, there must be an unconditional promise to pay the debt, or, *thirdly*, there must be a conditional promise to pay the debt and then the evidence that the condition has been performed."

Here there is the clearest evidence of the acknowledgment of the debt, the account current showing the amounts and the balance due. The law then implies the promise to pay, this was less than six years before the entry of this case into court, and therefore, considering the matter as a fairly commercial one, and the rules of evidence in commercial cases in England to apply, I think we ought to hold that the action is properly maintainable.

It was pressed upon us in argument that we should hold that if the Statute had run so as to bar the remedy that the subsequent admission should not take the case out of the statute, and the debt should be considered as wholly extinguished. The case of *Bowker* v. *Fenn*, (3) was referred to. How far that case may be affected by *Walker* v. *Sweet* (4) in the Court of Appeals in Quebec, recently decided, it is not necessary to determine. Under the decided cases in England there can be no doubt that the legal effect of an acknowledgment of a debt barred by the statute of limitations, is that of a promise to pay an old debt, and for this pur-

(1) 36 L. T. N. S., 98; (2) L. R. 6 Ch. Ap., 822; (3) 10 L. C. Jur., 120; (4) 21 L. C. Jur., 19.

pose the old debt may be said to be revived. It is viewed as a consideration for a new promise. If the creditor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. This is the language of Vice-Chancellor *Wigram*, used in *Philipps* v. *Philipps* (1), and referred to in subsequent cases, particularly in *Buckmaster et al.* v. *Russell* (2).

At this late day, I do not think we should lay down a different rule as to the effect of acknowledgments to take a case out of the Statute.

The evidence showed that Thomas Darling was not the party bound to pay the indebtedness of the firm to Isabella Darling, and as to Thomas, it was not argued before this Court that the case was not properly decided in his favour; and as against William, if the evidence to establish liability was sufficient, he, (William), being charged as jointly and severally liable, the judgment was proper enough, he being solely liable.

As to the first question submitted to this Court, I think there was sufficient evidence of William Darling's indebtedness to the amount of $2,288.44, with interest at 6 per cent., since 1st January, 1871; and I do not think the explanations given in the evidence in behalf of William Darling were sufficient to exonerate him from liability. Second—The articles of the *Code* as to the prescription of interest to five years does not apply in this case, as the prescription began before the *Code* was promulgated. Third—Whether the matter in question was commercial or not, the remedy is not barred by the lapse of five years before the bringing of the action. Fourth—Six years had not elapsed before the commencement of this action since the written acknow-

(1) 3 Hare, 281-299; (2) 10 C. B., N. S., 745.

ledgment was made by William Darling, which took the case out of the Statute. Fifth.—It was not argued before this Court that the plea of compensation for board and lodging was established by appellant. If it had been argued, I think the evideuce was not sufficient to sustain the plea.

The rate of interest in this account was six per cent. per annum making annual rests. In this way the account was rendered by Darling & Co., and Isabella Darling did not object. It may be considered, therefore, that this was the mode agreed upon between the parties as to the interest, and, according to that mode, the Plaintiffs should be entitled to recover. I do not quite understand how the learned Judge in the Superior Court fixed the amount to be recovered from the Defendant, William Darling, at $1,746.42, balance shown to be due on 31st December, 1863, under Plaintiff's exhibit No. 2, with interest on $1,661.23, balance due 31st December, 1863, until perfect payment and costs. I fail to see why the balance on 31st December, 1863, should be fixed as the sum due, or why that balance should not carry interest until payment. If the mode adopted of computing interest, and making annual rests anterior to 1863, be correct, it seems to me it should be followed up to the time of the bringing of the suit, or to the last balance which would have been struck previous to the bringing of this action. Taking the balance of the account, say on 1st January, 1871, as stated in William Darling's account at $2,535, and allowing for the excess of the five payments of interest credited with the interest thereon computed in the same way, I make the balance due the Plaintiff, $2,288.42, bearing interest from the 1st January, 1871, which, I

think, is the proper amount to find againt the Defendant, with costs.

RITCHIE, J., concurred.

STRONG, J.:

As regards the question of prescription, I have found nothing to lead me to the conclusion that the decision in *Whishaw* v. *Gilmour* (1) should not be considered as correctly settling the law; and I am, therefore, of opinion that the only prescription applicable to the case was the long prescription of thirty years. I fail to see any element of a commercial transaction in the loan by Isabella Darling, there being nothing in the contract, which is implied from the facts, making it obligatory on the borrowers to use the loan for the purposes of trade or speculation, and nothing making the rate of the lender's remuneration dependent on any contingencies of a speculative character. I need not say more on this head, as I entirely agree in the judgment which will be delivered by my brother Fournier, and which contains a full discussion of this question.

I also concur with the Chief Justice in the opinion that, if the short prescription were applicable, the letter of the 6th of November, 1865, would be an acknowledgment sufficient to interrupt it.

I think the appeal should be dismissed with costs.

TASCHEREAU, J.:

The action in the Superior Court was instituted by George Templeton, as universal legatee of his deceased wife, Isabella Darling. Templeton died during the

(1) 15 L. C. R., 177.

pendency of the suit; the Respondents, as executors of his will, took up the instance in the place of said Templeton. The action was brought against the Appellant and his brother Thomas Darling for $1,912.08, and interest from 31st December, 1865, as per settlement of account, for loan of monies at different times from 1858 to 1860. The Appellant fyled several pleas, but only the following need be considered under the present appeal: 1st. Plea of prescription for five years; 2nd. Plea of prescription for six years; 3rd. Plea of compensation by a counter claim for board and lodging from September, 1858, to Nov. 1862, at the rate of $300 per annum; 4th. The general issue.

We are of opinion that the judgment of the Court below should be confirmed. It is evident that the pleas of prescription of five and six years cannot be maintained for one instant, the debt claimed not being of a commercial nature. It consists in two separate loans of money bearing interest, made by a non-trader to traders it is true, but such a loan cannot be considered as a commercial transaction. This proposition was adhered to in the case of *Whishaw* v. *Gilmour* (1), and we find the same rule of law laid down in *Pardessus*, Droit Commercial (2); *Goujet et Merger, vo.* "Acte de Commerce" (3); *Dalloz* Dict., *vo.* "Acte de Commerce" (4); *Bédarride*, des Commercants, nos. 26, 27, 246, 247, 248; *Sebire et Carteret vo.* "Commerce," (5); and the Court of Queen's Bench, which confirmed the judgment appealed from, assented to the same doctrine. Even admitting, for the sake of argument, that the debt claimed was one of a commercial nature, the prescription of five years would not apply as being a new prescription created by the

(1) 15 L. C. R., 177; (2) Vol. 1 pp. 5 to 89; (3) P. 15, no. 153; (4) 34, no. 456; (5) P. 560, nos. 204 to 267.

Code (which came in force on the 1st August, 1866), and under Article 2,270, all prescriptions begun before the *Code* must be governed by the former laws.

The debt being of a civil and not of a commercial nature, the prescription of six years cannot apply, nor, if commercial, can the contention of the Appellants that the debt had not been acknowledged by any writing of his be of any avail, for the entries in his books are, according to our laws, conclusive proof against him unless otherwise explained or an error is accounted for, and in this case I am satisfied that there has been no error. This also disposes of the plea of general issue fyled by the Appellant. Now as to the plea of compensation, claiming $1,200 from the Respondent for board and lodging at different times from 1858 to 1862, we are of opinion that the claim cannot be entertained. No proof of a contract for board was made; on the contrary, it seems that it was on the invitation of the Appellant that Isabella Darling went to live with him. To show his intention of charging for this board, Appellant should have included this item in the accounts he furnished Mrs. Templeton whilst she was living with him. If we take into consideration the relationship of the parties, the rendering of the accounts without such a charge, and all the surrounding circumstances, I think we may safely come to the conclusion that no intention ever existed in Appellant's mind to charge board or lodging to a sister who came to his house by invitation. We therefore dismiss this plea as not proved, and confirm the judgment of the Court of Queen's Bench for the Province of Quebec, with costs in this Court as well as in the other Courts appealed from, with a slight alteration as to the amount.

FOURNIER, J. :

La principale question a résoudre se résumant à savoir si le contrat sur lequel est basé l'action en cette cause est, ou non, d'une nature commerciale, il suffit pour en déterminer le véritable caractère de rappeler en peu de mots de quelle manière il a eu lieu, et la qualité des parties contractantes à cette époque.

Le 3 mars 1858, William Darling, marchand de Montréal, reçut de William Darling, senior, son père, pour le bénéfice de sa sœur Isabella Darling, la somme de £120 stg., égale à $584.00 courant. Plus tard cette dernière devint légataire d'une autre somme de $800, en vertu du testament de David Darling, son frère. William Darling fut seul chargé de veiller à l'exécution de ce testament. Ces deux sommes lui ayant été laissées à titre de prêt, à six par cent d'intérêt par année, il en rendit compte à sa sœur jusqu'au 31 Décembre 1867. A cette époque il apparaissait être dû, tant par les livres de la société William Darling et Compagnie, que par un état de compte fourni par William Darling à la dite Isabella Darling, y compris l'intérêt échu, une somme totale de $1,746.72 courant.

Isabella Darling n'a jamais fait aucun commerce et rien ne fait voir qu'en plaçant ses fonds dans la société de William Darling et Cie., elle l'ait fait dans un but de trafic et de spéculation. Par le seul fait que William Darling était marchand, le prêt qui lui a été fait alors est-il devenu pour cela un acte d'une nature commerciale auquel la prescription particulière à ces sortes d'actes établie par la 10 et 11 Vic., chap. 11, se trouve applicable ? Il est indubitable que de la part d'Isabella Darling, cet acte n'est point commercial. C'est un contrat civil pour le placement de ses fonds

auquel la spéculation est tout à fait étrangère et qui conséquemment reste soumis, quant à la preuve et à la prescription, aux règles qui concernent le prêt. Comme on le verra par les autorités suivantes, le contrat pourrait être considéré en France comme une opération civile de la part d'Isabella Darling et comme un' acte de commerçant de la part de William Darling. *Dalloz* (1) " Le même acte peut n'être commercial que de la part de l'une des parties. Ainsi dans le cas d'une vente, l'acheteur peut faire un acte de commerce tandis que le vendeur ne se livre qu'à une opération civile, et réciproquement." *De Villeneuve et Massé* (2) " Les obligations d'un commerçant au profit d'un non-commerçant lorsque la cause en est commerciale, sont acte de commerce à l'égard du commerçant seulement."

Ce double caractère donné au même acte dans la législation française provient de la division des juridictions, attribuant au tribunal de commerce, la décision des matières commerciales, et aux tribunaux civils, celle des causes d'une nature civile. Il y a bien des cas en France où l'on donne le caractère de commercialité à un acte uniquemment pour définir la juridiction. Par exemple si le prêt fait à un commerçant est déclaré pour celui-ci, acte de commerce, c'est a fin de le soumettre à la juridiction du tribunal de commerce qui peut décerner contre lui la contrainte par corps pour le forcer de remplir ses obligations, ou le déclarer en faillite. Mais le commerçant ne pourrait y traduire sa partie adverse, si elle n'a pas fait un acte de commerce ; il serait obligé de l'assigner devant les tribunaux civils qui appliqueraient au contrat toutes les règles du droit civil qui le régissent. C'est ce que dit *Dalloz* (3),

(1) 1 Vol. Dict. de Legis. no. 5 ; (2) Dict. du Contentieux commercial, page 15, no. 153 ; (3) Dict. de Legis. no. 5. *Vo* "Acte de Commerce."

"Mais la compétence consulaire ne s'étend pas au "prêteur qui n'a pas fait personnellement un acte de "commerce même lorsque la convention formée entre lui "et le commerçant avait pour objet le trafic auquel ce "dernier se livrait."

Et aussi *Goujet et Merger* (1) Sect. I. au. No. 1. "Ce qui donne en général à un acte le caractère commercial, c'est la *spéculation*; toute opération faite dans un but de trafic, avec l'intention d'en retirer un bénéfice, constitue un acte de commerce."

No. 4. "Il résulte du même principe qu'un contrat peut être commercial de la part d'une des parties et civil de la part de l'autre, si l'une d'elles seulement a eu en vue la réalisation d'un bénéfice."

No. 6. "Toutefois il existe cette différence entre les commerçants et les non-commerçants, que les premiers sont, jusqu'à preuve du contraire, supposés avoir agi dans l'intérêt de leur commerce, au lieu que les derniers sont réputés également jusqu'à preuve du contraire, n'avoir pas voulu entreprendre une opération commerciale."

Dans la province de Québec, où cette division de juridiction n'existe pas, il n'y a pas la même raison de donner au même acte ce double caractère. Si le contrat est civil de sa nature, il ne change pas de caractère parce que l'une des parties qui y a pris part est commerçante.

Une question, exactement semblable à celle-ci, a été décidée par la Cour du Banc de la Reine en appel. C'est celle de *Whishaw* vs. *Gilmour* (2). Dans cette cause, il s'agissait aussi du prêt d'une somme d'argent par un non-commerçant à des commerçants qui opposaient à la demande la prescription de six ans, invoquée sur le principe que l'acte étant de leur part un acte de com-

(1) Dict. de Commerce *Vo* "Acte de Commerce," p. 24; (2) 15 L. C. R., 177.

merce, ils avaient droit de se prévaloir de cette prescription.

Leur prétention fut rejetée. Bien que les juges aient été divisés d'opinion, il n'y a jamais eu de décision au contraire et ce point a été depuis considéré comme règle, par ce jugement.

Je suis d'avis que dans cette cause comme dans celle de *Whishaw et Gilmour* la seule prescription applicable est celle de trente ans.

Il y a aussi un plaidoyer de compensation qui n'est pas mieux fondé que celui de la prescription.

Aucune preuve n'a été faite pour établir une convention en vertu de la quelle la dite Isabella Darling devait payer pour sa pension et logement dans la famille de son frère, William Darling, et rien ne fait voir qu'il ait jamais eu l'intention de lui en tenir compte.

Pour ces motifs je suis d'avis de confirmer le jugement de la Cour du Banc de la Reine en appel, avec dépens, en le modifiant cependant de la manière mentionnée par l'honorable Juge en Chef.

HENRY, J. :—

I agree with the views expressed by the Chief Justice, and my other colleagues, as to the nature of the transaction. The case of *Whishaw* vs. *Gilmour* is in point, and the transaction must be considered as being non-commercial, and the only prescription applicable is that of thirty years.

Appeal dismissed with costs, with certain variations as to interest in judgment of Court below.

Attorneys for Appellant : *Cross, Lunn & Davidson.*

Attorneys for Respondents: *Bethune & Bethune.*