1878

*Feb'y. 1.

June 3

JOHN FULTON.....APPELLANT;

AND

F. B. McNAMEE AND OTHERS.....RESPONDENTS.

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

Judicial avowal (aveu)—Deed, erroneous statement in—Art. 1,243, *C.C. L. C.*

By notarial deed, dated 3rd May, 1875, *F. McN.* and *P. K.* purchased from one *F. C.* certain printing materials. The agreed price was $5,000, and was paid; but the deed erroneously stated the price to be $7,188.40, which amount was acknowledged in the deed to have been paid and received. *C.* remained in possession, and, after being in partnership with *M.* for several months, failed. On 7th March, 1876, *F. McN.* and *P. K.* claimed the plant, and their petition stated the purchase had been made in good faith, and that they had paid the agreed price, but that the deed erroneously stated the price to have been $7,188.40. The evidence as to the price agreed upon and paid was that of *F. McN.*, and his statement

*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

1878

FULTON v. MCNAMEE.

was confirmed by. *F. C.* The Appellant, as assignee to be insolvent estate of *F. C.* and *M.*, claimed the payment of $2,188.40, being the balance between the consideration price mentioned in the deed and the $5,000 admitted to have been paid.

Held,—Affirming the judgment of the Court below, that the only evidence in support of Appellant's contention being that of *F. McN.*, the Respondent, the Appellant cannot divide the Respondent's answers (*aveu judiciaire*) in order to avail himself of what is favorable and reject what is unfavorable. (*Strong*, J., dissenting.)

That, although there is an error, or even a false statement, in a deed, the obligation to pay the consideration proven to be the true and legitimate one remains.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal Side).

In February, 1876, a writ of attachment, under the Insolvent Act of 1875, was issued against *Felix Callahan* and *S. J. Meany*, carrying on business as printers and publishers at *Montreal*, and the Appellant was appointed assignee to the estate of the firm, as well as to the individual estates of each co-partner.

In March, 1876, the Respondents presented a petition to the Superior Court, praying that the Appellant, as assignee of *Callahan* and *Meany*, be ordered to deliver to them certain plant and machinery which Respondents claimed to be their property, in virtue of a deed of sale, in their favor, by the insolvent, *Callahan*, passed before *Phillips*, Notary Public, on the 3rd day of May, 1875. In their petition the Respondents alleged :—

"That the said purchase was made by your Petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000, but that the said deed erroneously states the price to have been $7,148.40."

The Appellant, in his answer, admitted the sale, but alleged that the price stated in the deed of sale, and schedule annexed, was the real price of the articles sold, and that the Respondents were only entitled to

1878

FULTON v. MCNAMEE.

the goods on the paying of $2,188.40, the difference between the amount paid and the price stipulated.

On this issue the parties went to proof.

The facts of the case are as follows: *Felix Callahan*, a printer, being in want of funds to publish an Irish newspaper in *Montreal*, proposed to sell a part of his plant to the Respondent, *McNamee*, and a sale of the articles in question in this case was finally agreed upon for the sum of $5,000, which was to be advanced as Mr. *Callahan* should require the money. The Respondent, *McNamee*, then induced the other Respondent, *Kenney*, to join him in the purchase, and, on the 3rd May, 1875, a notarial deed of sale was executed before *Phillips*, N. P.

A schedule, enumerating the various articles which were sold, was annexed to the deed, and formed part of it. When the parties first went to the notary's office, they had no list of the articles sold, and an adjournment took place to enable Mr. *Callahan* to prepare one. In making the list he added opposite each article the price at which he had bought it. The deed was then drafted, and the price entered was the total of $7,188.40 shown at the foot of the list. No money was paid at the time, but afterwards the price of $5,000 was paid in various amounts as required by Mr. *Callahan*.

Mr. *Callahan* subsequently formed a partnership with Mr. *Meany* for the publication of the "Sun," and the Respondents allowed the firm to continue the use of the plant for the publication of the newspaper.

The Petitioners were examined for the assignee, and *Callahan* and another witness, *Carroll*, were examined for Petitioners in rebuttal.

The Superior Court gave judgment on the 2nd May, 1876, ordering the Appellant to deliver to the Respondents the articles claimed. This judgment was con-

firmed in the Court of Queen's Bench for *Lower Canada* (Appeal Side), on the 15th June, 1877.

Mr. *McMaster*, for Appellant :—

The whole difficulty in this case arises from the following averment in the Respondents' petition : " That the said purchase was made by your petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000 ; but that the said deed erroneously states the price to have been $7,188.40."

The Respondents, I contend, had to prove the error as to the price and what the real price was. The legal instrument showed the price to be $7,188.40, and there is no legal evidence to negative it. The only way of attacking a notarial deed is by a petition in improbation (*Inscription de faux*), or by evidence of equal value. Here, it is the party to the deed who is attacking it. Our Art. 1210 and 1211, *C. C. L. C.* apply in this case. This instrument was complete, and if they want to vary it in part, they must do it in accordance with the articles of the Code.

The question of dividing an admission does not present itself here. The only admission here made is, that the Respondents paid $5,000 for the articles claimed.

The receipt, erroneously styled a discharge, is admitted by *Callahan* to be false and cannot be invoked by the Respondents, who admit they paid nothing when the deed was executed and only subsequently paid the sum of $5,000.

The statements of *McNamee & Kenney*, examined as witnesses, cannot avail themselves. *C. C. P. L. C.*, 251.

The evidence shows the property was worth $7,188.40 ; that the sale was *bonâ fide*, and that the Respondents paid nothing down ; and the assignee, therefore, it is submitted, was entitled to stand by the deed, and have

1878

FULTON v. MCNAMEE.

it declared by this Court that the Respondents are debtors for the difference.

Reference was made to Arts. 1,496, 1,533, 1,234 *C. C. L. C.*

Mr. *Wurtele*, Q.C., for Respondent:—

The only question in this case is, what was the price paid for the goods and was it paid.

The evidence for the Appellant cannot be divided.

The Appellant invokes the Respondents' admission to prove there was falsity of consideration in the deed. But this same admission proves that the price was only $5,000 and that this sum has been paid; and it further explains satisfactorily, how the error happened. The admission must be taken as a whole, and cannot be divided. The Appellant cannot invoke in his favor, against the full discharge given in the deed of sale, the admission of the Respondents contained in their petition and in their testimony,—that only $5,000 were paid; and reject their declaration,—that this sum was the price really agreed upon, and that the deed erroneously stated the price to be $7,188.40.

The learned Counsel referred more specially to 3 *Merlin, Questions de droit* (1); and also, to *C. C. L. C.* Art. 1,243; *Marcadé* C. N. Art. 1,356 (2); *Demolombe* (3); *Toullier* (4); *Duranton* (5); and *Massé* (6).

1878

*June 3.

STRONG, J.:

I am of the same opinion as the dissenting judges in the Court of Queen's Bench. There can be no doubt

(1) Vo. Cause des obligations par. 1, No. 3, p., 249.
(2) Vol. 5, p. 213.
(3) Vol. 20, Nos. 80, 81, Vol. 24, No. 373.
(4) Vol. 6, No. 177, Vol. 10, No. 339.
(5) Vol. 10, No. 351.
(6) Droit Commercial, Vol. 5, Nos. 224, 225.

* The Chief Justice was absent when judgment was delivered.

1878

FULTON v. MCNAMEE.

but that the admission of the Respondents is not divisible in this sense, that it was not competent to the Appellant to reject the qualification to the statement that the whole purchase money specified in the deed was not paid; in other words, the qualification is admissible, and is to be taken into account in the Respondents' favour, but it is not, I think, on the authorities, necessarily conclusive. It is competent for the Appellant to contradict it, and the Court is bound to consider what weight should be attributed to it. Art. 231, clause 2, of the *Code of P. of L. C.* is as follows:—

> The answer of any party to a question put to him may be divided * * when the part of the answer objected to is improbable, or invalidated by indications of fraud, or of bad faith, or by contrary evidence.

The passage cited by Mr. *McMaster* from *Marcadé* (1) is an authority directly in point; *Laurent* (2) also states the law in the same way.

It was not, therefore, competent for the Appellant to reject that portion of the admission which made against him, altogether; but it was competent to him to contradict it and shew that it was not true, or to call upon the Court to discredit it. The question thus becomes one of fact—was the lesser sum of $5,000, and not $7,188.40, as stated in the deed, the true price? Not only is the testimony of the parties to the sale that the lesser sum was the real price inconsistent with the deed, but, in my opinion, the evidence is not sufficient to prove the error alleged.

It would be against the policy of the law, and productive of very dangerous consequences, if in any case the price stated in a solemn deed of sale could be proved to be erroneous by the evidence of the parties themselves unconfirmed by other testimony, when the

(1) Vol. 5, 6th ed., p. 223. (2) Vol. 20, 206.

1878

FULTON v. McNAMEE.

rights of third parties have intervened and the contract is sought to be enforced on behalf of creditors by the assignee in bankruptcy of the vendor.

Under a system of evidence which freely admits the testimony of a party in his own behalf, the purchaser's own unsupported evidence would not, in such a case, be deemed sufficient to establish mistake in the statement of price and to cut down the amount stated in the formal deed. For these reasons, I think the Respondents failed to establish the pretended mistake. To use the expression of the article of the *Code of Procedure*, already referred to, I think we ought to declare that part of the admission which is objected to improbable.

I feel, therefore, bound to dissent from the judgment of the Court as delivered by my brother *Fournier*, not on the law, but as regards the sufficiency of the evidence to contradict and vary the deed.

I think the appeal should be allowed with costs, and the petition of Respondents in the Court below dismissed with costs.

FOURNIER, J.:—

On the 3rd of May, 1875, the Respondents purchased by deed before a Notary Public from *Felix Callahan*, of the City of *Montreal*, book and job printer, all the stock of printing materials mentioned and enumerated in a schedule thereof thereunto annexed, which formed part of the deed. The consideration expressed in the deed is $7,188.40, which *Callahan* acknowledged and confessed to have well and truly had and received, previous to the passing of the deed.

The vendor, *Callahan*, having remained in possession of the materials, almost immediately formed a partnership with *J. Meany*, for the publication of a newspaper

called *The Sun*. After a few months, the firm of *Callahan & Meany* went into insolvency, in consequence of a writ of attachment issued in February, 1876. The Appellant was appointed assignee, and with the property of the firm he took possession of these printing materials.

The Respondents by petition, dated the 27th March following, claimed the plant which they had bought, alleging that the deed of sale of the 3rd of May above cited was their title to the said plant, and that from the date of their purchase it had never ceased to be their property. The consideration alleged to have been paid, is thus worded in their petition :—

> That the said purchase was made by your petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000.00, but that the said deed erroneously states the price to have been $7,188.40.

The petition prays that the assignee be ordered to deliver the plant to the petitioners.

The Appellant, in his plea, in answer to the petition does not attack the legality of the deed of sale in question, but alleges that the consideration price is not $5,000 but $7,188.40, being the amount mentioned in the deed, which amount was never paid to *Callahan ;* and that the same is now due ; and offers and tenders to the petitioners the said articles and effects upon payment of the said consideration price, or of any balance that may remain unpaid of the said purchase price.

The issue was joined by a general answer and the parties proceeded to proof.

The Petitioners, who had already produced in support of their demand a copy of the deed of sale of the 3rd May, 1875, also filed a copy of the insolvent's answers, under oath, given to the questions put to him before the assignee relative to the sale in question, pending the proceedings under the writ of attachment.

1878

FULTON v. MCNAMEE.

The Respondents rested their case there, in consequence of a decision of the Honorable Mr. Justice *Rainville* stating that the burden of proof was on the contesting party.

The error in the statement of the price, as it appears by the evidence, happened under the following circumstances :—

When the parties first went to the Notary's office, they had no list of the articles sold, and an adjournment took place to enable Mr. *Callahan* to prepare one. In making this list he added opposite each article the price at which he had bought it. When the parties returned to the Notary's office, Mr. *Philipps* drafted the deed, and he entered the total of $7,188.40, shown at the foot of the list, as the price, instead of the sum of $5,000. The parties, when the draft was read over, immediately detected and mentioned the error, and desired the Notary to correct it; but he stated that the amount mentioned in the deed as the price was immaterial, as payment was acknowledged, and the deed was executed as it was. No money was paid at the time; but the price of $5,000 agreed upon was afterwards paid in various amounts, as required by Mr. *Callahan*.

Admitting, even, that the Respondents only paid $5,000, whilst the agreed price was really $7,188.40, the receipt given must, notwithstanding, be considered to be valid, so long as it is not proved that it was either fraudulently or erroneously given. But there is no such averment. By the evidence it is proved that at the time of the purchase, *Callahan* was solvent, and that there was nothing to prevent him from giving a discharge in full, even if the actual consideration price had been $7,188.40, as was contended by the Appellant.

Being unable to contradict Respondents' judicial admission (*aveu*) as to the price, Appellant now claims the right to say that he will avail himself of that part only of Respondents' admission which is favorable to his view, such as the admission that he only paid $5,000, and reject that part relating to the error made in mentioning the price, because it is against him.

However, it is a general rule that a judicial avowal or admission cannot be divided (1). It is only in exceptional circumstances and for special reasons, which are not to be found in this case, that Courts will allow the answer of a party to be divided. The rule which should govern in such cases is thus given in a decision of the *Cour de Cassation*, dated the 13th June, 1872:—

Les aveux peuvent et doivent être divisés, soit que sur certains points de détails ou complexes ils soient reconnus faux, contradictoires et inconciliables avec les principaux faits confessés, soit qu'il en ressorte d'ores et déjà, la preuve d'une situation de fait et de droit entrainant la solution du procès.

Laurent (2) expresses himself on this same subject as follows:

La doctrine et la jurisprudence sont d'accord pour admettre que par *exceptions* à la règle de l'indivisibilité, il y a des cas où l'aveu peut être divisé.....

But when, as in the present case, the party invoking the division of the admission (*aveu*) has no other proof in support of his contention, he cannot have it divided, he must either accept or reject it in its entirety:

Si l'aveu est indivisible c'est parce que c'est la seule preuve du fait allégué; la loi veut qu'on prenne la déclaration tellequ'elle a été faite (3).

The Appellant seems to forget that if, on the one part, the deed of the 3rd of May, 1875, establishes the price to have been $7,188.40, it is, on the other hand, also evidence that the price has been paid.

Therefore nothing is due on the purchase price, and the Appellant has nothing to claim unless he can destroy the effect of the statement made in the deed that the purchase price was paid. He has no other alternative:

L'aveu judiciaire, dit la cour de cassation, est la déclaration que fait

(1) Art. 1243, *C. C. L. C.* (2) V. 20, No. 198, p. 324.
(3) Laurent Vol.. 20, No. 205.

1878

FULTON v. McNAMEE.

la partie en justice d'un fait dont il n'existe pas d'ailleurs de preuve et qui n'est établi que par cet aveu lui-même. C'est par cette raison et en considération de cette reconnaisance spontanée que la loi a attaché à l'aveu le caractére d'indivisibilité (1).

In this case there was no obligation on the part of the petitioners to state that the true consideration price was not the one which was mentioned in the deed. He might simply have alleged the discharge or receipt therein mentioned, against which no verbal testimony was admissible. By so doing, he did not in any wise improve his position, and an admission given under such circumstances, must either be accepted or rejected in its entirety. The following passage from *Duranton*, supports this view :—

Lorsque la partie qui a fait l'aveu n'était nullement obligée par quelque circonstance particulière à le faire, parce qu'il n'existait contre elle aucun acte, aucune lettre, aucune preuve testimoniale admissible, on doit croire, que pouvant nier absolument le fait, si elle l'a avoué, avec quelque circonstance qui en a détruit l'effet, ou qui le modifie, elle a dit la chose telle qu'elle existait. Dans ce cas il n'est pas douteux que l'aveu ne doive généralement être pris ou rejeté en son entier. Par exemple, vous me demandez la restitution d'un dépôt que vous prétendez m'avoir été fait par votre auteur, et dont vous n'avez aucune preuve ni commencement de preuve ; j'avoue avoir reçu le dépôt, mais je déclare l'avoir restitué à la personne qui me l'avait confié, mon aveu doit être pris en son entier, sauf à vous à me déférer le serment, si vous pensez que je serai lié par là plus que par l'aveu (2).

L'aveu quand il est la seule preuve produite, ne peut être divisé contre celui qui l'a fait : C. Cass, 18 Nov. 1873.

Art. 231 of the *C. C. P. L.C.*, concerning interrogatories on *faits et articles*, cannot be invoked against the principle above stated ; because by this article the law has defined the circumstances in which the admission (*aveu*) or the answers of the party to such interrogatories can be divided ; whilst, on the contrary, Art., 1243, *C. C. L. C.*, having declared in an absolute and general manner that the judicial admission cannot be divided, we cannot

(1) Laurent ubi supra. (2) Duranton, Vol. 13, No. 55.

qualify the provisions of this latter article by applying to it the dispositions of Art. 231 *C. C. P.* Most frequently the object of *faits et articles* is merely to procure a beginning of proof in writing. In such a case there is no room to raise the question of the indivisibility of the admission, as says *Laurent* (1) :

Quand l'aveu sert seulement pour commencement de preuve, l'indivisibilité est hors de cause ; les juges ont alors le droit de prendre l'interrogatoire dans son ensemble ou dans ses détails, pour y chercher le commencement de preuve qui leur permet de recourir à la preuve testimoniale. Ainsi le juge appliquera, dans ce cas, les principes qui régissent le commencement de preuve par écrit, et non les principes qui régissent l'aveu.

The Appellant strongly urges the insufficiency of the allegations of the petitioners in reference to what was the real price agreed upon. He contends that the averment is disingenuous because what they omitted to state led him to believe the contrary of what is expressed in the deed. He also criticises the statements of the learned Chief Justice, who speaking of this admission says :—

The Respondents have admitted they have only paid $5,000, but they, at the same time, state, that this was the *only* consideration for the deed.

It has been stated above in what terms this admission is expressed ; it comes immediately after the paragraph enumerating the complete list of the articles purchased, and to which articles the following words have reference :—

The *said purchase was made in good faith*, and that they (Respondent's) paid for the *said* articles above enumerated the sum of $5,000.

Is not this a plain averment that $5,000 was the price of the articles purchased. We are unable to take any other view of this admission than that taken by the learned Chief Justice, unless we come to the

(1) V. 20, No. 200, p. 227.

1878

FULTON v. McNAMEE.

conclusion that the Respondents in thus expressing themselves wished to waive the benefit of the discharge mentioned in the deed, and intended to acknowledge that there was still due a balance of $2,188.40. This interpretation is so absurd that it is needless to dwell upon it.

The Appellant also claimed that this ingenious admission, on the part of the Respondents, put him in a less favorable position than he would have been otherwise. This clearly cannot be, for had the Respondents rested their petition on the deed and simply alleged the discharge it contains, what would have been the result? The Appellant could have answered only by attacking this discharge as being erroneously given by *Callahan*, or fraudulently executed by him to the detriment of his creditors. If such had been the case, it would then have been for the Appellant to void this discharge, and this, in the absence of other proof, he could only succeed in doing by interrogating the Respondents; so that he would still be forced to rely on their admission (*aveu*). He would thus have been obliged to submit to what has taken place in this suit, viz: interrogate *McNamee* and *Meany* as being parties to the instrument in order to procure evidence that notwithstanding the receipt there was still due a balance on the purchase price.

The authenticity of a document or the laws of evidence are not in anywise infringed, because parties to a deed are questioned as to the truth of the declarations therein contained. On the contrary, it is one of the admitted modes to prove erroneous statements in a deed such as those alleged in this case. The *inscription de faux* is another of such modes, but not the only one, as the Appellant has contended:

La preuve de l'acte authentique peut être détruite par l'aveu de la partie, *e. g.* si *Pierre* a souscrit une obligation devant no-

taires, au profit de *Paul*, sans en recevoir la valeur, et que ce dernier le poursuive pour le paiement, *Pierre* peut le faire interroger sur les circonstances du prêt, pour tirer de ses réponses un aveu qu'il n'a pas fait ce prêt, quoi que l'obligation l'atteste et s'il peut y parvenir elle sera anéantie (1).

This is exactly what the Appellant did when he examined as witnesses *McNamee* and *Meany*, parties to the deed, to prove that the true price of the purchase was $7,188.40, and not $5,000. The Respondents had also that privilege, and they made use of it by producing *Callahan's* deposition in the proceedings in insolvency, and by examining him as a witness.

In his examination before the assignee, as well as in his examination as a witness in this cause, *Callahan* admits that the consideration was $5,000, and that the amount had been paid. There can be no doubt as to the Respondents' right to avail themselves of his admissions. As to what he admitted before the assignee, the following authority suffices to show that such an admission can be adduced as evidence in this cause.

Peut-on opposer l'aveu aux créanciers de celui qui l'a fait? L'affirmative n'est pas douteuse. Quand les créanciers exercent un droit de leur débiteur, ils agissent en son nom, et on peut leur opposer toutes les exceptions qui peuvent être opposées au débiteur. Sauf aux créanciers à attaquer l'aveu comme fait en fraude de leur droit. La jurisprudence est en ce sens. Bordeaux, 2 Mai, 1850. *Dalloz*, au mot "obligation" No. 5,154 (2).

As to the legal effect of such an admission repeated by *Callahan*, when examined as a witness in this cause, it is quite sufficient to state that his insolvency did not render him an incompetent witness. As it has correctly been stated by Mr. Justice *Rainville*, "If the action was between *Callahan* and the petitioners (Respondents), the latter would undoubtedly succeed."

Their position cannot be changed because *Callahan* has become insolvent.

(1) Pigeau, 1 Vol. P. C. p. 233. (2) Laurent, Vol. 20, No. 180, p. 208.

1878

FULTON v. MCNAMEE.

The Appellant might have rested his case here,—having established his payment by the deed and by *Callahan's* answers to interrogation in insolvency.

As to the objection raised by the Appellant founded on Art. 251. *C. C. P.*, which declares a party examined in a cause cannot make proof for himself, I do not consider it a serious one. The innovation introduced by that article to the law of evidence was simply for the purpose of allowing parties to a suit to be competent witnesses, when examined by the opposite party, with the above restriction, it is true, that a party cannot make proof for himself, a principle which has always existed in our law of evidence. This article does not destroy the effect of Art. 1243 of *C. C.*, with reference to the indivisibility of the judicial admission which is still in force, notwithstanding article 251, of the *Code of Procedure*. A party, therefore who, having no other proof, examines the opposite party as a witness, cannot now contend, any more than before the introduction of this article, that the admission of the party so examined may be divided in order to avail himself of what is favorable, and to reject what is unfavorable.

But in this case, the admission relied upon by the Respondents is that contained in their petition and not the admission made in their examinations as witnesses in this cause, which the Appellant was at liberty to declare he would not make use of as evidence in the cause. Such was admissible, but can only be invoked by the Appellant, if he declares his intention to make use of it, and then in such a case the admission must be taken in its entirety and is indivisible. If the Appellant does not wish to make use of these admissions, there still remains in the record the Respondents' admissions made in their petition, on which they can legally rely as stated in *Laurent* (1). After referring to the necessity

(1) Ubi supra No. 166 of vol. 20.

of taking down in writing the verbal declaration made by a party in Court, he adds :—

Quant aux déclarations faites dans les actes de procédures, elles sont par cela même authentiquement constatées.

These authorities, in my opinion, support clearly the conclusion at which I have arrived, 1st. There is in this cause a judicial admission contained in the petition (*aveu judiciaire*); 2nd. The circumstances under which was made, make it indivisible.

There still remains the following question to be answered, viz :—

The true consideration of the sale not being the one expressed in the deed of sale, can the validity of the obligation be impeached on account of this erroneous statement?

It is true that an obligation to be binding, must have a legitimate consideration, but it does not follow that an error, or even a false statement, as to the consideration, would render the obligation void and of no effect. In such a case the obligation still remains, provided that instead of the erroneous consideration mentioned a true and legitimate consideration is proven to have been received. All authors agree on this point. To those already cited by the learned Chief Justice, I will add a decision, rendered by the *Cour de Cassation* on 28th August, 1807, *In re heirs of widow Vivien*, which is reported in *Merlin's Répertoire de Jurisprudence* (1). The plaintiff in that case, being examined, was obliged to acknowledge the false statement of the consideration of the obligation on which his action was based, and to declare that the obligation executed by Mrs. *Vivien* was not for moneys lent, but in order to pay the debt of one of her sons-in-law. In the Court of original jurisdiction and in

(1) *Verbo* "*Confession.*"

1878

FULTON v. McNAMEE.

appeal, his action was dismissed, but he succeeded before the Court of Cassation, their judgment being reported as follows ;

Vu l'art. 1356 du Code Civil ; Considérant que la Cour d'Appel de Paris n'a pu considérer l'obligation dont il s'agit, comme sans cause, qu'en adoptant les aveux de *Gorlay*, en ce qu'il avait reconnu la fausseté de la cause exprimée dans la dite obligation, et en rejetant sa déclaration qui lui donnait une autre cause ; d'où il résulte violation de la loi précitée, qui ne permettait pas de diviser l'aveu judiciaire fait par *Gorlay*, la cour casse et annulle.

See also Laurent :

Je demande le paiement d'un billet causé valeur reçue en marchandises. Le défendeur nie avoir reçu des marchandises et me fait interroger sur faits et articles. J'avoue que la cause est fausse, mais j'allègue une autre cause licite. Mon aveu est-il indivisible. Dans notre opinion, oui, et sans doute aucun. Telle est ausi l'opinion commune, il y a cependant une décision contraire ? (1)

The Respondents' admission under the circumstances proved in this case, must be taken in its entirety and make proof in their favor ; the evidence on behalf of the Appellant confirms as well the truthfulness of their avowal. *Callahan* and *Carroll*, present at the passing of the deed, agree with the Respondents in their statement that the agreed price was $5,000. There is nothing in their testimony which might impeach their credibility ; *Carroll* certainly, whom *Callahan* had turned out of his partnership to take in *Meany*, cannot be said to have been in a disposition to favor by his evidence either *Callahan* or the Respondent.

With regard to the authorities, founded on the English law, cited by Counsel in support of Appellant's contentions, I fully concur with the following remark made by the Honorable Chief Justice *Dorion :*

This case is not a commercial case, and must, therefore, be decided by the rules of evidence applicable to civil cases.

For these reasons, I am of opinion, that the judgment

(1) Laurent vol. 20, No. 197, p. 224.

of the Court of Queen's Bench should be confirmed with costs.

RITCHIE and TASCHEREAU, J. J., concurred.

HENRY, J. :—

The Appellant claims to be entitled to a judgment for the difference (being over $2,000), between the amount stated in a contract of sale of goods as the consideration money and the amount actually paid. The instrument in question contains a receipt for the larger sum and an acknowledgment it was paid. Taking the instrument alone it operates to negative the allegation that anything is due for the goods sold.

Parol evidence is, however, admissible to show that the whole amount of the stated consideration was not paid; but it is also admissible to prove, as was done in this case, that the amount claimed was never due or payable as a part of the consideration money for the goods in question. We are remitted, therefore, to the oral agreement between the parties; and if by it we find that the full sum agreed upon was paid, we cannot adjudge a further payment contrary to the undoubted agreement of the parties. To so decide, would, in my opinion, be against both law and equity.

The Appellant seeks to open up the written agreement that equity may be done. He that seeks equity must do it, and when the written agreement is opened up it is subject to the equities of both parties. No fraud is suggested.

I therefore fully concur in the judgment given by my learned brother *Fournier*, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant: *McMaster, Hall & Greenshields.*

Solicitors for Respondents: *Judah, Wurtele & Branchaud.*