1882

*May 2, 3.
*June 22.

ANTOINE GAGNON..... APPELLANT,

AND

DAME HERMINE PRINCE.....RESPONDENT.

ON APPFAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

"Débats de comptes"—Sale of stock in trade by a father to his son—Onus probandi—Affidavit of a person since deceased not evidence.

In a "*débats de comptes*" between *A. G.* (appellant) in his quality of tutor to *M. L. H. C. R.*, a minor, and Dame *H. P.* (respondent), universal legatee of her late husband *L. R.*, who had had possession of the minor's property (his grandchild) as tutor, the following items, viz.:—$5,466.63 (for stock of goods sold by *L. R.* to his son) and $451.07, and $90.76, for "cash received at the counter," charged by the respondent in her account, were contested.

n 1871, *L. L. R.* the minor's father, married one *M. C. G.*, and by contract of marriage obtained from his father, *L. R.*, two immoveable properties, *en avancement d'hoirie*. At the same time *L. R.*, the father, retired from business and left to *L. L. R.*, his son, the whole of his stock in trade, which was valued at $5,466.63. making an inventory thereof. *L. L. R.* died in 1872 leaving one child, said *M. L. H. C. R.*, and *L. R.*, her grandfather, was appointed her tutor. There was no evidence that the stock in trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when *L. R.*, in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of $5,466.63.

Held, (reversing the judgment of the court below) that it was for the respondent to prove that there had been a sale of the stock in trade by *L. R.* to his son *L. L. R.* the minor's father, and that there being no evidence of such a sale the respondent could not legally charge the minor with that amount.

As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they

* PRESENT:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

1882

GAGNON v. PRINCE.

had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of one *Hébert*, the bookkeeper of *L. R.* filed with the *reddition de comptes* before notary, prior to the institution of this action.

Held, reversing the judgment of the Court below, that the affidavit of *Hébert* was inadmissible evidence, and therefore these two items could not be charged against the minor.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side) (1), reversing judgment of the Superior Court in favor of the appellant. The facts of the case are as follows:—

Louis Ludger Richard, of *Stanfold*, in the district of *Arthabaska*, died on the 15th of July, 1872, leaving one child, *Marie Louise Hermine Célanire Richard*, issue of his marriage with Dame *Célanire Gagnon*. On the 23rd October of the same year, the Honorable *Louis Richard*, father of *Louis Ludger Richard*, was appointed tutor to the minor child of his son. Thereupon *Louis Richard* took possession of the estate and succession of his son, and administered it up to the time of his death, which occurred on the 13th November, 1876. By his last will, Mr. *Louis Richard* constituted his widow, Dame *Hermine Prince*, the present respondent, his universal legatee, and she took possession of all the property of her deceased son, *Louis Ludger Richard*, which then belonged to her minor grand-child. On the 8th January, 1877, Dame *Célanire Gagnon*, widow of *Louis Ludger Richard*, was appointed tutrix to her child, and in June, 1879, she instituted an action against the present respondent to recover an account of the administration of the minor's property by *Louis Richard*, as tutor, and by his widow, since his death. On 21st February, 1880, the Superior Court at *Arthabaska* rendered judgment condemning the present respondent to account in the manner asked for by the action. In conformity with this judgment

(1) 2 Dorion's Q. B. Rep., 74.

1882

GAGNON v. PRINCE.

the respondent rendered an account. Pending these proceedings, Madame *Célanire Gagnon* (widow *Louis Ludger Richard*) having married a second time, her father, *V. Antoine Gagnon*, was appointed tutor to the minor, and took up the proceedings in that quality.

The account rendered by the respondent showed a total expenditure by the tutor, *M. Louis Richard* of..... $15,362 07½
and a total receipt of..... 15,270 51½

leaving a balance of..... $91 56

in favor of the respondent.

The appellant contested several items charged as expenditure, and the court of the first instance, in its judgment, struck off the following items from the expenditure:—

1st. A stock of merchandise..... $5,466 63
2nd. Upon the expenses of the rendering of the account..... 25 95
3rd. A promissory note by *Louis Ludger Richard* to his father..... 600 00
4th. A certain sum entered in the books as "cash received at the counter"..... 451 07
5th. Another similar sum..... 190 16

$6,734 41

The judgment also added to the receipts, a few small sums amounting in all to $105.30.

The result now was this:—

1st. The receipts by this addition of $105.30 were increased to the total sum of..... $15,375 81½
2nd. The expenses being cut off of the sum of $6,734.41, were reduced to..... 8,627 66½

$ 6,748 15

This left a balance of $6,748.15 against the respondent, for which amount judgment was rendered against her.

1882

GAGNON v. PRINCE.

On appeal to the Court of Queen's Bench, that court agreed with the court below upon several items, but declared that the item of $5,466.63 (for the stock of goods) and the items of $451.07 and $190.76 for "*cash received at the counter*" had been improperly struck off from the expenditure and should be reinstated therein.

These sums being reinstated in the expenditure, the total expenditure then amounted to $1,736.12; this left a balance of $639.69 against the respondent.

On appeal to the Supreme Court of *Canada* the three *items* struck off by the Court of Queen's Bench were under consideration, viz: 1st, $5,466.63 (for the stock of goods); 2nd, item $451.07; and 3rd, item $190.76 for "cash received at the counter." Item of $5,466.63 (stock of goods).

This item was entered in the account, under the head of expenditure, and is in the following language:

"The accounting party charges in expenditure, the sum of $5,466.63, being part of the sum of $5,676.94 entered in the inventory under the head of debts due to the said *Louis Richard*, for goods sold and delivered to the said *L. L. Richard*, as per statement now fyled as exhibit H."

The contestation of this item is as follows:

"And the party accounted to, declares that she contests the following items of the account:"

"1o. The sum of $5,466.63 for goods sold and delivered to the said *L. L. Richard*, as per statement."

"Because the goods in question never were sold by the said honorable *Louis Richard* to the said *L. L. Richard*, but on the contrary, had been given to him and were charged against the said *L. L. Richard* in the books of the said honorable *Louis Richard* several months only after the death of the said *L. L. Richard*, to wit, in November, 1872. That moreover, that sum of $5,466.63 is charged for a stock of goods, the inven-

1882

GAGNON v. PRINCE.

tory of which had been made more than six months before the said *L. L. Richard* had obtained delivery of the goods in question, the said honorable *Louis Richard*, having continued his trade during the said six months, and having sold a large portion of the goods, thus entered in the inventory."

There was no writing to establish whether it was as a gift or as a sale that these goods had been left by the father to his son, nor was there any witness who could relate what was the greement which may have taken place between the father and the son with regard to those goods.

It was proved, however, that in October, 1871, *Louis Ludger Richard*, who up to that time had been a clerk in his father's establishment, was married to the plaintiff, *Marie Célanire Gagnon ;* and that Mr. *Richard* on that occasion withdrew from business, and left him the whole of his stock-in-trade, valued, according to the inventory which was then taken of it, at the sum of $5,466.63. That inventory was closed on the same day that the marriage contract was passed, or on the previous day.

By this marriage contract, Mr. *Richard*, the father, gave to his son, *en avancement d'hoirie*, a house to make a dwelling-house, and the store or building wherein he had carried on his trade at *Stanfold* for a great many years.

As the other two items $451.07, and $190.76, a Mr. *Hébert*, the bookkeeper of Mrs. L. *Richard*, in his affidavit, which is appended to the first account rendered before a notary by the respondent, declares as follows:

"To my personal knowledge, all the different amounts above mentioned and forming the sum of $693.45 are entered in the cash book by the said *Louis Richard* and are entered under the heading of "cash received at the counter."

This Mr. *Hébert* was not examined as a witness, having died previous to the institution of the action.

As to items $451.07 and $190.76, making together the sum of $641.83. They were allowed on the ground that they are twice credited to the minor in Mr. *Richard's* books, once in the account of moneys received for cash sales over the counter, and again in the general account book. The Superior Court rejected this charge, as being entirely unsupported by evidence. The Court of Queen's Bench restored it.

The appellant, thereupon, appealed to the Supreme Court of *Canada.*

Mr. *Irvine*, Q. C., and Mr. *Felton*, with him, for appellant:

The first point to be considered is, the item number I in the *débats de comptes*, amounting to $5,466.63, charged in the account, for goods sold and delivered by the Honourable *Louis Richard* to his son, *Louis Ludger Richard.* The pretension of the appellant is, that this merchandise, which formed the stock in trade of Mr. *Louis Richard*, was not sold but given by him to his son. There is conflicting evidence upon this head, but the onus of proof is upon the respondent to show that these things were sold, and that the amount charged was due by *Louis Ludger Richard* for the price of them. At the time of the death of *Louis Ludger Richard*, this stock of goods was in his possession, and had been in his possession for several months. *Louis Richard*, the father, was a merchant who kept accurate books of account, and yet no entry was made in any of them showing that his son was indebted to him in any sum of money, as the price of this stock, until several months after the death of *Ludger Richard*, when an entry to that effect was made by *Louis Richard*, although, from time to time various small items were charged against

1882

GAGNON v. PRINCE.

Ludger Richard during his lifetime and at the dates when the payments were made. Under these circumstances, if the respondent desires to claim against the succession of her son for the price of these goods, it was upon her to establish by proof that they had been sold to him, and that this sum of money was due. No satisfactory evidence to this effect has been given.

As to items $451.07 and $190.76. The only evidence is that of *Hébert*, who died before the case came on for trial, and who had under other circumstances, made an *exparte* affidavit, in which he stated that these amounts taken from the account book known as the "*livre de recettes*" were also included in the cash receipts, "*argent au comptoir*." It is plain that in order to recover this amount in contradiction to her own account books, it was incumbent on the respondent to establish its correctness by legal evidence. No proof has been attempted beyond the production of the affidavit of *Hébert*. It is difficult to find any precedent for such a case. The court below has charged the minor, who is interested in this account, with a large sum of money on the evidence of a witness never examined in court, whom the appellant has had no opportunity of cross-examining, and who has in fact given no legal evidence whatever. The books of account of the late Mr. *Richard* and of his succession were carefully kept, and it is difficult to suppose that they would have contained so serious an error as *Hébert's* affidavit suggests, and one which must have been continued and repeated over a considerable length of time. Moreover, an examination of the books will shew that the statement of Mr. *Hébert* is impossible. On many of the days on which the amounts are shewn by the "*livre de recettes*" to have been paid, the amount received as "*argent au comptoir*" was not sufficiently large to include them.

Mr. *Laurier*, Q. C., for respondent:

As to the first item $5,466, the Superior Court came to the conclusion that *L. L. Richard* had received the stock in trade from his father as a pure gift, at the time he went into business. The Court of appeals held that it was not a gift, and that it was properly charged as a debt due by *L. L. Richard* to his father. The question therefore is, whether the stock of goods, put in the hands of his son by Mr. *Richard*, the father, at the time of the former's marriage, was an absolute gift or not? The evidence in this case does not support the appellant's pretension. Casual conversations are not sufficient to prove an absolute gift, or a *don manuel*. See *Richard Voyer* (1)

I submit also that a donation cannot be proved by parol evidence, but must be proved according to the ordinary rules of law.

The principle which decides that a donation of moveable property exceeding $50 must be proved by written evidence, though the donation can be made by verbal agreement, is the principle which applies to all contracts in the French law. The contract of sale, for instance, can be made by verbal agreement, but if it exceeds $50, it has to be proved by written evidence. Nothing is more certain. The *don manuel* is no exception to this rule, and though the point was at one time controverted, it can no longer admit of a doubt, since the latest commentaries upon the code *Napoléon*.

Moreover, notwithstanding what has been said by the learned counsel for the appellant, I submit there is proof of record establishing that there was a sale.

In the first place, Mr. *Richard* himself treated it as a sale, and so entered it in his books. But it is said that Mr. *Richard* made that entry in his books only after his son's death.

(1) 5 Revue Légale, 591.

1882

GAGNON v. PRINCE.

If this contention, on the part of the appellant, means anything, it means that Mr. *Richard* would have been guilty of a most dishonest act, that after having made a gift to his son he would have, after the latter's death, taken the means of depriving his child of it. But the facts as proved vindicate his memory.

In the first place, it is true that Mr. *Richard* made that entry in his day book and in his ledger, only after his son's death, but there was an entry made in another book, and the whole circumstances are fully explained by the testimony of *Octave Ouellet*. In October, 1871, previous to *Ludger Richard's* marriage and to Mr. *Richard's* withdrawing from business, *Octave Ouellet* was employed by the latter to make the inventory of the stock.

That inventory is entered in a book marked "H" in this cause; the goods footed up to the sum of $5,909.42. *Ouellet* says that Mr. *Richard* let his son have these goods at the price of 16*s.* 9*d.* in the £. Then there are added, a certain quantity of goods from the *Somerset* store, for which *Ludger Richard* was paying the full price. The total amount of the goods from the stores of *Stanfold* and *Somerset* amounted to..... $6,574 61

The following entry is then found in the book, viz.:

Cr. by deduction of 3*s.* 9*d.* upon the account of the inventory of 1871, to wit: $5,909.42..... 1,107 98

$5,466 63

Ouellet says in his deposition that that entry was made by himself, and that to the best of his recollection it was so made at the time that the inventory was taken. The following year after *Ludger Richard's* death, he was again called to take part in the inventory of the estate, and then he advised Mr.

Richard to report that entry from that book, to his day-book and his ledger.

All this not only explains how, and when, the entries were made in the books of Mr. *Richard*, but it also shows that the transaction was a sale, that there was a price agreed upon and delivery.

As to the two other items, one of $450.07 and the other of $190.76, which have been struck off the expenditure, the appellant has made the best possible proof under the circumstances, that these two sums had been entered in the receipts, as "cash at the counter," and again in the collection. This double accounting is due to the fact that the appellant, viz : the present respondent has entered in the receipts the cash received at the counter, and also the cash received for collections according to the ledger when such collections were also included in the "cash received at the counter."

Hébert, who could have established that fact in a precise manner, is dead and could not be heard as a witness. His affidavit alone cannot make a complete evidence. But we believe that this is one of the cases, where in a case for an account, the appellant, the accounting party, has a right to be believe don her oath after having proved the practice followed by Mr. *Richard* and the death of her principal witness.

TASCHEREAU, J., delivered the judgment of the court:

In this case, I am opinion to allow the appeal. Three items of the *débats de comptes* are in controversy. As to the first one, amounting to $5,466.63, the only question is, were goods to that amount sold by the honorable *Louis Richard* to his son *Ludger Richard*? Upon the respondent, who alleges such a sale, was the onus of proving it. Now, where is the evidence of it in this record? I cannot find any, and the Court of Appeal, although it reversed the judgment of the Su-

1882

GAGNON v. PRINCE.

Taschereau, J.

perior Court as to this, could not find any. If there was a sale, what were the conditions and terms of payment? None that I can find out in the evidence adduced. On the cross-examination of the witness *Jean Baptiste Allard*, the respondent attempted to prove terms of payment, but not only failed to do so, but established clearly that *Louis Richard* never sold these goods to his son—but gave them under certain charges and conditions.

The appellant has, in my opinion, clearly proved that these goods were a donation by his father to him; but I base my judgment on the ground that the respondent had to prove a sale and failed to prove one.

As to the other two items submitted to our consideration, I am also of opinion that the judgment of the Superior Court was right, and that the Court of Appeals erred in reversing it. They are small items, one of $451.07 and the other of $190.76 They have been allowed by the Court of Appeal on the ground that, in *Richard's* books, the minor child is twice credited for them, once in the account of monies received for cash sales over the counter, and once in the general account book. Now, in order to recover this amount, in contradiction to her own account books, the respondent had to establish it by legal and clear evidence. What evidence has she produced? None whatever, but an affidavit of a deceased person given, voluntarily and extra-judicially, before a commissioner of the Superior Court. It may well be asked what authority has this Commissioner to receive this affidavit. If he had none, there is no affidavit, no oath whatever. But leaving this question aside, and taking this affidavit as duly given, how could it be admitted as evidence in this case, is a question which the respondent's counsel failed to answer at the hearing before us. The oath of the respondent cannot be construed in her favor. She swears that these items are

1882

GAGNON v. PRINCE.

Taschereau, J.

correct, but swears it, not of her own knowlege, but only because *Hébert*, the deceased person, said it in his affidavit. It is unfortunate that *Hébert* died before he could be examined in this case, but, according to the Court of Appeal, it is not the respondent's misfortune whose witness he would have been, that such should be the case, but the appellant's misfortune.

This appeal should, in my opinion, be allowed with costs in all the courts against the respondent.

Appeal allowed with costs.

Solicitors for appellant: *Felton & Blanchard.*

Solicitors for respondent: *Laurier & Lavergne.*

Application was made on behalf of respondent to the Privy Council for leave to appeal, but leave was refused.