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*Mar. 8.
*Mar. 18.

GEORGE PLUNKETT MAGANN, (DEFENDANT) ..... APPELLANT;

AND

AMÉDÉE JOSEPH AUGER, ET AL, (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Contract by correspondence—Acceptance—Mailing—Indication of place of payment—Delivery of goods sold—Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Procedure—Opposition to judgment—Arts. 85, 94, 129, 1164, 1173, 1175, 1176 *C.P.Q.—Arts.* 85, 86 *C.C.—Post Office Act.*

An offer was made by letter dated and mailed at Quebec, the defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, the defendant, who was served substitutionally, opposed a judgment entered against him by default by petition in revocation of judgment, first by preliminary objection taking exception to the jurisdiction of the court over the cause of action and then, constituting himself incidental plaintiff, making a cross-demand for damages to be set off against plaintiffs' claim.

Held, that in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but it is complete on the mailing of such letter in the general post-office. *Underwood* v. *Maguire* (Q. R. 6 Q. B. 237) overruled.

Article 85 of the Civil Code, as amended by 52 Vict. ch. 48, (Que.) providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract.

In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 C. P. Q. is obliged

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.

A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.

In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers.

The judgment appealed from, affirming the decision of the Superior Court, District of Quebec (Q. R. 16 S. C. 22), was reversed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec (1), dismissing the defendant's declinatory exception and, on the merits, maintaining the plaintiffs' action with costs.

The circumstances of the case and questions at issue upon this appeal are sufficiently stated in the head-note and in the judgment of the court delivered by His Lordship Mr. Justice Taschereau.

Fitzpatrick, *K.C.*, (Solicitor-General) and *Brodeur*, *K.C.*, for the appellant. The trial court had no jurisdiction, as the contract was made in Toronto and the whole cause of action did not arise in Quebec; art. 94 C.P.Q. The terms of arts. 1164 and 1176 C.P.Q. compelled defendant to set up full defence on the merits and his cross-demand by way of set-off or compensation, at the same time and in the pleading by which he opposed the default judgment entered against him. Therefore by defending on the merits defendant did not abandon the preliminary objection nor accept the jurisdiction of the incompetent tribunal. See *Goulet* v. *McCraw* (2). The plaintiff did not plead waiver of the *exception déclinatoire* and, in any case, the withdrawal by defendant of his pleas to the merits

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replaces him in the same position as if his cross-demand had never been made; art. 277 C.P.Q

Under English law, contracts by correspondence are completed where the letter of acceptance is delivered, and our Post Office Act enacts that a mailed letter becomes the property of the person to whom it is addressed as soon as it is put in the post office (R.S.C. ch. 55 sec. 43). The mail carrier is then acting as agent of the person to whom the letter is addressed. *Underwood* v. *Maguire* (1) is evidently a misinterpretation of the law. The letter of acceptance having been mailed in Ontario, it was there that the parties became agreed, there their minds first met, and the law of that province must govern. Art. 8 C.C.

We claim that by the law in force in the Province of Quebec, the contract is made where the letter of acceptance is mailed. *Cloutier* v. *Lapierre* (2); *McFee* v. *Gendron* (3); *Warren* v. *Kay* (4); *Wurtele* v. *Lenghan* (5). Massé, Droit Commercial, vol. 3, p. 31, No. 1451. The authors who have written under the laws of France contending that the contract is made at the place where the letter is received, have not considered the dispositions of our Post Office Act. Delivery or indication of a place of payment in Quebec makes no difference. *Tourigny* v. *Wheler* (6); *Lapierre* v. *Gauvreau* (7). See also *Connolly* v. *Brannen* (8); *Rousseau* v. *Hughes* (9); *Henthorn* v. *Fraser* (10); *Turcotte* v. *Dansereau* (11); *Dawson* v. *McDonald* (12); *Dawson* v. *Ogden* (13); *Trevor* v. *Wood* (14); *Cowan* v. *O'Connor* (15); *Borthwick* v. *Walton* (16) Arts. 123, 196, 217, 218 C.P.Q.

(1) Q. R. 6 Q. B. 237.
(2) 4 Q. L. R. 321.
(3) M. L. R. 5 S. C. 337.
(4) 6 L. C. R. 492.
(5) 1 Q. L. R. 61.
(6) 9 Q. L. R. 193.
(7) 17 L. C. Jur. 241.
(8) 1 Q. L. R. 204.
(9) 8 L. C. R. 187.
(10) [1892] 2 Ch. 27.
(11) 27 Can. S. C. R. 583.
(12) Cass. Dig. 2 ed. 586.
(13) Cass. Dig. 2 ed. 797.
(14) Allen Tel. Cas. 330.
(15) 20 Q. B. D. 640.
(16) 15 C. B. 501.

Hogg K.C. and *Linière Taschereau K.C.* for the respondents. The mutual assent necessary to bind both parties came into operation only at Quebec. The contract was also executory in Quebec and delivery to be made there. *Clouthier* v. *Lapierre* (1); *Waren* v. *Kay* (2). Domicile was elected there; arts. 85, 1533 C. C.; payment was to be made there; Leake, Contracts, (ed. 1892) p. 23; Addison, Contracts, p. 17, referring to *Household, Fire, etc., Accident Ins. Co.*, v. *Grant* (3); Story, Conflict of Laws, p. 576, art. 280; Lafleur, pp. 148, 149; Dicey, pp. 567, 570; *Vaughan* v. *Weldon* (4.) 1 Massé, Dr. Comm., *n.* 579, p. 515; Pardessus, Dr. Comm. (5 ed.) *nn.* 249, 250, 251; 6 Toullier, *nn.* 28, 29; 15 Laurent, *n.* 479; 1 Troplong, "Vente," *nn.* 24, 25, 26; Pothier, ed. Bugnet. "Vente," *n.* 32; 2 Baudry-Lacantinerie, Dr. Civ. *n.* 797 *bis*; 1 Larombière, art. 1101, *nn.* 19, 21; Merlin, (5 ed.) Rep. vo. "Vente," § 1, art. 3, *n.* 11 *bis*. p. 473; 1 Ponjol, Obl. art. 1109, *n.* 3; 7 Huc. art. 1108, *n.* 14; Dalloz, Rep vo. "Vente," *nn.* 86, 87, 88; Ferzier-Herman (ed. 1898) art. 1101 *n.* 58; 3 Massé et Vergé sur Zachariæ, *nn.* 6, 1453; Bédarride, Achats et Ventes, *nn.* 100 *et seq;* Edgar Hepp, *de la Corr. privée, nn.* 106, *et seq;* Würth, *Lettres missives;* Flandin, *Vente par Correspondance*, in *La Revue du Notariat*, Aug. & Sept. 1869; 1 Delamarre et Lepoitevin, *n.* 96; 3 Delamare et Lepoitevin, *nn*, 7, 102; Pollock, on Contracts, p. 11; Addison, on Contracts, pp. 14, 17; *Gillain* v. *Fourrier* (5); *Vandenbranden* v. *Mitchell* (6); *Gagey* v. *Cornu* (7); *Uzel* v. *Michard* (8); *De Marans* v. *Veuve Deschamps* (9); *Brousse* v. *Fardeau* (10).

(1) 4 Q. L. R. 321.
(2) 6 L. C. R. 492.
(3) 4 Ex. D. 216.
(4) L. R. 10 C. P. 47.
(5) S. V. 66, 2, 218; 67, 1, 400.
(6) S. V. 68, 2, 182.
(7) S. V. 68, 2, 183.
(8) Dal. 78, 2, 113.
(9) S. V. 86, 2, 30.
(10) Dal. 70, 2, 6.

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The person making the offer may retract it until the letter of the person accepting it has reached him. *Jahn* v. *Charry* (1); *Maïer-Yung* v. *Grapinet-Marmand* (2); Dal. Sup. vo. "Vent." *n.* 32; *Clark* v. *Ritchey* (3); *Underwood* v. *Maguire* (4); *McFee* v. *Gendron* (5).

Defendant constituted himself incidental plaintiff and asked judgment against the plaintiffs for $3,000, thereby accepting the jurisdiction, which he could do, the court being competent *ratione materiæ* to try the case. His subsequent withdrawal cannot be given retroactive effect to deprive plaintiff of the benefit of such acceptance; 2 Carré, *Procédure*, p. 174, art. 169, note 2, § 1, p. 175, art. 169, note 2, § 2; Metz. 12 mai, 1818, 4. Jour. des Avoués, p. 633; Grenoble, 29 août, 1836, 52; Jour. des Avoués, p. 231; Cass. 13 flo. an IX, 1 Jour. des. Avoués, p. 88; 1 Dalloz, *Rep.* vo. "Acquiescement," *nn.* 37, 39; vo. "Competence," *nn.* 9, 25; 4 Carré, *Procédure*, p. 18, Q. 1584, et Suppl. *n.* 475: Dalloz, *Rep.* vo. "Exceptions et fins de non-recevoir," *nn*, 46, 115, 118, 188. A cross-demand is not a plea, but a new claim arising out of either the same or other causes to allow compensation to be declared. It is the most explicit acceptance of the jurisdiction of the court. He was not compelled to adopt that procedure to claim his right; he could have sued in any other court he thought competent. Having chosen the procedure, he acquiesced in having his claim decided by the Quebec court. As to the subsequent withdrawal, art. 277 C. P. Q. refers only to procedure, not to the right itself of jurisdiction granted by the defendant, an assent on which plaintiff can rely, and which he cannot retract.

(1) Dal. 71, 2, 96.
(2) Dal. 94, 1, 432.
(3) 9 L. C. Jur. 234.
(4) Q. R. 6 Q. B. 237.
(5) 18 R. L. 230.

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Moreover, the declinatory exception must be pleaded within a fixed delay. By instituting a cross-demand, defendant's right of pleading to the jurisdiction ceased; and when he withdrew his cross-demand the delay had expired. The declinatory exception ought to have been pleaded *in limine litis;* and the right to plead it was extinguished by filing a cross-demand. Art. 99 C. P. Q.

On the merits, we refer to the judgment of Andrews J. in the Superior Court, unanimously adopted by the Court of Queen's Bench.

The judgment of the court was delivered by:

TASCHEREAU J.—The judgment of the Superior Court, confirmed by the Court of Appeal for the same reasons, as appears by the printed case, dismissed the appellant's exception to the jurisdiction on the sole ground that by constituting himself incidental plaintiff he had submitted to the jurisdiction of the court, and waived his said exception. We think that judgment untenable. The appellant's incidental demand, though not so in express terms as it was for instance in *Peale* v. *Phipps*, (1) was of its nature merely alternative, in the event of his exception to the jurisdiction not prevailing. If any part of the appellant's petition was illegal it was the incidental demand, not the declinatory plea. It is that demand that should have been objected to by the respondents, as incompatible with the exception to the jurisdiction. The respondents replied to the petition and declinatory plea and proceeded to trial and judgment upon the declinatory plea as a separate issue, and it was the court *ex proprio motû* which suggested the question of waiver. Now, it is a well settled rule that waiver must be pleaded or invoked by the party who relies upon it. In this case

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if there has been a waiver at all, it was on the part of the respondents who asked the Court a judgment on the merits of the appellant's declinatory exception without invoking waiver of it by the appellant. Then, were it necessary to determine the point, it would seem that appellant is right in his contention that under articles 1164, 1173, 1175, 1176 C. C. P., (new), his incidental or cross-demand was rightly filed with his petition. Arts. 217, 218, 219, C. C. P. *Turcotte* v. *Dansereau* (1). *Brunet* v. *Colfer* (2); 5 Boncenne-Bourbeau, 100 *et seq.* Though not a plea, in the ordinary sense of the word, the cross-demand was in the nature of a set-off, or compensation against the respondent's claim. Had he not filed it with his petition, he could not later have been allowed to file it, as of right.

Having come to the conclusion that the appellant had not waived his declinatory exception, we have to pass upon its merits, and determine whether or not the whole cause of respondents' action has arisen in the District of Quebec. If not, it is conceded, the Court had no jurisdiction. This brings up the controverted question raised in *Underwood* v. *Maguire* (3), and noticed in Sirey, Code Civil annoté, under art. 1101, no. 32, under art. 1583, no. 40; Code de procéd. under art. 420, no. 78, and in Pandectes Françaises vo. "Obligations," no. 7054. In negotiations carried on by correspondence is the contract entered into only when the letter containing the acceptance has reached the party who has made the offer? Or, as put in Sirey, *loc. cit.*

Est-il nècessaire pour la perfection du contract que l'acceptation soit parvenue à la connaissance de celui qui à fait l'offre?

The jurisprudence and commentators' opinions in France on the question are fully cited and collected in Sirey and the Pandectes, *loc. cit.*

(1) 27 Can. S. C. R. 583. (2) 11 Q. L. R. 208.
(3) Q. R. 6 Q. B. 237.

If counted merely, the respondents' contention that the question should be answered in the affirmative would seem to have a majority in its favour. But if the reasoning is weighed, the question should, we think, be answered in the negative, and we adopt the view taken by Pothier, Vente, no. 32; 24 Demol. 1er, des Contr. No. 72; by Marcadé, vol. 4, under art. 1108, no. 395; by Lyon-Caen, Dr. Commercial, vol. 3, nos. 25 *et seq;* by the annotator to the *arrêt* of the 21st Jan, 1891, in Pand. Franc. 92, 2, 163, by the annotator o the same *arrêt* in Dalloz, 92, 2, 249; by Guillouard, Vente, vol. 1er, no 15; by Vigié, Dr. Civ. Fr. vol. 2, no. 1112; and by Hudelot, Obligations,no. 37. It would appear useless to repeat here the argumentation upon which these commentators have reached their conclusions upon the question. A simple reference to them is sufficient. They completely refute the reasoning upon which the contrary doctrine is based.

If it were required for the *aggregatio mentium* necessary to create mutuality of obligations in a contract made by correspondence that the party who has made the offer has received the acceptance of his offer, it would follow that the party accepting should himself not be bound till he is informed that his acceptance has reached the party offering. It is obviously of the greatest importance to the commercial community that such a doctrine should not prevail.

By the conclusion we have reached upon the question, we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of this Dominion, a fact rightly alluded to by Mr. Justice Bossé in *Underwood* v. *Maguire* (1), as of great importance specially in commercial matters.

It had previously in France been said by a learned writer that this view of the question

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est celle qui présenterait le plus de chances de succés devant la jurisdiction commerciale. Boncenne-Bourbeau, vol. 6, p. 163.

It has been argued for the respondents that as under arts 1152 and 1533 of the Civil Code the payment by the appellants under this contract had by law to be made to them in the District of Quebec where delivery of the ties sold to them had to take place, they had the right to bring the action there under the provisions of art 85. In France, no doubt, the action is rightly brought where the payment has to be made. But that is so only in virtue of art. 420 of their Code of procedure, which is treated by the commentators and the jurisprudence as an exception in the *tribunaux de commerce* to the ordinary rules in the matter. Dalloz, 63, 1 ,176. Pand. fr. 99, 1, 22. At common law, the indication of a place of payment does not confer jurisdiction upon the tribunals of that place. I refer to Demol. vol. 1er no. 374; Sirey Cod. Civ. Ann. under art. 111, no. 52; 12 Duranton, no. 99; 27 Demolombe, vol. 4, des contrats, no. 274; 6 Boncenne-Bourbeau, 210 *et seq*; *Wurtele* v. *Lengham* (1); *Tourigny* v. *Wheeler* (2); *Cloutier* v. *Lapierre* (3), *Clark* v. *Ritchey* (4). By the act 52 V. ch 48, amending article 85 of the Civil Code, the indication of a special place of payment in any note or writing, wherever it is dated, now confers jurisdiction over any action relating to such note or writing upon the tribunals of the place so indicated. But here, in the written agreement sued upon there is no such indication of a place of payment and the declaration does not allege any. *Bent* v. *Lauve* (5); *Vidal* v. *Thompson* (6); *Morris* v. *Eves* (7). The place of payment designated by the law alone is not the indication required by art. 85 of the Code as it now reads. It is a stipulated

(1) 1 Q. L. R. 61.
(2) 9 Q. L. R. 198.
(3) 4 Q. L. R. 321.
(4) 9 L. C. Jur. 234.
(5) 3 La. An. 88.
(6) 11 Mart. La. 23.
(7) 11 Mart. La. 730.

domicile, one expressly contracted for by the parties not the place indicated by the law that this article provides for.

When articles 94 of the Code of procedure read with art. 86 of the Civil Code says that a defendant may be summoned in the case of an election of domicile for the execution of an act, before the Court of the domicile so elected, it means clearly a conventional domicile, not a legal domicile, not the place that the law alone designates as the place of payment.

It would seem, moreover, that article 85 C. P. Q. requires that the election of domicile and the indication of a place of payment equivalent thereto under its provisions, be made at such a designated place in a locality that the notifications, demands and suits relating thereto may be made and served thereat; art. 129 C. P. Q. For instance, if a note says "payable at Quebec," that is not an election of domicile under this article.

We hold therefore that the contract between the parties in this case having been made in Toronto where the appellant accepted the respondent's offer and mailed his letter of acceptance, the whole cause of action did not arise at Quebec, and the indication of a place of payment as required to give jurisdiction over the matter to the Superior Court at Quebec not having been alleged nor proved, the action not having been personally served upon the appellant must be dismissed.

Appeal allowed with costs, declinatory plea maintained and action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Dandurand, Broüeur & Boyer.*

Solicitors for the respondents: *Taschereau, Pacaud & Smith.*