Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hamel and others v. *Panet, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered 18th November* 1876.

Present:

LORD SELBORNE.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR JAMES HANNEN.

THIS is a suit instituted in 1869 to set aside a notarial act which purports to have been passed on the 26th January 1855. The Judges in Canada have been very much divided in opinion upon the case; three of them in the whole, counting the Chief Justice who sat in the Superior Court which decided for the present Appellants, being against the suit, and three of them, constituting a majority in the Court of Appeal, in favour of the Plaintiff. The original judgment, therefore, which was against the Plaintiff, was reversed, and the appeal is from that judgment of reversal.

The nature of the notarial act and the parties to it are as follows. It appears that a person of the name of Joseph Falardeau the younger was and had been for some years before in business at or near Quebec. Both his parents were living; his father was of the same name, and he was himself married. He had property, as it would appear, in community, and so had his parents, immoveable property, in the province of Lower Canada. He owed at that time a sum

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of 939*l.* odd to the Appellants, who are a firm carrying on business in the colony, and I suppose we may infer that, being pressed for payment, he offered them the security which is contained in this notarial act; that is to say, he offered the security which that notarial act was intended to perfect. On the face of the act, he and his wife, his father and mother, are all parties to it. Its operation, as far as the son, the debtor, and his wife are concerned, is not now in question. It is an obligation for the payment of the debt, accompanied by a hypothecation of certain immoveable property belonging to the son, in community, as their Lordships infer. So far as the parents are concerned, it purports to create suretyship on their part for the debt of the son, and its interest, and to hypothecate for that purpose certain specified items of immoveable property which were in community as between the parents; and it further contains an express consent by the mother to the hypothecation of that immoveable property by her husband in the Appellants' favour, and an express renunciation of any rights, whether of property or hypothec, which she might have had, which could in any way come into competition with the security so created, whether by her own or her husband's act.

That is the nature of the instrument. It was passed, or purports to have been passed, in the afternoon of the 26th January 1855, by a notary named Petitclerc, in the parish of St. Ambroise, and, as it is expressed, at the house of the son; the parish of St. Ambroise being, as is stated in the papers, about eight miles from Quebec. It is countersigned by another notary, Gamache, who seems to have been connected in business with Petitclerc; and early on the morning of the third day afterwards, the 29th January, it was

duly registered in the proper office of registry, where it has ever since remained on record.

As has been stated, the suit was instituted in 1869, 14 years afterwards. It was instituted by a notary named Louis Panet, a stranger to the transaction, claiming under a subsequent act of donation from the mother. At the time when the suit was instituted, nearly everybody who ever knew anything about the transaction was dead; both the notaries Petitclerc and Gamache were dead; both the parents, Joseph Falardeau and his wife, were dead; Joseph Falardeau the son, the principal debtor, was also dead; and the only survivors were Hermine Laveau, the wife of the debtor Joseph Falardeau the son, and the Appellants, who were the secured creditors.

By the law of Lower Canada, a notarial act, *primâ facie* at all events, is probative; that is, proves itself; or, in the language of that law, is "authentic;" and, to support it, no external testimony is necessary; the burden of proof for impeaching such an act rests upon the person impeaching it. The present Respondent, therefore, M. Panet, has to satisfy the Court that there is sufficient ground for setting aside this act. He alleges that he has done so in one or other of three ways. In the first place, in his original pleading, he impeached it as substantially fraudulent, alleging that neither Joseph Falardeau the father nor his wife ever appeared before the notary or acknowledged the act, or were parties to it in any sense, or had it read over to them. Not in his original pleading, but in a later stage of the cause, he superadded to that graver allegation, of actual fraud and fabrication, a suggestion that, even if that were not so, there were informalities appearing on the face of the instrument, with reference to the manner in which it was prepared and expressed and passed, which would deprive it of its probative

character, and throw upon the mortgagee the burden of making out that it is a good deed by affirmative evidence of his own, which in this case he has not attempted to do. And, thirdly, it was suggested that, failing both those means of attack upon the deed, still, in point of law, it did not bind that title of the wife to the immoveable property in question, which M. Panet had derived from her act of donation.

Their Lordships will consider those objections in the order in which they have been stated. First of all, is there any ground made out for impeaching the *bona fides* of the deed, reserving, of course, the questions of form and the questions of law? Their Lordships are most clearly of opinion that there is no ground whatever for doing so. How is it attempted to do this? So far as extrinsic evidence is concerned, it can scarcely be said to be attempted at all. None is produced having a real and proper bearing, or even a tendency in the direction of such proof, except the deposition of Hermine Laveau, the widow of the son, the principal debtor; who states, that as to her and her husband it was all perfectly right and straightforward; that the act was executed and passed at her husband's house, but that his parents were not there. They lived within a very short distance, in the same parish; and her statement is, that the notary M. Petitclerc, with her husband and Abraham Hamel, one of the creditors, having come in a carriage which they left at the door of the son's house, went with the instrument to the father's house, stayed there some time, and afterwards, on their return, stated that they had seen the father, who had signed the deed, but that the mother was not at home, and therefore it had been signed in her absence. Cross-examined, she says that one reason

she has for believing the mother was not at home is, that the mother had told her before that she meant to go and pay a visit. Now if that evidence were true, it involves these consequences: in the first place, supposing it to be true that the notary was present, either as a party making, or hearing in silence, the statement that they had found the father at home but not the mother, and had taken the father's consent alone, and not the mother's,—if that statement were true, it follows that at that very same place and time the notary immediately proceeded to pass the act, stating directly the contrary upon the face of it; because on the face of it he says, that he saw both the father and the mother; that the deed was read over to them both, and that both of them stated they could not write or sign. So that this is imputing to the notary a direct and deliberate simultaneous fabrication of a false document containing a false statement on the very point on which he had just told everybody what was the truth. What can be conceived less probable than such a state of things? What can be more contrary to the principle of the law giving credit to notarial acts, than that attention should be paid, after the lapse of 14 years, to the statement of an interested witness to that effect? The deed was regularly registered within three days afterwards, (a Sunday intervening,) and the notary, if the facts had been as so alleged, placed upon record an act for which undoubtedly he would have deserved condign punishment. Besides, what could be more irrational than the conduct of all the parties if such a state of things had arisen; because the statement is, not that the father objected to sign, but that he had signed, nor that the mother was unwilling to sign, but that she was not at home, and, as is suggested, not very far off?

Is it possible to believe that the creditors would not have taken some steps to get the security which had been promised them instead of being content with something less? Is it possible to believe that the notary would have deliberately committed falsehood and fraud instead of taking the carriage which was at the door and going after the lady, or waiting till she came home, or postponing the completion of the transaction till a time when it was known she would be at home? Their Lordships have no difficulty in saying that, even apart from the fact that Mr. Abraham Hamel, whose evidence the Respondent has chosen to take and use in the cause, distinctly denies the truth of this allegation, they could not for a moment give credit to it; and it appears to them that the Respondent has not felt that he could rely upon it; for his suggestion has rather been,—not that the notary was guilty of any fraud or falsehood in the matter, not that he stated on the face of the deed what he knew to be untrue,—but that he might himself have been imposed upon, and that persons who were not the parents might, by the fraud of the son have been presented to him at the parents' house. For that suggestion also their Lordships find no ground whatever. Indeed, there is nothing in the case to account for its being made, except the circumstance, that the mother's christian name is mis-stated in a somewhat extraordinary manner upon the face of the instrument. That is not, certainly, a thing which would seem probable *a priori*, nor is it in any way satisfactorily explained; but it is impossible, from that and nothing more, as against the credit of a notarial act, to infer personation and fraud, and that a son presented in the house of his parents to the notary persons whom the notary

believed to be his parents, but who, in fact, were not so. In truth, this false name, for false it is in the sense of being inaccurate, was a thing as little likely *a priori* to have happened if there had been fraud, as if the transaction were honest; because persons, who must have known what the true name of the lady was, would certainly, in support of any fraudulent purpose, have had every conceivable motive to describe her by her proper rather than by a different name.

There is really no other extrinsic evidence in support of this attack upon the deed. Their Lordships, of course, have not forgotten that it has been attempted to support it by the introduction upon the record of certain statements made, partly on oath in another suit and partly to private persons, members of her family, or friends, by the mother herself, after her husband's death. Those statements, being left on the record, must be taken into consideration; but only for what they are worth. Now, what are they worth? This and this only: That the lady, in a manner which is not evidence as against the Appellant, from time to time stated that which is inconsistent with the notarial act. Which is to be believed? The statements of an interested party, not evidence,—or the notarial act? Their Lordships cannot for a moment hesitate about the answer to be given to that question, even if there were not added on the record other matters tending to impeach the credit of those statements and of the lady who made them. Their Lordships regret to find this record loaded, as it is, with collateral and really immaterial issues, arising manifestly out of the original introduction of matter which ought never to have been introduced.

There is also the fact, that in another case,

of another mortgage passed by other notaries in favour of other parties, in a transaction with which the present Appellants had nothing whatever to do, with which they are in no way connected, and as to which the evidence was different from the evidence now before their Lordships, the Court of Queen's Bench of Lower Canada, as then constituted, also passed a judgment reversing a former judgment of the Superior Court, and set aside that other deed. Now, there again, matter not germane to this litigation has been added to the record, for the purpose of showing that in that judgment there was a miscarriage of justice. It is not proper for their Lordships to say more upon that subject than this, that they cannot read the matter so added to the record, consisting of a conveyance by the son to his father of immoveable property subject to the payment of the very debt which was in question in that cause and certain other debts, and proof of the use of that deed which the father made afterwards to resist the claims of creditors of the son, referring on that occasion to the very instrument the fabrication of which was alleged in the suit of *Panet* v. *Renaud*,—their Lordships cannot read that evidence, especially bearing in mind that Panet was the notary who passed the deed and was a party to the use so afterwards made of it, without concurring, as far as on such a collateral matter it is proper for them to express concurrence, in the observations made upon that transaction by Chief Justice Meredith. Therefore that also has no bearing in support of the Respondent in the present case. Neither has the statement of Mr. Stuart, that when the son first entered into business he advised the parents not to make themselves liable for the son, and afterwards, when the son was dead, found out that they had not acted upon his

advice. There is, therefore, except that evidence of Hermine Laveau which has been already sufficiently dealt with, no extrinsic evidence whatever in support of the impeachment of this notarial act.

What intrinsic evidence is there? We have heard at the bar, repeated and very ably dilated upon, all the objections which are in the print at page 208 of the Record in the report of the experts, and they in substance go to this: First, that the mother's name is improperly stated to be Isabelle and not Josephte. Upon that point their Lordships see no reason to add anything to what has already been said. Secondly, that upon examination of the document, it appears to be a piece of patchwork put together of various portions, written, as appears from the character of the ink and writing and other circumstances, at different periods of time; and particularly, that the portion which contains, not the whole, but the greater part of the contract and acts affecting the parents of the debtor, is written, on the pages which are numbered 7 and 8, in a manner from which it is inferred that it was written to fit in to what follows at page 9, and that what follows at page 9 had been previously written. There is a passage in the factum of the Respondent, which puts concisely and clearly the result of the test which would be applied, if those two pages were supposed to be entirely left out. At page 235 of the Record, after making some particular observations upon the document, at line 38, this is said: "Another remark is "worthy of attention; the said act would "be complete in itself without this half "sheet,"—that is, the half sheet containing pages 7 and 8,—"if you only added five words, "that is to say, 'Sieur Abraham Hamel l'un

" 'd'eux,' on the first line of the ninth page " which had been left blank, and left out the " following words at the end of the act:—'les " 'dits sieurs et Dame Joseph Falardeau cautions, " 'ont déclaré ne savoir ni écrire ni signer de ce " 'requis lecture faite.'" So that leaving out words, perhaps as material as any in the deed, which occur at the end of it, and putting in words necessary to be added between the end of the sixth page and the beginning of the next, whatever the next was, you would then have a context which would be rational and coherent without those two pages. But on what conceivable principle, consistent with the law applicable to the matter, and for the moment dealing with substance and not with form, are you at liberty to put in words in one place, and leave them out in another, for the purpose of discrediting a part of the document, which, as it stands, is consistent, coherent, and necessary to its operation, and the simple omission of which would leave the document inconsistent, incoherent, and not operative according to its expressed intention? When attention is called to the peculiarities of the document, these considerations acquire additional force. It does indeed at first sight strike one as a very slovenly thing to put together, in the manner which we find here done, sheets written at different times, the first two pages plainly added to the four which follow, which had been prepared for a different purpose before, and which are altered, the alterations being initialled. They were in the handwriting of M. Gamache and not of M. Petitclerc; M. Petitclerc initialled the alterations, and then he evidently afterwards, in order to adapt the beginning of the instrument to the pages in the handwriting of his partner, put in the first page and the second, which are not initialled; he put them

in; and so you get down to the end of the sixth page. Now it is hardly probable, if we are to speculate upon the manufacture of this document, that what had been written by M. Gamache ended with the word "dit," which is the last word at the end of the sixth page, and did not go further; but for some reason or other nothing in the handwriting of M. Gamache is adopted, except what carries you to the word "dit" at the end of the sixth page; and then come these two pages in the handwriting of Mr. Petitclerc, which carry forward the context quite correctly without any break. They begin with the very words which ought to follow the word "dit," and which otherwise would not be found in any part of the instrument; and those words do not fill up, as one of the Judges seems to have thought, the whole of the first line which in other pages in the handwriting of M. Petitclerc is left blank, because another word necessary to the context of the second line occurs at the end of that first line also. It is clear that, so far, you have got two parts of the deed written not in the order in which they occur,—the first part and the second part,—and put together when this particular instrument was brought into existence. It has been strongly argued that the third part, which is contained in the half sheet pages 7 and 8, must have been written after the part which follows; because not only the handwriting and paper seem a little clearer and fresher, but also because the last lines are extended in such a manner as to indicate a wish on the part of the writer to fill up that page without going beyond the precise point to which those last lines take you; and which point concludes the whole of the operation of what I may for convenience describe as the suretyship part of the deed, with the exception (a very important exception) of the renunciatory clause by the mother.

Well, it does not seem to their Lordships to be at all impossible to suggest theories which might be consistent with that having happened, although this portion of the deed, or some original part corresponding with it which may have been transcribed and fair copied, may have been brought into existence before that which follows. But their Lordships are content to take the argument as it has been offered, and to assume, for the sake of testing the case, that in point of fact the part, or some portion of the part, which appears on the last two pages, had been written before the part which appears upon pages 7 and 8; and that what had been so previously written was adopted for the purpose of this deed, just as the part in M. Gamache's handwriting had been. But if that is assumed, this must follow, that the two last pages, though they look (with the exception of certain words filled in upon a space which had been originally left blank on the ninth page) as if they had been all written at the same time and in the same hand, yet in point of fact were not so; and that the two last pages did not become what they are now, and had not the concluding sentence, which now forms part of them, until after it had been determined to adopt the half sheet which is in this way impeached. What possible objection can there be to this? Every part of it is done by the notaries,—every sheet is in the handwriting of the one notary or the other,—substantially, all is in the handwriting of Petitclerc, because he adopts that of Gamache, and alters and initials it. The deed is not sensible or consistent with itself, as it stands, without this portion; it is perfectly and entirely sensible and consistent with it. It was the notary's duty to prepare such an instrument as would fulfil his instructions. Why should their Lordships,—because he has put together different sheets, written

at different times, for reasons which, now that he is dead and everybody else is dead, after the lapse of 14 years, cannot be explained,—why should their Lordships presume that it was not in that condition when the instrument was signed? Their Lordships entirely agree on that point with the opinion of the experts, not only that they cannot presume any such thing, that fraud is not to be presumed, and least of all against notaries,—but further, that the internal evidence of the document is the other way. If you omit those words, you have not a continuous context. The deed as it ends, (and it must have ended as it does now, before the signatures were affixed,) would have nothing for the conclusion to apply to; and the 6th page would not be properly connected with that which would follow. If it be necessary to go further, it is not difficult to suggest a theory much more probable than that of the Respondent, which might account for the order having been followed which has been suggested in the preparation of this part of the deed, supposing the suggestion of that order to be correct. The 9th and 10th pages (except the concluding sentence,) evidently contain what may be described as a common form. In one part indeed of the 9th page, a blank was left to be filled with matter which, perhaps, is not in a common form, namely, that if payments are made on general account they are not to be ascribed to the extinction of this particular mortgage, unless expressly made for that purpose, or something to that effect. At that place a blank was left, which has been so filled up, and no question arises upon it. But with that exception, if it be one, all the matter contained in pages 9 and 10, down to the last sentence, seems to be in the common form and style of such transactions. But the matter contained in pages 7 and 8 is

not so; because, in addition to such portions of it as are in common form and style, it contains the names of the sureties and the description of the property which was to be hypothecated,—facts, the correct information as to which must necessarily have been obtained, not from any precedents in the notary's possession, but from the parties themselves. It may well be that the deed, having been prepared intentionally in an imperfect state,—that is, certain parts of it written out to be afterwards completed by the addition of what was necessary to make up the full context,—this portion was reserved until the proper information had been obtained as to the description of the property; perhaps, also, as to the names of the parties. And this agrees with the account given by the Appellant Abraham Hamel, as to what was actually done at the house of Joseph Falardeau the elder. But supposing that happened, why should it not be so? What is there wrong, or indicative of fabrication or forgery, in such an order of the preparation or transcription of the different parts of the intended instrument necessary to bring it into existence, and to make it an instrument at all, as any considerations which occurred to the notary might make convenient? Their Lordships, still dealing with this as a question of substance, are most clearly of opinion that there is nothing whatever in these objections.

That brings them to the questions of form; and the first point of form is connected immediately with this last topic, as to the condition of the deed and the two pages 7 and 8 which are supposed—and for this purpose their Lordships assume that the grounds are sufficient for so supposing—to have been written after the writing of all or part of what is on pages 9 and 10. Is there any law which deprives the act of its authentic and probative character because those

pages are not initialled? Their Lordships are unable to discover any such law. The French law contained in the Ordinance of Francis I., of October 1535, to which Mr. Westlake referred, says that in instruments, which their Lordships assume to include such an instrument as this, there shall be no blank left; everything shall be in writing *d'un datille*. The learned counsel have asked us to infer that that means the same thing as the expression *d'une seule contexte* which occurs in a recent French law; but their Lordships are not satisfied that the commentaries on the recent French law, or the text of that law, were intended to be interpretative of the word "datille" in the Ordinance of Francis I.; and unfortunately neither the counsel nor any dictionaries which their Lordships have been able to refer to have supplied the required information on that point. Well, at all events, it says it is to be written *d'un datille* without making any *apostille* in the margin or the text, or any interlineation, or leaving any blank; and if there be any such thing as that which ought not to be, that is to say, an *apostille*, interlineation, or blank, it must be repaired and set right at the end of the note; in fact, it should be initialled or verified by some form of certificate on the part of the notary. Well, as far as that law is concerned, if we inquire whether there is anything here to which it requires the notary's initials or certificate to be applied, their Lordships say they find no *apostille* in the margin or in the text, and no interlineation; for they cannot regard the addition of a particular page or sheet containing words occurring in their proper order and manner in the context of the deed, without interrupting any order which existed before, and without changing the effect of any prior coherent and rational context,—they cannot regard that as an interlineation

either in the letter or in the spirit, or as an *apostille* in the margin of the text, whatever be the proper and exact meaning of that word.

Then comes the Canadian law, the Arrêt of the Council of State of 1733, which says that the notaries shall be bound to put their signatures, amongst other things, to approve and initial all *renvois* (it is admitted this is not a *renvoi*) and erasures by the parties, and so on. The letter of that law does not strike this case, nor does the spirit, as their Lordships think. The mere fact that it is written in a different handwriting,—the mere fact that this part of the only instrument which ever was brought into existence may have been manually written after that which follows it, the two together constituting on the face of the instrument one context for the intended purpose,—seems to their Lordships not to come within the law at all. It is, therefore, unnecessary to consider whether there is not in substance a sufficient certificate on the face of this notarial act, in words which do not happen to be printed in the Record. These words at the end precede the signatures—"82 words "erased" "—three renvois—approved." This, coming at the end of the entire instrument, appears to show that the notary was careful to discharge his duty with regard to the certification of erasures and *renvois*; and it makes it in the last degree improbable that he would have omitted to certify this, if it had really the nature of an interpolation, or alteration, or addition, or *renvoi*, such as was contemplated by the law. Of course, if it was not there, and if he fraudulently added it afterwards, he might fraudulently have certified in that manner. But that supposition reduces the deed to something inconsistent with its obvious intention. The principle of these laws is the same with that which we are very familiar with in the case

of wills; where that which appears to have been added, or altered, by way of erasure or interlineation, requires authentication, and otherwise would be presumed to have been subsequent to the execution of the instrument, the instrument without it being sensible and coherent. And their Lordships find that this is indeed the test laid down by some of the authorities cited on both sides; particularly in the case of *Savère* v. *Savère*, cited from Dalloz of 1851; where, upon the present French law, conceived in terms somewhat similar and the same in principle, it was made the very essence of the question whether the context was complete without the addition of the words in controversy. The words which were in question were these,—it was a marriage contract, and between one line and another these words were introduced,—"*la dite donation* "*étant faite à titre de préciput.*" Upon this, the Court said: "One of the prescriptions of "the law expressly laid down is that nothing "shall be added to that which, in what has "been already written, forms a complete sense"; and then; "Notwithstanding that law, in the "particular case, the stipulation was complete "by the last words, 'a revenue of 600 'francs;' "those which followed, determining the char-"acter of the donation, constitute a new order "of ideas, and are therefore, according to "the law, words added within the meaning "of the law." It appears to their Lordships that such a test applied to this case supports the instrument and not the reverse; because the sense is not complete, the deed is not coherent, without the pages which are objected to, and is so with them. This objection, therefore, as an objection of form, appears to their Lordships also entirely to fail.

Then we come to the other objection of form, with respect to the place stated upon

the face of the deed as the place of passing the instrument. It is stated upon the face of the deed that it was passed in the parish of Saint Ambroise, in the house of the son. Upon the subject of the place, the law relied upon is the Ordinance of Blois, Article 167,— " Notaries shall also be bound to state in their " contracts the quality, abode, and parish of the " parties, and the witnesses named in them; the " house where the contracts were passed," and so on. Now, if their Lordships had to determine, as a mere question of construction, the effect of those words, " the house where the contract " shall have been passed," they would be obliged to say, that the terms of that law do not expressly refer to a case where the acknowledgment or signature of some of the parties has been taken at one house, and the acknowledgment or signature of other parties at another house, and where the notary signs and passes the act, as far as his signature is the mode of passing it, after the last acknowledgment or signature. If their Lordships were obliged to express an opinion on those words, they are by no means prepared to say that they are not susceptible of the construction, that the proper place to be certified as the house where the contracts are passed is that in which the notary completes the contract by affixing his own signature, which in this case was done; and, if that were sufficient, it would remove the objection. Furthermore, the case cited by Mr. Bompas, of *Evanturel* v. *Evanturel* before this tribunal, is in point as to the principle. There is clear and full evidence that what was done in this case was in accordance with the customary practice of notaries of Lower Canada, at all events at Quebec. Seven witnesses, notaries, were examined on the part of the Appellants; all

of them proved that this, or something similar, was their own practice and the practice to which they were accustomed; one of them proved that, according to his experience, it was the general practice of those with whom he had done business. No evidence was offered to the contrary; which is the more remarkable, because the next witness to those upon the record is the Appellant himself, a notary at Quebec; and the first passage in his evidence is to the effect that the practice of notaries of Quebec is not to require the presence of the second notary when the act is passed. He knew what evidence had been given by the other notaries of the general practice of Quebec; and had it been otherwise, can it be doubted that his counsel would have given, or endeavoured to give, him the opportunity, on cross-examination, of stating his own experience and professional knowledge upon that subject? Their Lordships, under those circumstances, entertain no doubt that credit may be given to the witnesses who show in what sense this law has been practically understood and acted upon by the notaries of Quebec; and they are not at all prepared to say that a notarial act passed according to that practice therefore loses its authentic character. But beyond that, the passage cited by Chief Justice Dorion from Toullier is to this effect, that if upon the face of the act there is a description which is shown to be incorrect, the consequence is not nullity, nor that the act loses its notarial and probative character; but only that it must be proved that the place where it actually was passed was within the jurisdiction of the notary. The very same *media* of proof by which the Respondent here attempts to show that what appears on the face of this act is inapplicable to the place where the sureties (using that expression for convenience and brevity only)

assented,—that very same evidence shows that if they did assent, the place where they did so was within the jurisdiction of the notary. It may well be, that according to Canadian law the Appellants cannot use in their own favour the testimony which was extracted from them, or rather from Abraham Hamel, by the Respondent; but the Respondent has chosen to use it. He cannot use it to show that the act was not acknowledged by the parents at the house of the son, and exclude the context, which shows that it was acknowledged, according to that statement, elsewhere within the notary's jurisdiction; and if the evidence of Hermine Laveau is referred to, although she pretends that they said the wife was not at home, yet so far as relates to the father, and to the place where any acknowledgment taken from the father or mother was taken, her evidence also, so far as it goes, tends to show that such place was within the jurisdiction of the notary. So that, in truth, the means relied upon by the Respondent to discredit the deed on this point of form supply the deficiency, and show all that, according to the authority of Toullier, it was necessary to show.

There is no other objection of form. It was attempted indeed to suggest a third, namely, that in this case the notary was not personally acquainted with the father and the mother; that it was necessary there should be independent witnesses to certify to him their identity for the purpose of the contract. But the foundation of all argument on that subject fails; for there is no evidence that those persons were not at the time known to the notary; and it would be inconsistent altogether with the principle of the credit given to notarial instruments to assume that fact for the purpose of inferring that something required by the law was omitted to be done.

Their Lordships are thus brought to the only remaining point: was or was not this instrument, which must now be taken as well executed, authentic and probative,—sufficient in law to bind the title which the Respondent claims through the donation of the mother? Their Lordships think that, having regard to the terms of the law and the decisions upon it, they ought to hold, that it was sufficient for that purpose. The matter stands thus. In 1808 Joseph Falardeau, the father, married his wife, and two instruments were then contemporaneously executed. By one of them, the immoveable property in question, with other things, was conveyed by way of donation by the wife's mother to the future husband and wife, that is, to Falardeau, and Josephte Savard. By the other, which was a marriage contract, Falardeau and his wife agreed *inter se* that they would live in community; that all immoveable as well as other property belonging to either of them at the date of the marriage should be brought into community; that it should, for the purposes of the community, be deemed moveable; and then there was a clause, called the clause of *reprise*, at the end, to the effect that when the community was dissolved by death or otherwise, the wife might, at her option, reclaim or resume all property brought in on her part clear and free from the debts and charges of the community; but with this qualification, that in any case in which she had bound herself, or *parlé*, (which their Lordships understand to mean assented in any manner verbally or personally to a particular debt or charge), or had a judgment pronounced by some competent court against her; in those cases she was to rely upon and to have the benefit of the liability of her husband's estate, to supply what evidently that clause supposed she would lose; and should have, as from the date of the marriage, a

hypothec upon her husband's estate for the fulfilment of that contingent obligation. The community still subsisted as to this immoveable property when the deed now in question was passed in 1855. Three years afterwards, the wife elected to dissolve the community, and to take the benefit of this clause of *reprise*. The question is whether, having previously assented to this notarial act passed in favour of the Appellants, she is or is not bound by the hypothec contained in that act. By the law of Lower Canada (it is not necessary to refer to the text), it is provided that a married woman shall not become surety for the debts of her husband; and it has been decided upon that law, in the case of *Jodoin* v. *Dufresne*, that all engagements, though with third parties and not creditors immediately of the husband, which the wife enters into concurrently with the husband, are to be treated constructively as his liabilities; that is to say, that the contract, whether it be of suretyship for somebody else or of any other kind, is to be treated as primarily his contract, and the wife as brought in by him to secure the liability which he is going to contract. Their Lordships wish it to be distinctly understood that they express no opinion upon the question, whether that case of *Jodoin* v. *Dufresne* was well decided or not. It is not in their opinion now necessary to say a word which will detract from its authority, whatever that may be; but they also desire to say nothing which can be deemed to add to its authority. But, taking this to be good law, still the question remains, what the effect of that doctrine is upon this particular transaction? Now this transaction consists, as far as the Appellants and the debtor are concerned, really of three parts. In the first part it is expressed that they pledge themselves as sureties for the payment of the son's debt. The law, as interpreted in that

case, clearly and beyond controversy renders that null and ineffectual as far as the mother is concerned, but leaves it perfectly effectual and valid as far as the father is concerned. Next they purport, as such sureties, to hypothecate the immoveable property in question which was then in the community as moveable. The law again, their Lordships assume, would strike at that which they purport to do as sureties by way of hypothecation, so far as the wife is concerned, and would leave that part of the deed as only the husband's deed; but it would be, as far as his power over this property in community extended, a perfectly good deed, and valid and effectual, subject to what might follow from the clause of *reprise* in the marriage contract. There is a third part of the deed, which is not connected in like manner with the first or with the obligation of suretyship so far as the wife is concerned. On the contrary, it is expressed in words which show that the framers of it were well aware that it was necessary to deal therewith a distinct matter, which might or might not be effectual, apart from the preceding context. In that portion of the deed the wife expresses her consent to the hypothecation of the immoveable property in question by her husband in favour of the creditors, and renounces in their favor all claims, whether by way of property or of hypothec, which she might otherwise have been competent to make to their prejudice. Does that consent and that renunciation fail, because she could not make herself a surety, and because she could not hypothecate in the character of surety? Their Lordships see no reason for holding that it does fail. In that opinion they are fortified, as appears to them, both by reason and by authority. By reason, because the wife could only claim to disturb the husband's hypothe-

cation by virtue of the clause of *reprise*, on which she acted two or three years afterwards, in the marriage contract. But that clause of *reprise*, if you look to its terms, does not enable her to resume or reclaim anything as against a creditor in whose favour she has consented to the act of her husband during the community; and their Lordships think there is no reason or authority for holding that the law, which was passed long after that contract, to prevent married women making themselves sureties for their husbands, could enlarge the effect of the clause of *reprise* or make it operative in the wife's favor as against the husband's power over the community, in a case in which, according to the qualification expressed in its terms, it would not be so operative. It has been expressly so decided in Lower Canada in the case, in the 14th of the Lower Canada Reports, of *David* v *Gagnon;* and although that appears to be the decision of a single judge, their Lordships see no reason to doubt that it was well decided, and they have no reason to suppose that it has ever since been called in question. The other authorities also go to the effect, that, although there may be in a deed an ineffectual attempt to bind a married woman by words of obligation, yet a renunciation of this kind in the same deed is perfectly good. Two decisions of the Courts of Lower Canada,—no doubt by a majority of judges in each case, and I think one Judge changed his mind,—Chief Justice Duval,—are referred to in the Record; both of which determined that the renunciation and the consent of the wife to her husband's act, as against such rights as she might have under a marriage contract, whether of hypothec or of *reprise*, may be good, although she could not bind herself by a direct contract, which she had attempted to do in the same

deed. Their Lordships see no reason to differ from those decisions. It therefore is unnecessary to go into the further consideration of the question, whether a clause of *reprise* may or may not be so conceived as to destroy the husband's power over mobilised immoveables of the wife *durante communitate*. Pothier evidently thought the better opinion was that no clause of *reprise* would do so, for that the effect of mobilisation and the effect of community taken together required, that while the community subsisted the husband should be able to deal with the immoveables as moveables; but at the same time, recognising some difference of opinion among jurists on the subject, he suggested, that clauses should be worded so as to remove that doubt; and this clause in fact has been so worded. The other authority, Renusson, relied upon by the Respondent, most distinctly recognises the general power of the husband, during the community, not only to sell, but to hypothecate the wife's immoveables under such circumstances; and all that can be said to the contrary, as far as he is concerned, is that he saves and does not determine the question, what the effect of a clause of *reprise* might be, supposing it were expressed in terms which clearly were intended to give the wife a right paramount to any hypothecation or alienation by her husband. The authorities, as far as they go, upon this subject, appear to their Lordships to be entirely one way, and that is against the Respondent.

On the whole case, they are of opinion that the present Appeal must be allowed, and with the usual consequences as to costs.

Their Lordships will therefore humbly recommend Her Majesty to reverse the judgment of the Court of Queen's Bench for the Province of Quebec, with costs, and to affirm, with costs, the judgment of the Superior Court.