DAME LURENA DAVIS *ès qualité* (PLAINTIFF) ..... } APPELLANT;

AND

HARRIET ELIZABETH KERR (DEFENDANT) (TWO APPEALS).... } RESPONDENT.

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*Nov. 5,6,12.
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Mar. 10.

DAME LURENA DAVIS *ès qualité* (PLAINTIFF)..... } APPELLANT;

AND

MARY LOUISA KERR (DEFENDANT)...RESPONDENT.

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

Tutor and minor—Loan to minor—Arts. 297 *and* 298 *C.C.—Obligation—Personal remedy for moneys used for benefit of minor—Hypothecary—action.*

Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has knowledge that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by Art. 298 C.C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.

If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used.

APPEALS from judgments of the Court of Queen's Bench for Lower Canada (appeal side) (1).

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

(1) M.L.R. 5 Q.B. 156 ; 17 Rev. Leg. 620, 622.

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The appellant, in her quality of executrix of her deceased husband's will, sued the respondent, Harriet Elizabeth Kerr, for the sum of $6,044.62, of which $3,064 was for the amount of a notarial obligation and hypothec, dated 8th January, 1880, and given by one T. C. Fields in his quality of tutor to said Harriet Elizabeth Kerr, and $2,330.62 was for the amount of another notarial obligation and hypothec given by the said Harriet Elizabeth Kerr on the 23rd of February, 1885, the appellant alleging that in the said last mentioned obligation the said Harriet Elizabeth Kerr had ratified the first obligation granted by her tutor. To this action the respondent, Harriet Elizabeth Kerr, pleaded that she was not indebted; that the obligation of the 8th of January, 1880, was illegal, null and void; that Fields had never been legally authorized to borrow money from the appellant for her; that if Fields received any money from appellant it was for himself; that she had abundant means to live on and no necessity existed for borrowing more on her behalf; there was no cause nor consideration given for said obligations and hypothec; that her signature to the last mentioned obligation was obtained from her by threats and violence practised upon her by George Simpson, subrogate tutor and agent of the appellant as well as trustee and heir of his late father, Robert Simpson, and by Mrs. Fields on the advice of whom she was accustomed to rely when she was in a feeble condition of health, bodily and mentally.

At the same time the appellant brought an hypothecary action against the respondent, Mary Louisa Kerr, for the amount of the obligation granted by the deed of the 8th of January, 1880, and ratified by the deed of the 23rd of February, 1885. To this action the respondent, Mary Louisa Kerr, pleaded that the obligation of the 8th of January, 1880, was illegal, null and void.

The Superior Court gave judgment in the action

against Harriet Elizabeth Kerr in favor of the appellant for the sum of $2,380 62, being the amount of the obligation of the 23rd of February, 1885, and dismissed the action for the surplus, holding that the obligation of the 8th of January, 1880, was null and void, having been executed without the observance of the formalities required by law which constitute the guarantee of minors under such circumstances ; and as regards the hypothecary action the obligation on which it was based being annulled it was dismissed.

Each party appealed to the Court of Queen's Bench for Lower Canada (appeal side) from the judgments of the Superior Court in the suit of *Davis* v. *Harriet Elizabeth Kerr*, and the plaintiff appealed in the suit of *Davis* v. *Mary Louisa Kerr*. The Court of Queen's Bench for Lower Canada (appeal side) dismissed both actions with costs.

Three appeals were then taken to the Supreme Court of Canada and were argued together.

The evidence given in support of the respondents' pleas is fully reviewed in the reports of the case in the courts below (1), and in the judgment of Mr. Justice Taschereau hereinafter given.

Laflamme Q.C. for appellant.

The principal question which arises in these cases is :

Was the tutor, Fields, legally authorised to execute the obligation of the 8th January, 1880; if not, was the want of proper authorization, or the irregularity which accompanied it, remedied and effaced by the ratification and confirmation by Harriet E. Kerr as mentioned in the obligation of the 23rd of February, 1885 ?

The requirements of the law (arts. 297 and 298, and 1010 C.C.) were complied with and it is proven that at least $6,000 of improvements had been made on

(1) M.L.R. 5 Q.B. 156 ; 17 Rev. Leg. 620, 622.

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the property of the minor when the loan was applied for.

Now the authority to whom is entrusted the care of protecting the minors, and who is invested with judicially determining the power to borrow money on behalf of minors and to sanction any loan so made, is conclusive, unless there be fraud on the part of the lender, or notice given to him, or that he has direct knowledge of serious irregularities. Such authorisation must be held a complete protection for the party advancing the money which cannot be questioned by the minor or his representatives at any subsequent period. It is obvious that if the party from whom the minor seeks to obtain means which he needs is bound to guarantee the action of the judiciary, and if the minor after many years could question the correctness and the truth of the allegations sanctioned by a proper tribunal, no minor could find relief and protection from ruin when necessity, or his manifest interests, would require the assistance and loan of capital.

Then as to ratification I contend that under art. 1008 C.C., the plaintiff is entitled to recover the full amount acknowledged to have been received by her unless she can prove violence or fear within the meaning of arts. 994 and 995. Upon this question the Superior Court gave judgment in favor of the appellant and the evidence fully justifies this finding.

As to art 1214 C.C. The true meaning of the article is the expression of the existing law on the subject and as explained by our old authorities and best commentators on the corresponding articles of the French Code. Articles 1337, 1338, clearly show that article 1214 applies to ratification in general terms as not sufficient to cover nullities unknown to the party ratifying and not disclosed in the original deed, but was never

intended and cannot be intended to exact from the party obtaining the ratification a detailed mention of all the grounds of objection or irregularities which could be opposed to the original obligation.

The ratification set up in the present case is more an actual execution of the original obligation than a ratification proper, and the free execution of a deed, otherwise valid in form and substance, implies a renunciation of the right to invoke any nullities, which is equal in effect to an express formal ratification. Moreover, all the conditions required by the article 1214 are fulfilled by this act of ratification in which the substance of the obligation is mentioned and specially referred to. The obligation was for and on behalf of the party ratifying who was then alleged to be a minor; the only cause of nullity would be the fact that the property was mortgaged by the tutor without the proper formalities; but two years' after the majority of the minor, she expressly ratifies the act and declares it to be binding on her. What more direct expression as to the substance of the obligation, the cause of its being voidable and the intention to make it valid, can be found than what this deed of ratification contains? She knew of the existence of the mortgage, the circumstances under which it was granted. She must be presumed to have taken cognizance of it. She must be held in the same manner as if it were the ratification of an act done on her behalf without her consent and knowledge. Every authority declares that any ratification of an act done by a third party without authority is completely binding if the party in whose name the same was done thinks proper to approve of it.

The learned counsel cited Rolland de Villargues, Dic.

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du Droit Civil, (1) ; Duranton, (2) ; Toullier, (3) ; Freminville, de la Minorité, (4) ; Solon, Nullités, (5).

As to the case against Mary Louisa Kerr, if the mortgage should be held valid the hypothecary action would necessarily be maintained.

Hutchinson for respondent.

The tutor has no authority to borrow on behalf of the minor nor to hypothecate his immovable property without the authorization of the judge or prothonotary and that only in case of necessity or for the evident advantage of the minor. Arts. 297, 298, 267, 269 C. C. Meslé (6) ; Lamoignon Arrêtés de (7) ; Argou (8) ; Pothier, Obligations, (9) ; Pothier, Vente (10) ; Toullier, Droit Civil (11).

The law provides that in case of necessity the judge or the prothonotary can only give the authorization required when it is established by a summary account submitted by the tutor that the moneys, moveable effects and revenues of the minor are insufficient. The question, therefore, at once arises : Did the tutor present an account and show that the moneys, moveable effects and revenues of the minor were insufficient ? Of course, with this provision of the law staring the tutor and the family council in the face some account had to be presented, and some attempt had to be made to show the prothonotary from whom the authorization was asked that the moneys, moveable effects and revenues of the minor were insufficient. How was it done ? Simply by resorting to—falsehood.

The next question of importance which presents itself, is to know what knowledge the appellant, who it

(1) 7 Vol. Vo. Ratification art. 1, Par. 20, 21, 22.
(2) 13 Vol. liv. 3, par. 274.
(3) 8 Vol. par. 495.
(4) 2 Vol. p. 286.
(5) 2 Vol. p. 250.
(6) Ch. 8, No. 22.
(7) Tit. 4 No. 84.
(8) 1 Vol. p. 138.
(9) No. 76.
(10) No. 14.
(11) 2 Vol. No. 1224.

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is alleged lent this money, had of the deception that was practised upon the prothonotary, in order to get this authorization, and as to the necessity which existed on the part of the minor to borrow this money.

In the first place the appellant, who is an elderly lady, acted in this matter entirely through her son, George Simpson. This fact appears by her own evidence, consequently the knowledge of her agent is the knowledge of the appellant. And George Simpson had full knowledge of everything that was done by the tutor with respect to borrowing this money. He was also the subrogate tutor of the said minor, Harriet Elizabeth Kerr.

Moreover the law does not entitle a tutor to borrow money and mortgage the property of his minor as security for the loan of money with which to pay himself. Sirey Codes annotés, (1) ; Chardon, Traité des trois puissances, (2) ; Demolombe Code Civil, (3). The learned counsel also referred to *Beliveau* v. *Chevrefils*, (4) ; *Poustie* v. *McGregor* (5).

It is, however, pretended by the appellant that even if this mortgage given by the respondent's tutor was valueless and without effect, yet the respondent, after she became of age, ratified and confirmed it by a subsequent deed of the 23rd of February, 1885.

In answer to this, the respondent says :—

That this pretended ratification cannot avail the appellant, inasmuch as the first deed of the 8th of January, 1880, being voidable as above shown, it is necessary that the act of ratification should expressly recite the substance of the former obligation and set forth the cause of its being voidable, and also expressly men-

(1) Art. 459, No. 8, art. 471, No. 4.
(2) No. 499.
(3) 7 Vol. Nos. 751, 755, 756, 757, 765.
(4) 2 Q. L. R. 191.
(5) 9 L. C. Jur. 332.

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tion that it is the intention of the parties to cover the nullity, which has not been done. Art. 1214.

As to the second obligation of the 23rd February, 1885, the respondent contends that this obligation is also entirely null and void and without effect because the respondent never received any lawful cause or consideration for the said obligation. Art. 989.

On the question of duress, I refer to art. 994, 995, 996, C.C. ; Pothier on Obligations, (1) ; Marcadé, (2) ; Duranton, (3). The evidence is ample to justify the conclusion arrived at on this question of fact by the Court of Appeal.

The judgment of the court was delivered by:—

TASCHEREAU J.—On the 2nd of January, 1880, one Thomas Craig Fields, in his quality of tutor to the defendant, Harriet Elizabeth Kerr, then a minor, obtained from the prothonotary of the district of Terrebonne, acting in lieu of a judge, the authorisation to borrow from the present plaintiff the sum of $3,664 for and in the name of the defendant, upon the security of a mortgage on the properties of the defendant situated at St. Andrew's, within the said district. Pursuant to that authorisation on the 8th of the same month the said tutor passed an obligation in the defendant's name in favor of the plaintiff for the said amount, and it is that amount, *inter alia*, that the plaintiff now seeks to recover from the defendant by the present action.

The defendant pleads to the action that she received no consideration for the obligation sued upon ; that the authorisation granted to her tutor to borrow for her the said amount and give a mortgage therefor on her property was null and void; and that the amount thereof went to pay her tutor's personal debts.

(1) Nos. 21, 22, 23.

(2) 4 Vol. Nos. 410, 411, 413.

(3) 10 Vol. No. 152.

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She has made out that plea, in my opinion, as to a great portion of this item of the demand.

It appears that the plaintiff's transactions in this matter with Thomas Craig Fields were negotiated entirely through her son, one George Simpson, who was her general business agent.

This George Simpson carried on a general store with his brother, Moses, and the firm had on the 8th January, 1880, an account in their books against T. C. Fields, personally, for $1,381.

This same George Simpson was the defendant's subtutor. In December, 1879, he, apparently getting anxious to obtain a settlement from Fields of the large amount standing against him in his books, concocted with him, Fields, the tutor, upon the suggestion and advice of a notary named Howard, whose conduct in the matter I cannot but qualify as deserving of severest censure, the means to get himself paid by this minor child of these $1,381 due to him by Fields personally, under cover of a loan from his mother, the present plaintiff, to this minor.

A family council had by law to be called for the purpose. One was assembled accordingly before that notary Howard, who knew all the parties, on the 26th Dec., 1879, at the request of the tutor, Fields, and was composed of George Simpson himself, Field's creditor, and agent of the lender, of Moses Simpson, his brother and partner, and as such also Field's creditor, of L. T. Simpson, another brother and creditor for $84, of one Christie Davis, their uncle and the lender's brother, of one Howard, the notary's son, and two others who are said to have been then George Simpson's clerks.

These seven persons "having been duly sworn upon the holy evangelists, and having examined the tutor's declaration, and the summary statement of accounts produced by him, and maturely deliberated together,

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were unanimously of opinion that it was expedient and necessary that the said tutor should be authorised to borrow from Lurena Davis (the present plaintiff) for and on behalf of the said minor, $3,664 and to mortgage the said minor's property as security for the said loan." Such are the very words of the notary's *acte* or *procès verbal* of the deliberations of the family council.

The prothonotary of the district a few days after homologated these proceedings in apparently the loosest possible manner. Acting in a judicial capacity, and bound by law to scrupulously scan every proceeding brought before him that might in any way be prejudicial to minor children's interests, this officer granted the permission to mortgage this young girl's property for the large amount of $3,664 without making any inquiry whatsoever, without having the family council, or the tutor, or the sub-tutor examined before him, and even without requiring from the tutor the summary account of the minor's revenues required by art. 298 C.C. In utter disregard of the duties assigned to him in the matter, and seemingly unconscious of the responsibility attached to his functions, he contented himself with relying upon the notary's proceedings, and granted the authority to borrow a large sum in this minor's name without any attempt whatever to exercise his own judgment on the merits of the application or on the necessity of the loan. A more iniquitous proceeding, a more glaring fraud against the law, is hardly conceivable; and that it should have so readily received the sanction of two public officers in the province demonstrates, it seems to me, that the protection due to minors is not, under the system there in force, always surrounded with the proper safeguards. A family council, called to protect the minor and advise on the opportunity of a loan for her, composed of two of the creditors who are to be paid from the pro-

ceeds of that loan, one of them the special agent of the lender, three of them sons of the lender, and a fourth a brother of the lender, called together on a petition of the debtor, whose debt to two of the council is to be paid from the proceeds of the loan ; all of them swearing upon the holy Evangelists that after having maturely deliberated they are *unanimously* of opinion that, in the minor's interest, the loan from their mother was expedient and necessary ; and all this upon the petition of a tutor who is to get his share of the loan ; is a proceeding so ludicrous that I would think it fanciful if I had not this record before me. The whole transaction was evidently nothing but a deceitful contrivance, and this to the knowledge of the plaintiff, through her agent.

A party who lends money to a minor, through her tutor legally authorized to borrow, is not bound to see that these moneys are really expended in the minor's interest ; neither has he, when in good faith, to go behind the judicial order that authorises the loan, if such order on its face is legal and regular. But the plaintiff here was, through her agent, a party to the illegality and fraud against the law which entirely vitiates the authorisation to effect this loan from her. She, the lender, formed, through her agent, part of the family council called to get her to determine upon oath whether or not, in the minor's interest, this loan was expedient or necessary. She, through her agent, knew that the proceeds of a great part of this loan were to go to the agent himself. She, through her agent, was aware that no summary of the minor child's revenues had been submitted to the prothonotary or family council as required by law. *Qui mandat ipse fecisse videtur.* I am of opinion that all this *a nécessairement eu pour effet de vicier dans son essence même la constitu-*

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tion du conseil de famille. Re Gielly (1). *Fraus et dolus nemini patrocinere debent.*

I do not lose sight of the fact that Simpson, examined as a witness, swears that it was to Fields as tutor for the defendant this $1,381 was advanced, but this is directly contradicted by his own books where the amount stands charged to Fields personally, and then, were this true, the fact remains that the loan to that amount was to go to him, Simpson, who formed part of the family council. And this, in my opinion, absolutely avoids this authorisation, not only as to the $1,381, but as to the whole amount of the loan. Could it be contended, however, that the loan was legally effected as to the surplus over the $1,381, there remains the objection to this surplus that, on Field's own statement produced before the family council upon his own application, as tutor to borrow for his pupil, this surplus was to reimburse him, Fields, as creditor of his pupil, for advances made and money expended for her. The illegality of this is patent. Sirey (2). Where the interest of a minor is to be considered and dealt with *uberrima fides* must be the rule, and the law will neither allow proceedings to be instituted for a minor by a tutor interested in the result nor tolerate in the family council the presence of any party who has directly or indirectly an interest in the matter submitted for consideration. Towards a tutor, a sub-tutor or a member of a family council, more than to any others perhaps, the tribunals are bound to rigorously enforce the wholesome doctrine that "no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements or assume functions in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those he is bound to protect;" or as the

(1) Dalloz 80, 2, 9. (2) 32, 2, 289.

Privy Council tersely puts it in *Bank of Upper Canada* v. *Bradshaw* (1), that an agent or mandatary (and a tutor or a sub-tutor are mandataries) cannot be allowed to put his duty in conflict with his interest.

I do not think, however, that this entails the dismissal of the whole of the action as to this item. Any one who lends money to a tutor even not legally authorized to borrow for the minor, or even to a minor himself without the intervention of his tutor, has the right to recover all of this loan which he the lender proves to have been used to the advantage and benefit of the minor. This is unquestionable. I need only refer on this and other points arising on the case, to the authorities cited in *Miller* v. *Demeule* (2); and to *Gagnon* v. *Sylva* (3); *Venner* v. *Lortie* (4): Demolombe (5); Laurent (6); Sirey (7); Sirey (8); *Urquhart* v. *Scott* (9); *Payne* v. *Scott* (10).

The issue on this item of the demand is consequently reduced to a mere question of evidence. For what amount has the defendant been proved to have benefited? The evidence on this is very meagre. There are, on the one hand, three witnesses who estimate the additional value given by Fields to the defendant's property at from $3,000 to $6,000. But on the other hand, it is in evidence that Fields during his administration received from New York and elsewhere for the defendant divers large sums of money. So that it is impossible to tell, Fields being now dead, precisely which portion of this loan was spent on the property. Yet the plaintiff cannot recover more than what she has actually established to have benefited the defend-

(1) L. R. 1 P. C. 479.
(2) 18 L. C. Jur. 12.
(3) 3 L. N. 332.
(4) 1 Q. L. R. 234.
(5) No. 174.
(6) 5 Vol. Nos. 94, 101, 108; 16 Vol. Nos. 40, 42, 47, 53; 18 Vol. No. 556; 19 Vol. No. 70.
(7) 31, 1, 162.
(8) 70, 1, 307.
(9) 12 La. An. 674.
(10) 14 La An. 760.

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ant. That amount I cannot find to be from this record over $1,230, that is to say $1,000 paid to McIntosh on a previous mortgage he had on the defendant's property, and $230 for the outbuildings erected thereon by Fields. I would give only the legal interest, not 7 per cent., because that amount was not even authorised by the family council, and then the plaintiff recovers on the moneys disbursed for the defendant's benefit, and not on the obligation of the 8th January.

As to the hypothecation granted by the deed of 1880, it cannot stand even for the amount that the minor has benefited from the loan: Art. 1009 C.C. not in Code Napoleon. I refer for this to Duranton (1); Demolombe (2); Solon Nullités (3).

L'hypothèque constituée est nulle, lorsque les formalités requises n'ont pas été observées, encore bien qu'elle ait eu pour cause un emprunt qui a tourné au profit du mineur; en ce cas, le prêteur n'a qu'une simple action personelle; le mineur n'est point tenu en vertu d'un contrat, mais, *ex lege*, en vertu du principe d'équité qui ne permet à personne de s'enrichir aux depens d'autrui (4).

See also *re Beauquis* (5).

The reporter's summary of the case of *Beliveau* v. *Duchesneau* (6) is misleading. The court there did not hold that a mortgage given by a minor is not radically null when the nullity is invoked by the minor or on his behalf.

The hypothecation being null it follows, of course, that the hypothecary action against Mary Louisa Kerr stands dismissed.

As to the ratification by the defendant of this obligation of the 8th of Jan., 1880, by the deed of 23rd February, 1885, the plaintiff's contentions have been, in my opinion, rightly dismissed by the Superior Court.

(1) 19 Vol. No. 848.
(2) 7 Vol. No. 739.
(3) 2 Vol. No. 370, 376.
(4) 2 Boileux page 439.
(5) S. V. 82, 2, 211.
(6) 22 L.C. Jur. 37.

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It was consented to by the defendant at a time when she was in complete ignorance of the circumstances under which the first obligation had been passed by her tutor, and at the instances and through the agency of the very man who had been her sub-tutor, and who thereby attempted to make her unwittingly ratify his own improper dealings in his own interest and those of his mother, the plaintiff, when acting for her, the defendant, under the guise of a friend and protector in the family council of 1879. A confirmation or ratification, either express or tacit, either under art. 1213 or under art. 1720, is not binding if the arty assenting to it was not aware of the causes of nullity or illegality of the first obligation. No one can be presumed to abandon voluntarily his rights. And no one can be held to have abandoned them when he did not know them. Sirey (1). "Acquiesence and ratification must be founded on a full knowledge of the facts" said their lordships of the Privy Council, in *Banque Jacques Cartier* v. *Banque d'Epargnes* (2), or, as the French courts put it in other words, *l'intention évidente de réparer avec connaissance de cause le vice dont l'acte est atteint*. And, says Bédarride (3), *On ne peut renoncer à un droit dont on n'a aucune connaissance.*

As to the second item of the plaintiffs' demand, $2,385.63, for so much acknowledged by the defendant to be by her due to the plaintiff, by the deed of the 23rd Feb., 1885, apart from the first obligation, I think she is entitled to recover. The defendant was then of full age, and had been since 1881. This deed is expressed to be for valid consideration for advances made to her. On the defendant, then, was the burden of proving that the deed was false in this particular. She has entirely

(1) Codes Ann. under Art. 1338, No. 49; Codes Ann. under Art. 1998, Nos. 32 seq.; 63 1, 457; 791, 57; 81, 2, 17.

(2) 13 App. Cas. 118.

(3) Dol. et Fraude No. 584.

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failed to do so. As to the contention that she consented to sign this deed only through fear and pressure, I am of opinion with the Superior Court, and Tessier and Bossé JJ. in the Court of Appeal, that she has not proved it. A plea of this nature, to destroy a solemn deed received by a public officer, cannot prevail but on the clearest evidence. The only witnesses on the point are the defendant herself, whose testimony must be read out of the record, her sister, who is herself a defendant on an hypothecary action where the same deed of ratification is attacked by her on the same ground, and Mrs. Fields, their foster mother, whose evidence is so palpably biassed that it is not surprising that the learned judge before whom the evidence was taken did not rely on it.

I would, on this item, restore the judgment of the Superior Court.

Appeals of Davis v. *Harriet E. Kerr allowed with costs of one appeal.*

Appeal of Davis v. *M. L. Kerr dismissed with costs.*

Solicitors for appellants: *Laflamme, Madors & Cross.*

Solicitor for respondents: *M. Hutchison.*