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* Oct. 29, 30,
Nov. 2, 3.
* Feb. 2.

STANLEY JOHNSTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

DAME WINNIFRED BUCKLAND (PLAINTIFF) ..... } RESPONDENT.

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

Broker and client—Evidence—Marginal trading transactions—Accounts by mother and two daughters—Verbal agreement by mother with broker to treat all three accounts as one and as her own—Oral evidence—Whether commencement of proof in writing—Whether "commercial matters"—Necessary elements to constitute "commencement de preuve par écrit"—Trial judge's decision on the matter—Article 1233 C.C.—Article 316 C.C.P.

The appellants were stock brokers in Montreal and had a branch in the city of Sherbrooke, where the respondent resided. In the month of August, 1926, the latter entered upon the operation of a marginal trading account at that branch. About a year later, two daughters of the respondent opened similar accounts of their own at the same branch office. These became very large and most active accounts until came the break in the stock market in October, 1929. The accounts went under the margin and even under the market, and the respondent and her daughters were continually called upon to supply funds or securities to support their accounts. The respondent, after her daughters had given all they had for that purpose, was able to support them for a certain period. Finally, having tried and failed to raise funds to provide for further margins required by the branch manager, the respondent expressed to the latter the desire to have an interview with one of the appellants, Mr. Johnston, in Montreal. The interview took place; and, after a long discussion about the exact positions of all the accounts, the respondent, according to Mr. Johnston's version, authorized the latter verbally to treat all three accounts as one, and to close them, agreeing to hold herself responsible for them and that any balance due on the other accounts should be charged against her account The respondent brought an action against the appellants asking, *inter alia,* that the latter be condemned to pay her the sum of $58,793.98, being the total of two debit balances in the accounts of one of her daughters charged to the respondent in the final statement of account sent to her by the appellants; the respondent specifically denying the fact of her alleged authorization to treat all accounts as one and arguing further that this alleged agreement was not susceptible of being proven by oral testimony. The trial judge held that the agreement on which the appellants relied was susceptible of being proven by oral testimony as he found sufficient commencement of proof in writing, and that the evidence had established the existence of such agreement. The appellate court held that such evidence was not legal and maintained the respondent's action in part.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

Held that verbal proof of the agreement alleged by the appellants was admissible, as, upon the facts and circumstances of this case, sufficient commencement of proof in writing under article 1233 (7) C.C. could be found in order to let in oral evidence of the particulars of such agreement.

Held also that, whatever may be the correct legal description of the agreement alleged to have been made by the respondent, it does not come within the transactions made by stock brokers in the ordinary course of their business; and, therefore, verbal evidence was not admissible as constituting proof of "facts concerning commercial matters" within the meaning of those terms in paragraph 1 of article 1233 C.C.—The decision of *Forget* v. *Baxter* ([1900] A.C. 467) is not applicable to the present case.

The expression "commencement of proof in writing," although no definition of it is contained in the Civil Code, connotes a writing emanating from the party against whom it is to be used which tend to render probable (in French "vraisemblable") the existence of the fact which is desired to be proved—It is not necessarily required that the writing should be in the hand of the party against whom it is sought to be used or that it should be signed by that party; it is sufficient if it "emanates" from him.—The writing required for the commencement of proof may be replaced by the evidence of the party (article 316 C.C.P.)—The question whether there is a writing and the further question whether that writing emanates from the party against whom it is sought to be used are questions of law; but the question whether the writing, or the evidence of the party against whom it is used, tends to render probable the existence of the fact which it is desired to be proved, is a question of fact.

The trial judge's finding, in this case, was in favour of the appellants; and it is a well established practice that an appellate court should not disturb such findings, on questions of facts, unless there could be found evident error by the trial judge in appreciating the evidence; but the rule must even be more strictly adhered to when it is applied to the question of whether a commencement of proof in writing is sufficient to let in oral evidence.

The trial judge's finding, that "on important points, (respondent's) testimony was often evasive, confused and contradictory" was peculiarly within the province of the trial judge, who was in the best position to pass upon it; and such a situation has always been recognized as a valid basis of commencement of proof in writing.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Denis J. and maintaining the respondent's action in part.

The material facts of the case and the questions at issue are fully stated in the above headnote and in the judgment now reported.

L. A. Forsyth K.C. and *G. F. Osler* for the appellants.

J. T. Hackett K.C. and *J. E. Mitchell* for the respondent.

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The judgment of the court was delivered by

RINFRET J.—The real controversy between the parties, at the time when the action was brought, was whether or not Mrs. Buckland, at an interview with Mr. Johnston, head of the appellants (who are stock brokers), on October 14, 1930, authorized the appellants to consolidate her accounts with the accounts of her daughters and to charge to her any debit balances in her daughters' accounts.

This was not, however, the issue presented by the respondent in the original declaration accompanying the writ of summons served upon the appellants. In that declaration, the first conclusion was for an accounting; the second conclusion was that the appellants be jointly and severally condemned to return to the respondent any securities belonging to her which may still be in their possession; the third conclusion was that the appellants be ordered to pay to the respondent the value as of the dates of delivery by the respondent, or of purchase for her, of all her securities subsequently sold by the appellants illegally, wrongfully and improperly, as was alleged; and the fourth conclusion, which was only in the alternative, was that the appellants, upon their failure so to do,

be jointly and severally condemned to pay plaintiff the sum of one hundred and fifty thousand dollars ($150,000) with interest from the sale of the said securities.

It was only several months after the institution of the action and after the appellants had filed their plea that the respondent amended her declaration so as to ask that

in any event, (the appellants) be jointly and severally condemned to pay (the respondent) fifty-eight thousand seven hundred and ninety-three dollars and ninety-eight cents ($58,793.98), with interest from the 15th December, 1930, and costs.

This sum of $58,793.98 was the total of two debit balances in the accounts of one of Mrs. Buckland's daughters, Vera (Mrs. Webster), charged to Mrs. Buckland in the final statement of account sent to her by the appellants as of December 15, 1930.

Still at a later date—and, in fact, after *enquête* was closed at the trial—the respondent moved to further amend her declaration and to add the following words:

and that, in so far as necessary, the statements furnished by the defendants (appellants) to the plaintiff (respondent) be corrected by returning to the plaintiff's account the said sum of $58,794.48 and by deleting from the said account the said transfer (N.B., meaning the transfer of the debit

balances amounting to that sum of $58,794.48 from Mrs. Webster's account to Mrs. Buckland's account) and all interest charges in connection with it.

In truth, the conclusion implied in this last amendment was the only one aptly covering the facts and circumstances disclosed at the trial. Nevertheless, the new amendment was disallowed by the trial judge. While he permitted the respondent to amend in minor details some of the allegations of her declaration, he refused permission to amend her conclusions in the manner above set forth, on the ground that the new amendment was incompatible with the original conclusions and would "change the nature of the demand," contrary to the provisions of article 522 of the Code of Civil Procedure.

As a result, and treating the respondent's proceedings as they stood before him, the trial judge dismissed the action as unfounded. But, although one of the grounds of dismissal was, no doubt, that the action as brought (and as legally amended up to the date of the judgment) could not be maintained having regard to the evidence, a further ground held by the trial judge was that the appellants were entitled to succeed because they had established that they were authorized by Mrs. Buckland to consolidate the accounts of herself and of her daughters and to charge to her the debit balances in her daughters' accounts.

In that way, the trial judge, though disposing of the litigation on the declaration as drafted, at the same time passed upon the real issue between the parties and decided that issue against the respondent.

In the Court of King's Bench, on the main issue, the judges were of opinion that the evidence adduced to prove the agreement was not legal; and, as a consequence of that opinion, the judgment of the Superior Court was reversed. Though the conclusions of the respondent for an accounting and for the return of the securities or, in the alternative, for a condemnation of $150,000 were rejected; though it was found that the conclusions for the payment of the specific sum of $58,793.98 could not be maintained, it was held possible on the pleadings to treat the action as one in the nature of a demand *en réformation de compte*. Accordingly, on the appeal, the adjudication was that, not only the two items amounting altogether to the sum of $58,793.98 (representing the debit balances transferred from Mrs. Webster's accounts), but all the items similarly transferred

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should be deleted from Mrs. Buckland's account, and that her action ought to have been maintained to that extent, with costs, reserving to her all her rights against the appellants in respect of her own account with them.

The appellants, in this Court, met the judgment of the Court of King's Bench with two preliminary objections.

It was first said that it was not open to the appellate court to give the judgment it did on the pleadings as they stood. Indeed, it was urged that, in so doing, the Court of King's Bench had treated the action practically as if the last amendment prayed for by the respondent had been permitted, while, in fact, it had been disallowed by the trial judge.

In the second place, the appellants argued that, even assuming the action might be treated in that way by the appellate court, the adjudication made by it was *ultra petita,* since the respondent never asked for more than the striking out of the two particular debit charges transferred from Mrs. Webster's accounts and the judgment of the Court of King's Bench goes further and also strikes out several other items transferred from Mrs. Webster's accounts and in regard to which no conclusions appeared in the respondent's declaration, even if due allowance be made for all the amendments sought to be introduced by her.

To the first objection of the appellants in that respect, the answer is that, undoubtedly, as stated at the opening of the present judgment, the true controversy between the parties and the only one really discussed at the trial, was whether on October 14, 1930, when Mrs. Buckland met Mr. Johnston, an agreement was reached whereby the firm of Johnston & Ward was authorized to liquidate all the accounts and to charge to Mrs. Buckland any resulting debit balances in the accounts of her daughters. That it was so, clearly appears from the judgment of the Superior Court, where the trial judge states that such question was

> the only one in actual dispute and concerning which the rights of the parties can be seriously discussed.

True, the learned judge, in using those words, refers solely to the prayer for a condemnation to pay the specific sum of $58,793.98, but that condemnation was sought as a consequence of the respondent's claim that no agreement of the nature and character alleged by the appellants had ever been made by her. The existence of that agreement was

the bone of contention between the parties throughout the trial. Time and again, counsel on either side was heard to say that that question was "all that was before the Court at the moment in this case." The *enquête* centred almost exclusively on the point whether the alleged agreement existed and whether it could be proved by oral evidence. The appellants themselves, in the Court of King's Bench, acknowledged that the main question on the appeal before that court was:

> Whether or not the appellant (the present respondent) at the interview with Mr. Johnston of October 14, 1930, authorized the respondents (now appellants) to consolidate her accounts with her daughters and to charge any debit balances in the latter to her.

The whole case was fought on that ground, to such an extent that, in its formal judgment, the Court of King's Bench characterizes the litigation by saying:

> C'est à ce seul point que se réduit le litige et à cette seule fin que la cause a été faite.

And, on the record, the assertion is justified in the most undisputable way.

Under the circumstances, the judgment of the Court of King's Bench does not mean that, in a case such as this, the amendments made by the respondent should ordinarily be allowed consistently with the provisions of the Code of Civil Procedure, and we do not wish to be understood ourselves as sustaining any such proposition. But what the Court of King's Bench states—and that statement is fully warranted on the record—is that, in the special circumstances of this case and having regard to the way the trial was conducted by the parties, it was and it is perfectly open to the courts to treat the litigation as one to have it decided whether or not the agreement contended for by the appellants was made by the respondent. In that view of the question, the objection of the appellants resolves itself into one of pure practice and procedure; and this is not a case where this Court would interfere with the decision of the highest court of final resort in the province. The whole defence of the appellants on that question was gone into and everything in any way pertaining to it was before the Superior Court. No possible injustice can have resulted against the appellants, and the Court of King's Bench having decided that, in the premises, the controversy as presented by the pleadings and as submitted at the trial opened the way to the adjudication made by that Court,

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it would not be in accordance with our usual practice to reverse its judgment upon an objection of the nature of that made by the appellants.

Nor do the appellants fare better on their second preliminary objection to the effect that the adjudication made by the appellate court is bad because it grants *ultra petita*. Assuming, as the Court of King's Bench did, that the real issue in the case was whether the agreement of October 14, 1930, had taken place, and that the issue was sufficiently raised by the pleadings or, at all events, that such was the issue fought at the trial, it follows that the consequential prayer in respect to an amount of $58,793.98 fully covered an adjudication in respect to a reduced amount.

It was claimed by the respondent that there was no such agreement and that, as a consequence, she was not properly charged with the two debit balances of Mrs. Webster's accounts. It stands to reason that, upon that point, having come to the conclusion that no agreement to that effect had been legally proven, the Court of King's Bench could, at the same time, decide that the result was not that Mrs. Buckland should have her account reduced by the deletion solely of the sum of $58,793.98 (representing only the two debit balances), but that all the items transferred by the appellants from Mrs. Webster's account on the assumption that the agreement existed, had to be struck from the respondent's account. That was the logical consequence of the decision reached by the Court of King's Bench. Any other conclusion in the premises would have been unfair to the appellants and very much open to challenge. It appears from the record that the net result of the adjudication appealed from is that a sum considerably lower than $58,793.98 was thereby struck from the respondent's account. Indeed, we were told at bar that when the final adjustment would be made on the basis of the judgment rendered by the Court of King's Bench, the net amount whereof the respondent will benefit will prove to be in the neighbourhood of $10,000. We cannot see, therefore, how the appellants can contend that the judgment grants *ultra petita;* and, in our view, the effect of that judgment is exactly the other way.

But, for the same reason just stated, we think the respondent's preliminary objection to the jurisdiction of this

Court also fails. It is apparent that the amount or value of the matter in controversy exceeds the sum of $2,000 (s. 39 of the *Supreme Court Act*). The respondent cannot, in the same breath, ask us to uphold the judgment of the Court of King's Bench, on the ground that the issue was whether the agreement of October 14, 1930, had been consented to by her (an agreement which is shown to involve a sum of at least $10,000) and then turn around to claim that the action is merely one for accounting and that, therefore, on the strength of some decisions in this Court, we have no jurisdiction to hear the appeal. It is clear that the decisions on that score cited by the respondent (*Généreux* v. *Bruneau* (1); *Mathieu* v. *Mathieu* (2); *Canada Car* v. *Bird* (3)) in no way apply.

The preliminary objections made on behalf of both the appellants and the respondent must, therefore, be disregarded and we will now proceed to dispose of the main point in controversy.

The appellants were stock brokers in Montreal and had a branch in the city of Sherbrooke, where the respondent resided. In the month of August, 1926, the respondent entered upon the operation of a marginal trading account at that branch. As matters went on, the operations were made both on the New York and on the Montreal stock exchanges; and, for that purpose, an account was kept and known as the New York account and another account was kept and known as the Montreal account. About a year later, two daughters of Mrs. Buckland, Vera (Mrs. Webster), living in Sherbrooke, and Grace (later Mrs. Wasson, living in Boston), opened similar accounts of their own at the appellants' branch in Sherbrooke. They also traded in United States and Canadian securities and they also had each a New York account and a Canadian account. In addition to that and for reasons not material here, Mrs. Webster had a special New York account and a special Canadian account.

The accounts of Miss Grace never became of great importance; but Mrs. Buckland's and Mrs. Webster's gradually developed into heavy transactions, until they became

(1) (1910) 47 Can. S.C.R. 400. (2) [1926] S.C.R. 598.
(3) Cameron's Supreme Court Practice, 3rd ed., p. 164.

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what were probably the largest and most active accounts in the Sherbrooke branch.

Then came the break in the market, in October, 1929. The accounts went under the margin and even under the market. Mrs. Buckland and Mrs. Webster were continually called upon to supply funds or securities to support their accounts; and there came a time when Mrs. Webster had given all she could in the way of money and securities. Mrs. Buckland was able to support Mrs. Webster and Miss Grace for a certain period. Then, it was found necessary to call another sister, Mrs. Greenleaf, of Decatur, Alabama, to the rescue; and some of the latter's securities were placed in Mrs. Webster's accounts. Later, the assistance of Miss Grace (who had become Mrs. Wasson) was also invoked; and, on the eve of the crucial interview between Mr. Johnston and Mrs. Buckland at Montreal, on October 14, 1930, Mrs. Buckland had just returned from Boston with some of Mrs. Wasson's securities for the purpose of supporting the accounts. There is a controversy as to whether it was only for her own account or also for Mrs. Webster's accounts; but this will be dealt with later.

In fact, the trip to Boston had been prompted by the reason that the appellants were pressing both Mrs. Buckland and Mrs. Webster for further margin; and, as she admitted to McAnulty, the manager of the Sherbrooke branch, the respondent was finding it

> very heavy on her carrying those accounts * * * having to take care of them at that time.

Mrs. Buckland was a widow who had inherited from her husband the ownership of a newspaper known as *The Sherbrooke Record*. The paper was fairly prosperous and was bringing to Mrs. Buckland something like $11,000 annually. She had also owned interests in the O'Cedar Manufacturing Company, which she had sold for a large amount, so that admittedly when she started her speculations on the stock markets, she enjoyed considerable wealth.

After Mrs. Buckland returned from Boston, she went to the branch of the Canadian Bank of Commerce in Sherbrooke and endeavoured to borrow from that bank, on her *Sherbrooke Record* stock as collateral, a sum of between $245,000 to $250,000, with the avowed purpose of using that money to pay off all the accounts of herself and her daughters with the appellants. The local manager of the bank

said that he recommended the loan, but the head office was unwilling to put it through.

Having failed in her proposition to the Canadian Bank of Commerce, Mrs. Buckland expressed to McAnulty the desire to have an interview with Mr. Johnston; and this was arranged to take place in Montreal on October 14, 1930.

Before leaving for Montreal and in order to protect the accounts in the meantime, Mrs. Buckland deposited in the hands of McAnulty the securities belonging to Mrs. Wasson and which she had brought from Boston.

We have stated that there was a controversy as to whether the securities were left for the purpose of supporting only Mrs. Buckland's own accounts, or whether they were also deposited for the purpose of Mrs. Webster's accounts. As this point of fact is important, it may be cleared up at once. Unfortunately there is no express holding of the trial judge on that fact. McAnulty is positive that the securities were left for the protection of Mrs. Webster's account. Mrs. Buckland, in her deposition on discovery, referring to the incident, says in terms:

> Yes, I had taken in some securities to Mr. McAnulty to cover my account and my daughters'.

We are asked to disregard that answer, on the ground that it must be a mistake in the transcription of the stenographer's notes. It should be observed that this request could hardly be entertained in this Court. If there really was an error in the transcription of Mrs. Buckland's evidence, it should be pointed out that the alleged error appears in her deposition on discovery taken almost a year and a half before the trial, and that the so-called error was allowed to remain in the record since that time throughout the trial and throughout the proceedings before the Court of King's Bench, while a very simple procedure for correction is provided by the Code of Civil Procedure (art. 348), of which the respondent could have availed herself long before the hearing in this Court. We fear that, in the premises, we are not in a position to come to the relief of the respondent in that respect. It is true that the following questions and answers in the deposition on discovery lend some colour to the contention of counsel for the respondent; but even if Mrs. Buckland should be held to have stated on discovery that Mrs. Wasson's securities were

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deposited solely in support of her own account, there would stand against her statement the very positive assertion to the contrary made by McAnulty, whose evidence is supported by all the surrounding circumstances; for Mrs. Buckland had been in the habit of depositing securities to support Mrs. Webster's account; it was quite a usual thing for her to do, whether we call it a loan of the securities to Mrs. Webster or a straight pledge of the securities in aid of Mrs. Webster—a point to which Mrs. Webster seemed to attach a great deal of importance, but which is of no real consequence for the purposes of this case.

But, above all, the main reason for accepting Mr. McAnulty's version is that, before Mrs. Buckland left for Montreal, Mrs. Webster's account needed support; it was badly in want of additional margin; the appellants had notified her that, if margin was not forthcoming, the securities held in her account would have to be sold at once. If, therefore, Mrs. Wasson's securities, on the morning of the Montreal interview had not been deposited with McAnulty in support of Mrs. Webster's account, the purpose would not have been served; the account would have been left unprotected; and there would have been no reason why McAnulty would have held it until he got the report of what had happened in Montreal. We think it must be held that McAnulty was right when he testified that the securities brought from Boston had been deposited with him as well for Mrs. Webster's account as for Mrs. Buckland's. All the circumstances point in that direction.

We may now resume our recital of the trend of events interrupted by the digression just concluded.

For the purpose of the Montreal interview, Mrs. Buckland had caused McAnulty to prepare for her a list of all the securities held by the appellants for the accounts both of herself and of her daughters. She brought in that list with her in the office of Mr. Johnston and gave it to him. He called for his own record; and then proceeded to figure out what was the exact position of all the accounts. She offered to pledge her *Sherbrooke Record* stock in support of all the accounts This was discussed and Mr. Johnston advised her not to do so. The reason for this advice is thus stated by him:

> You made a substantial loss on those operations in which you have engaged, and it is my opinion you should hold out that *Sherbrooke Record*

stock. It gives you a revenue of $10,000 a year, and in Sherbrooke you could live on that.

We were asked by counsel on both sides to assume that Mr. Johnston had other reasons for refusing the *Sherbrooke Record* stock—other reasons which he, at least, did not disclose. We do not think we should be called upon to speculate on what he had in his mind, in view of the fact that a long cross-examination failed to detract in any way from his own version of the motive which prompted him on that occasion.

It is fair to say that Johnston admitted that the *Sherbrooke Record* stock was "not a type of security upon which he would lend", but one is often willing to accept security in support of an already existing debt, although not prepared to make a new loan on that security. We do not think much help comes to the respondent from that admission.

The suggestion of pledging the *Sherbrooke Record* stock in aid of all the accounts having been discarded, it was incumbent upon Mrs. Buckland to find other means of meeting the situation and, no other acceptable suggestion being forthcoming from her, it was then that Mr. Johnston advised the respondent to liquidate all the accounts and proceeded to make an estimate, as of that date's market values, of all the securities, in order to figure out what debit or credit balance would remain in each account and what mutual transfers would be required to balance them; whereupon, according to the appellant's version, Mrs. Buckland said:

Never mind doing that. Treat them all as one. I am responsible for them all. Close out the accounts; and, if there is any balance in the others, charge it against my accounts.

This is positively asserted both by Mr. Johnston and by Mr. Murray, in charge of Johnston & Ward's branch office accounts, who was present at the meeting.

Mrs. Buckland returned to Sherbrooke and, the next morning, she telephoned to McAnulty the result of the interview. McAnulty's version of what she then told him is as follows:

She said Mr. Johnston advised her not to put up any more collateral but to liquidate those accounts. She said they considered all the accounts in there as one and she instructed me to sell the accounts that morning, and that she would be down to see me later.

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As a matter of fact, Mrs. Buckland that morning did call on McAnulty. She is stated to have then repeated that: "In Montreal, they treat those accounts as one." McAnulty is asked whether he told Mrs. Buckland that the instructions he had received from Mr. Johnston were to put all the accounts together and charge them to her. His answer is:

> Yes, because that was the condition upon which I gave her back the securities. I could not give them back otherwise.

Counsel for the respondent may be right in pointing out that the latter part of that answer is argument rather than a statement of what McAnulty said. It is open to that interpretation. But the fact remains that Mrs. Wasson's securities left with McAnulty on the previous day for the purpose, as we have found, of supporting both Mrs. Buckland's and Mrs. Webster's accounts, were delivered back to Mrs. Buckland; and the appellants thus deprived themselves of securities estimated, that day, at $11,420 and which otherwise they would have been entitled to hold. McAnulty's assertion is that he returned those securities to Mrs. Buckland upon instructions from the head office.

When Mrs. Buckland came to McAnulty's office that morning, she brought with her a list of securities, which, at the trial, was marked "Exhibit D2." That was a list of securities belonging to Mrs. Greenleaf and which, from time to time, had been pledged to margin Mrs. Webster's account. The list also included certain securities supplied by Mrs. Buckland. The object of bringing that list to Mr. McAnulty was for the purpose, admitted by Mrs. Buckland, of asking him to keep those securities up to the last, that is: that Mrs. Buckland wished all the other securities in the accounts to be liquidated first and to keep the securities enumerated on the list D2 until it should be found necessary to sell them in order to balance the accounts.

Immediately after Mrs. Buckland's visit to McAnulty that morning, the appellants began to liquidate the accounts and to sell the securities. As the sales were made, sold notes would be sent, in each instance, to Mrs. Buckland or to Mrs. Webster, advising them of the particulars of the sales, in accordance with the usual practice of stock brokers. On October 21, 1930, Murray (already referred to as having been present at the Montreal interview of October 14, 1930), telegraphed to McAnulty:

Understand all accounts are to be consolidated. Also transfer funds as required.

It is established that this telegram had reference to what were known in the office as the "Channell accounts," meaning: the accounts of Mrs. Buckland, Mrs. Webster and Miss Grace Channell.

At the end of October and of November, 1930, the usual monthly statements of their accounts were sent to Mrs. Buckland and Mrs. Webster respectively. The liquidation and sale of the securities in all accounts was completed by the 15th of December, 1930; and then the consolidation was made, placing in the name of Mrs. Buckland the credit balance in Mrs. Webster's New York account, representing the very substantial sum of $37,113.47, and also charging to Mrs. Buckland's account the several debit balances shown in Mrs. Webster's other accounts (two items of which made up the sum of $58,793.98, in regard to which alone conclusions were taken in Mrs. Buckland's declaration), and, at the same time, transferring to Mrs. Buckland's account the debit balance against Miss Grace Channell (Mrs. Wasson), and transferring also to the credit of Mrs. Buckland all the securities remaining in her daughters' accounts and which had not been sold. The result was that, on that date, in the language of the stock exchange, the accounts of Mrs. Webster and of Miss Channell became "flat" or even and the account of Mrs. Buckland was charged with the debits of her two daughters, but at the same time benefited from the transfer of the credits in money and in outstanding securities from those accounts. As already mentioned, it was stated at bar that the whole of the transfers was equivalent to a debit charge to Mrs. Buckland of approximately $10,000.

By that time, however, Mrs. Buckland had already asked her solicitors to take charge of the matter; and, since December, 1930, the latter had been asking Messrs. Johnston & Ward

to replace and deliver to (their) client immediately all stocks which were sold after the credit balance in (her) American account was equal to the debit balance in (her) Canadian account.

In turn, Messrs. Johnston & Ward referred the matter to their solicitors; and, following the correspondence exchanged between the respective solicitors during the course of the month of December, 1930, and on the 2nd January, 1931,

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Mrs. Buckland was furnished with the monthly statements prepared at the end of each month, showing how her account stood as a result of the consolidation of all the accounts. Additional correspondence ensued for a month or so, Johnston & Ward, through their solicitors, putting forward that all they had done, as shown in the consolidated account, was done in accordance with the instructions of Mrs. Buckland, and the latter, through her solicitors, denying Johnston & Ward's

> contention that she gave instruction to sell the securities so that accounts other than her own might benefit from the proceeds.

It will be seen, therefore, that, when Mrs. Buckland brought her action, she was fully aware of the appellants' contention, and, notwithstanding her being aware of that fact and that they were relying on such an agreement, she brought her action for an accounting and for the return of the securities which had been sold from her account, without in any way referring to the transfers from her daughters' accounts and without praying that these transfers and charges be struck from her account. It was only much later that she moved for the amendment already discussed at the beginning of this judgment, remotely referring to the transfers from Mrs. Webster's account and, at that, incorrectly describing them. She never squarely asked in terms to delete from her consolidated account the transfers made to it as of December 15, 1930, by the appellants. Even in her last motion, presented after the whole *enquête* was over, she moved for an amendment referring only to the two transfers of debit balances amounting to $58,793.98. And it was only through the adjudication made by the Court of King's Bench, in the circumstances already discussed, that the other transfers were ordered to be deleted. As for the transfers charged from Miss Grace's accounts, they have never, to the present date, been requested to be struck from the respondent's account; and she made it clear, in the course of the trial, that she was not objecting to them.

It was under those circumstances that the trial judge came to the conclusion that the evidence had established the existence of the agreement alleged by the appellants and whereby they were authorized to consolidate the accounts and to make to the respondent's account the

transfers in question from the accounts of both her daughters.

This finding made by the trial judge was not disturbed by the Court of King's Bench. Suffice it to say that, so far as we are concerned, we are of opinion that the finding could not be disturbed and that it is fully warranted by the evidence on record.

This means that the action of the respondent was rightly dismissed by the Superior Court, unless we should come to the conclusion, as the Court of King's Bench did, that the agreement on which the appellants relied was not susceptible of being proven by oral testimony; for the agreement was not made in writing and, in order to establish it, the appellants had to resort solely to verbal evidence.

The inadmissibility of that oral evidence was the ground on which the Court of King's Bench came to the conclusion that the judgment of the Superior Court ought to be reversed.

Under the law of Quebec (art. 1233 C.C.), proof may be made by testimony:

> 1. Of all facts concerning commercial matters;
>
> * * *
>
> 7. In cases in which there is a commencement of proof in writing.
>
> In all other matters, proof must be made by writing or by the oath of the adverse party.

We have omitted the other provisions of article 1233 C.C., limiting our citation to the paragraphs on which the appellants relied for their contention that verbal evidence was admissible in this matter.

Both courts below held that the verbal evidence was not admissible as constituting proof of " facts concerning commercial matters "; and, as we agree with them, we do not feel that we should discuss the point at any length.

It was held by the Judicial Committee of the Privy Council in the case of *Forget* vs. *Baxter* (1) that in an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases on his account, these transactions were " commercial matters " within article 1233 of the Civil Code which the stockbrokers might prove by oral evidence; and, of course, this judgment was greatly relied on by the appellants. But it is well to look at the judgment and to see what were the

(1) [1900] A.C. 467.

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transactions that their Lordships of the Privy Council held to have been "commercial matters" in that case. Sir Henry Strong delivered the judgment of the Board; and, referring to this particular point, he said:

> Neither in this or in any other article of the code is there to be found any definition of the meaning of the term "commercial matters." It cannot be doubted that the business carried on by the appellants as stockbrokers was of a commercial nature, nor that the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of that business were operations of commerce. It does not appear to their Lordships that the fact that the respondent was not himself a dealer trading in shares, but that his object in buying and selling through the agency of the appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the appellants. Unless such a construction is adopted, very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are, therefore, of opinion that the execution by the appellants of the respondent's commissions constituted "commercial matters" within art. 1233 which it was open to them to prove by oral evidence.

As will appear from the above passage, what their Lordships term "commercial matters within art. 1233" are

> the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of (their) business * * * as stockbrokers, (or) the execution by the appellants of the respondent's commissions.

But the judgment does not go any further; and it is clear that what is there called "operations of commerce" does not include any agreement such as the one now put forward by the appellants.

Whatever may be the correct legal description of the agreement alleged to have been made by the respondent, it does not come within the transactions made by stockbrokers in the ordinary course of their business. It is, on the part of the respondent, an undertaking to pay to the appellants a sum due by a third party and, as such, we have no doubt that it must be treated as a civil matter or, at all events,—and that is sufficient for the purposes of this case—that it does not come within the term "commercial matters" in paragraph 1 of article 1233 of the Civil Code.

It is not an undertaking in the ordinary nature of dealings between stockbrokers and their clients. On that point, we find ourselves in agreement with both the Superior Court and the Court of King's Bench.

The reason why the Superior Court held the proof of the agreement admissible was that it found sufficient com-

mencement of proof in writing under article 1233 (7) C.C., to let in oral evidence of the particulars; and, on that ground, we must say that, with great respect and contrary to the view entertained by the Court of King's Bench, we agree with the trial judge.

As we understand it—for there is in the Civil Code no definition of what should be understood by "commencement of proof in writing"—the expression connotes a writing emanating from the party against whom it is to be used which tend to render probable the existence of the fact which is desired to be proved. This agrees with the definition of Pothier (3e éd. Bugnet, vol. 2, Traité des Obligations, p. 430, no. 801):

> Lorsqu'on a contre quelqu'un, par un écrit authentique où il était partie ou par un écrit privé, écrit ou signé de sa main, la preuve, non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie.

If one looks through the doctrine and the jurisprudence, he will find that the commentators and the courts all agree on a definition substantially in the above terms. It is not necessarily required that the writing should be in the hand of the party against whom it is sought to be used or that it should be signed by that party, it is sufficient if it "emanates" from him; and the French Civil Code (art. 1347) contains a definition which uses precisely the word "émaner." In some cases, this has been held to extend to a writing, though not in the handwriting of the party or though not signed by him, yet which is used by him as his own ("écrit qu'il fait sien et dont il use comme s'il était de lui").

So far, therefore, so as to have a commencement of proof in writing sufficient to let in oral evidence:

1st: there must be a writing;

2nd: the writing must emanate from the party against whom it is used;

3rd: the writing must tend to render probable (in French "vraisemblable") the fact which it is desired to be proved.

But it has come to be understood, both in the French doctrine and in the French jurisprudence, that the writing required for the commencement of proof may be replaced by the evidence of the party; and that question need not be

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discussed here, since the principle was incorporated in the Code of Civil Procedure of Quebec (art. 316):

> A party may be examined by the opposite party and his evidence may be used as a commencement of proof in writing.

Then, there is another principle which is generally accepted; and that is that the question whether there is a writing, and the further question whether that writing emanates from the party, are questions of law; but the question whether the writing, or the evidence of the party against whom it is used, tends to render probable the existence of the fact which it is desired to be proved, is a question of fact. The principle, we think, is well expressed in the following passage of Mignault, *Droit Civil Canadien*, vol. 6, pp. 79 & 80:

> La question de savoir si un écrit quelconque rend vraisemblable le fait allégué et peut être invoqué comme commencement de preuve par écrit est une question de fait entièrement abandonnée à l'appréciation du tribunal.

In the present case, there was both a writing (Ex. D2) which emanated from the respondent, at least in this sense that, to use the words of Aubry & Rau (tome VI, p. 451): "Elle se l'était rendu propre par son acceptation expresse ou tacite"—a passage cited with approval by Demolombe (Traité des contrats, tome 7, édit. par Paul Grevin, page 146, no. 132):—and there was also the evidence of the respondent which, by force of art. 316 of the Code of Civil Procedure, could be used as a commencement of proof.

The two first conditions required by law, therefore, existed; and there can be shown no misdirection on the part of the trial judge in these respects.

This being so, the further question whether the writing Ex. D2 or the respondent's evidence rendered probable the existence of the agreement which it was desired to be proved, was nothing but a question of fact for the decision of the trial judge. We need not dwell on the function of an appellate tribunal in respect to a question of fact. It has been stated in this Court as often as the question came up. We find it defined in a judgment of the Court of King's Bench (appeal side) of the province of Quebec, in the case of *Ruthman* v. *La Cité de Québec* (1). It is expressed thus:

(1) (1912) Q.R. 22 K.B. 147, at 150.

Sans doute, la loi permet l'appel sur le fait comme sur le droit. Mais lorsqu'il ne s'agit que d'une question de fait, le jugement de la cour de première instance ne doit être infirmé que s'il y a eu erreur manifeste du juge dans l'appréciation de la preuve.

Even if some allowance should be made to avoid too stringent an application of the practice on this subject, the passage just quoted shows that the principle is recognized in the jurisprudence of the Quebec courts.

And if it be so in ordinary practice, we have no doubt that the rule must be more strictly adhered to when it is applied to the question of whether the commencement of proof in writing is sufficient to let in oral evidence. In support of that proposition, let us refer to the commentators and the jurisprudence on that point. Pothier expresses it (Traité des obligations, no. 801, éd. Bugnet, vol. 2):

Il est laissé à l'arbitrage du juge de juger du degré de preuve par écrit pour, sur ce degré de preuve, permettre la preuve testimoniale.

The use of the word " arbitrage " so used by Pothier is so strong that it might even be understood to mean that the holding of the trial judge is decisive.

Among the more recent authorities, expressions are to be found of a somewhat similar character. Speaking on the same subject, Demolombe (vol. 30, no. 139) says:

L'appréciation du degré plus ou moins grand de vraisemblance appartient souverainement, en fait, aux magistrats.

Baudry-Lacantinerie & Barde, 3e éd. *Des Obligations*, tome 4e, no. 2614, after having stated that

Les caractères du commencement de preuve par écrit * * * i.e. si un écrit émané soit de celui à qui on l'oppose, soit de la personne qu'il représente ou par laquelle il était représenté, constitue une question de droit; et, par suite, la vérification de l'existence de cette condition rentre dans les attributions de la Cour de cassation.

then go on to say:

Mais le point de savoir si l'écrit invoqué à titre de commencement de preuve rend vraisemblable le fait allégué est, au contraire, une question de fait et, en conséquence, les juges du fond l'apprécient souverainement.

This is in accordance with the passage of Mignault already referred to.

Planiol & Ripert (*Traité pratique de droit civil*, tome 7, no. 1534) consider it as

une question de pertinence dont le juge du fond est le souverain appréciateur.

Aubry & Rau (5e éd. vol. 12, p. 362) do likewise.

As for Larombière (Théorie des Obligations, édition de 1885, tome 6e, at page 506) and Laurent (3e éd. tome 19e, p. 550), they go still further.

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Larombière says:

La question de savoir si l'écrit invoqué rend vraisemblable ou non le cas allégué est abandonné dans tous les cas à l'appréciation discrétionnaire du juge, qui n'a alors d'autre règle de décision que l'examen consciencieux des circonstances de la cause. A lui seul appartient de résoudre cette question de vraisemblance.

And Laurent:

Puisque l'article 1347 définit le commencement de preuve par écrit, le juge ne peut sans violer la loi s'écarter de cette définition en admettant, par exemple, comme faisant commencement de preuve par écrit un acte qui n'émane point de celui à qui on l'oppose, ni de celui qu'il représente ou par lequel il est représenté. Mais il y a aussi une question de fait; c'est celle de la vraisemblance qui résulte de l'écrit. Sur ce point, les juges du fait *jouissent d'un pouvoir discrétionnaire* et, par conséquent, ils décident souverainement.

The principle so expounded by the distinguished commentators to whom reference has just been made was applied, amongst other cases, in the province of Quebec, by the Court of Review, in the case of *Malenfant* v. *Pelletier* (1) where Sir François Lemieux, C.J., speaking on behalf of the full court, said

L'ancienne Cour d'appel a appliqué une règle légale dans l'affaire de *Fournier* v. *Morin* (2). C'est qu'en matière de preuve testimoniale admise vu l'existence d'un commencement de preuve par écrit, le juge de première instance exerce un pouvoir discrétionnaire et que les tribunaux d'appel ne doivent troubler l'existence de cette discrétion que dans le cas d'erreur manifeste. Cette règle basée sur le bon sens le plus élémentaire et sur la loi a été généralement suivie par les tribunaux d'appel; et lorsque ces tribunaux s'en sont écartés, ils ont, à notre avis, commis une erreur grave.

And, with due respect, it seems to us that from the very nature of the question it ought to be so for the reason so well expressed in Fuzier-Herman, Répertoire du droit français, vol. 31 *vbis.* Preuve par écrit (commencement de) p. 584, no. 232, and which we would like to adopt as our own:

Il n'est pas possible de tracer des règles précises d'après lesquelles on puisse reconnaître les cas où un écrit doit rendre vraisemblable le fait allégué. La vraisemblance est en effet un aperçu de l'esprit qui nous porte à penser qu'une chose a tout au moins l'apparence du vrai: elle est fondée sur la liaison ou la connexité plus ou moins grande qui existe entre l'écrit et le fait allégué, et comme cette liaison peut être plus ou moins éloignée, il est évident que la vraisemblance varie à l'infini, suivant les faits et suivant les esprits qui ont à les apprécier.—Toullier, t. 8, n. 293, et t. 9, n. 56; Bonnier (éd. Larnaude), n. 169; Laurent, t. 19 n. 527 et s.; Demolombe, t. 30, n. 138 et s.; Aubry et Rau, t. 8, 764, p. 340; Larombière, sur l'art. 1347 n. 27 et s.; Baudry-Lacantinerie, *Précis*, t. 2, n. 1275; Fuzier-Herman et Darras, sur l'art. 1347, n. 161.

We do not intend to lay down here such a strict rule as that which would seem to follow from the statements of

(1) (1914) Q.R. 45 S.C. 404. (2) (1885) 11 Q.L.R. 98.

the commentators or of Sir François Lemieux in the case of *Malenfant* v. *Pelletier* (1), for we do not believe it is necessary to go so far in the present case.

We are of opinion that there was ample justification for the trial judge to use the writing marked Exhibit D2, and more particularly the evidence of the respondent, as a commencement of proof in writing sufficient to permit the appellants to adduce verbal evidence of the agreement which they alleged.

It was pointed out by Mr. Justice Walsh that

a willingness to help support another is not necessarily the assumption of another's debt;

and by Mr. Justice Saint-Jacques that

Elle était prête à faire tous les sacrifices possibles pour empêcher la liquidation immédiate; * * * mais de là à conclure que * * * elle aurait entrepris de payer le déficit du compte de sa fille * * * il y a une marge * * *.

These propositions, of course, should probably be accepted, but such was not, in our view, the point upon which the trial judge had to make up his mind. He had to decide whether, in his opinion, these facts and the others admitted by Mrs. Buckland in her evidence or to be deduced from the use she was making of the writing Exhibit D2, were of such a character that they rendered probable ("vraisemblable") that, having failed to persuade Johnston to accept her other propositions, she had, in the end, agreed to what the appellants allege had been the final outcome of the interview in Montreal on October 14, 1930. And after having reached the conclusion that this was rendered probable by what was admitted in Mrs. Buckland's evidence or what could be deduced from Exhibit D2, the trial judge then declared the oral evidence of the agreement admissible in view of the commencement of proof in writing which he found in Mrs. Buckland's testimony and in the writing D2; and upon that evidence being adduced, he found that the agreement had been proven. As observed by Langelier, *De la preuve en matière civile et commerciale*, p. 241, no. 574:

L'écrit doit rendre vraisemblable le fait à prouver. Il n'est pas nécessaire que l'écrit le prouve; car, s'il le prouvait, ce ne serait plus un commencement de preuve, mais une preuve complète qu'il constituerait. Il n'est pas nécessaire, non plus, qu'il le fasse présumer, car alors il rendrait la preuve par témoins inutile.

(1) (1914) Q.R. 45 S.C. 404.

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And what is said there of a writing is, of course, equally true of the respondent's evidence, by force of art. 316 of the Code of Civil Procedure. This brings us back to the statement of Pothier (loc. cit.):

> La preuve, non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit.

and, as stated in Planiol (tome 7, no. 1534):

> Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver. Il peut être seulement le point de départ d'un raisonnement pour le juge. Le lien qui doit exister * * * lien de similitude * * * est laissé à son entière appréciation.

It would serve no purpose for us to enter into the details of the testimony of the respondent in order to point out wherein the learned trial judge was warranted in finding in it evidence which could be used as a commencement of proof in writing. It is not so much each single fact admitted by the respondent as the "ensemble" of the facts so admitted which justified the holding that the learned trial judge made. We would be prepared to say that, had we been in his place, we would have come to the same conclusion; but it is sufficient to state that, at all events, we cannot find any justification for reversing his decision on that question. It may be that he gave too much importance to certain facts testified to by the respondent; it would seem to us that, on the other hand, he may not have given proper importance to certain other admissions; but, on the whole, we think the result of his findings is not open to criticism, more particularly if we bear in mind the views of the doctrine and the jurisprudence on the subject. (See Mathieu J., *re Kay* v. *Gibeau* (1), and numerous authorities there referred to).

In addition to the commencement of proof which he found in the admissions of the respondent, the learned judge further declared

> that, on important points, plaintiff's testimony was often evasive, confused and contradictory.

Of course, a finding of that nature was peculiarly within the province of the trial judge, who was in the best position to pass upon it; and it is needless to recall that such a situation has always been recognized as a valid basis of commencement of proof in writing. (Demolombe, vo. 30, p. 139; Baudry-Lacantinerie, vol. 15, no. 2613; *Langlois* v.

(1) (1888) 16 Rev. Leg. 411.

Labbé (1); *Gagné* v. *Gagné* (2); *Boisclair* v. *Les Commissaires d'Ecoles de St. Gérard de Magella, Cour de Révision* (3).

For these reasons, we have come to the conclusion that the appeal ought to be maintained and that, in the result, but subject to a further question still to be discussed, the judgment of the trial judge should be restored with costs throughout against the respondent.

But, unfortunately for the parties, this does not dispose of the whole case; for, by an amendment to her answer to plea, the respondent raised the subsidiary point that, even if she had agreed to assume liability for the indebtedness of her daughter, Mrs. Vera Webster, to the appellants, the transactions of Mrs. Webster were null and void because they were entered into without the authority of her husband and the agreement, therefore, ought to be set aside and annulled.

The Court of King's Bench did not pass upon that point because it was unnecessary, having regard to the view that Court took on the question of the commencement of proof in writing. But the Superior Court, in order to dismiss the action, was evidently obliged to decide the point, and it dismissed the respondent's contention in that respect for the following reasons:

(1) the husband being the only person who could give or refuse the necessary authorization, his testimony was the only original source from which the information could be gathered;

(2) his wife, outside of the fact that she was necessarily interested in testifying on behalf of her mother, was not the real and legal source from which it can be gathered as to whether or not his authorization was ever given.

(3) the evidence of Mrs. Webster to the effect that she was not authorized did not adduce the best proof of which the case was susceptible (1204 C.C.);

(4) Mrs. Webster was "presumed to have been authorized"; and

(5) "the disposition of the law which renders invalid the acts of an authorized married woman was enacted for

(1) (1914) Q.R. 46 S.C. 373, at 375.
(2) (1915) 23 R. de J. 384, at 397 & 398.
(3) (1912) Q.R. 57 S.C. 335.

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the protection of such person alone and not for the protection of third parties, and, therefore, does not apply to the plaintiff."

We are of opinion that this important question may not be disposed of in that way.

In so far as it tends to dispute the right of Mrs. Buckland to raise the point, the decision of the learned judge would seem to be directly contrary to art. 183 of the Civil Code:

> 183. The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.

In so far as the decision of the learned judge was directed towards the proof of the lack of authorization adduced by the sole testimony of Mrs. Webster, it appears to us that the objection goes to the weight rather than to the legality of the evidence. (Taylor on Evidence, 12th ed., no. 393). But, in view of the conclusion to which we have arrived and presently to be announced, we prefer to refrain from expressing our own opinion on that whole question of the husband's authorization.

It is clear to us that no pronouncement can be made upon that point, which involves matters in which the appellants and Mrs. Webster are primarily interested, without Mrs. Webster being a party in the case; and she is not a party. This Court has always adhered to that principle (*Burland* v. *Moffatt* (1); *Laliberté* v. *Larue* (2); *Goulet* v. *Corporation de la Paroisse de St-Gervais* (3).

Of course, it was Mrs. Buckland's duty to call Mrs. Webster as a party, since she raised the point necessitating the latter's *mise-en-cause* and since the point could not be decided without Mrs. Webster being made a party in the case. On that account, following the precedent in *Burland* v. *Moffatt* (1), we might have disregarded that ground for the simple reason that the respondent, having failed to put the Court in a position to grant the relief prayed for by her, her demand must be dismissed. But while, generally speaking, we would probably do so in ordinary cases, we do not think it ought to be done in a case like the present one, where the question raised is one of public order and the law says that the want of authorization by

(1) (1884) 11 Can. S.C.R. 76, at 88-89.

(2) [1931] S.C.R. 7, at 11.

(3) [1931] S.C.R. 437.

the husband, where it is necessary, constitutes a cause of nullity which nothing can cover.

It is not so much that the undertaking of the respondent to pay the appellants and to assume liability for the indebtedness of Mrs. Webster to them must be set aside and annulled in so far as Mrs. Buckland is concerned (as was prayed for by the conclusions of the amended answer to plea), but the situation is that if Mrs. Webster's transactions can be brought within the prohibition contained in article 177 of the Civil Code, and that is to say: that those transactions cannot be held to have been authorized by her husband, within the meaning of that article, these transactions would be radically null; her debt to the appellants would be non-existent and, therefore, notwithstanding the agreement made by Mrs. Buckland, there would be nothing to pay for her. It would seem that, in that case, all of Mrs. Webster's transactions so unauthorized would have to be considered as not having taken place and both the credit and debit charges in her account would have to be assumed and borne by Johnston & Ward. (*Johnston* v. *Channell* (1).

The situation is still more compelling since it was alleged and it was common ground that Mrs. Webster has herself brought action to have all her transactions with Johnston & Ward set aside on account of the lack of authorization of her husband. It is easy to see the inconvenience that would result from a decision by us on that point in a case where she is not a party, if later, in her own case against the present appellants, the courts should decide in a different way. In truth, were Mrs. Webster one of the parties in the present case, the fact that she has a case of her own on the same point against the appellant would almost constitute a situation of *lis pendens* and it might, no doubt, be found proper, under such circumstances, to order that the present case should be suspended, at least so far as that issue is concerned, until the other case has been finally determined.

The consequence is that, much to our regret, we are constrained to adopt the course followed by this Court in the case of *Lamarre* v. *Prud'homme,* referred to at p. 441 in *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (2);

(1) [1935] S.C.R. 297, at 301. (2) [1931] S.C.R. 437.

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and the case must be remitted to the Superior Court for the purpose of trying that issue—but it must be understood that it is so returned for that sole purpose.

On all the other questions, our decision is that the judgment of the Superior Court is, in the result, restored. On the issue arising out of the question of the authorization of Mrs. Webster's husband, if the respondent wishes to have a decision, she will have to take proper steps for the *mise-en-cause* of Mrs. Webster within one month from the date when the record is in due course returned to the Superior Court of the district of Montreal, where it belongs. Unless she adopts the necessary proceedings for that purpose within the delay now ordered, her action should stand finally dismissed for all purposes. The costs of the trial on this special issue will, of course, be in the discretion of the judge who will preside at the trial. In all other respects, the appeal is allowed and the judgment of the Superior Court is restored with costs throughout against the respondent.

The formal judgment of the Court was settled as follows:

The appeal is allowed with costs throughout; the judgment of the Court of King's Bench (appeal side) is reversed and set aside and, in the result, the judgment of the Superior Court for the province of Quebec, sitting in and for the district of Montreal, is restored, save in so far as the same purported to deal with the issues of fact and law raised by or arising out of the allegation made by the appellants and the respondent relative to the alleged lack of marital authorization of Dame V. C. Webster, as to which issues, the said Dame V. C. Webster not being a party to the present proceedings, the Court declines to adjudicate; and this Court further orders that this case be remitted to the said Superior Court for the sole purpose of enabling the respondent, if she so desires, to institute by impleading the said Dame V. C. Webster within one month from the date of the return of the record herein to the said Superior Court, the necessary proceedings to try the sole issue of whether the transactions of the said Dame V. C. Webster with the appellants referred to in the amended answer to plea herein, were null, and if they were null, what is the effect, if any, of such nullity, as between the appellants and the respondent; and this Court further orders

that the appellants be permitted to raise or allege or plead, at or for the purpose of the trial of such issue, in addition to any ground or matter already raised or alleged or pleaded, any other ground or matter or thing whatsoever directed solely to the trial of such issue, the question whether Mrs. Webster's transactions with the appellants are null and void for want of marital authorization, together with the consequences which flow from it, being the sole issue to be submitted to the Superior Court, without any objection being allowed as to the questions of procedure already decided; and this Court further orders that unless the respondent adopt the aforesaid proceedings within the above-mentioned period of one month, the action should stand finally dismissed for all purposes.

Appeal allowed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett & Hannen.*