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Jurisdiction	France
Tribunal	Cour d'appel de Grenoble (Court of Appeals of Grenoble)
Date of the decision	13 September 1995
Case no./docket no.	93/4126
Case name	*Caiato v. Factor France S.A.*

Translation[*] *by Annabel Teiling*[**]

Translation edited by Yvonne Salmon[***]

Caiato v. Limited Company S.F.F.

Commercial Chamber Court of Appeals of Grenoble Mr. Beraudo, Esq., presiding No. 492 R.G. no. 93/4126

FRENCH REPUBLIC

In the name of the French People

Ruling of Wednesday, 13 September 1995

BETWEEN: Mr. Caiato the [buyer], domiciled at Gare de Brignoud in Villard-Bonnot (38190) [France], working under the name Tomatopasta, Appellant of a judgment rendered by the Commercial Tribunal of Grenoble on 9 July 1993, following an appeal raised on 27 August 1993, represented by M. Ramillon, Esq., attorney-at-law and assisted by Mr. Rossetti, Esq., attorney-at-law; AND the French Factoring Company International Factor France «S.F.F.» (Limited Company), the Headquarters of which are in Tour d'Asnières, 4 Avenue Laurent Cely, Porte 3, in Asnières (92608) Cédex, summoned represented by SCP Perret and Pougnand, attorneys-at-law, assisted by M. Eydoux, Esq., attorney-at-law;

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellant of France is referred to as [buyer]; the Defendant-Respondent of Italy is referred to as [seller]. Amounts in French currency (*French francs*) are indicated as [*f*].

[**] Annabel Teiling is a graduate of the Pace University School of Law. The second-iteration redaction of this translation was by Dr. John Felemegas of Australia.

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COMPOSITION OF THE COURT. During the deliberation: M. Beraudo *Président*, M. Baumet *Conseiller*, M. Fallet *Conseiller*. DEBATES: At the public audience of 15 June 1995, M. Beraudo, *Président*, responsible for the report, assisted by Mme. Combe, clerk, heard the statement of the issues to be decided and the pleadings of the attorneys; the parties not having objected to such an audience, in accordance with the provisions of Article 945-1 of the New Code of Civil Procedure; An account of the case was given to the court by M. Beraudo in his deliberations, and the ruling was given in public on Wednesday, 13 September 1995. The court gave a verdict on the appeal raised by the [buyer] with regards to the judgment which had been rendered on 9 July 1993 by the Commercial Tribunal of Grenoble, and for which appeal is allowed.

[...]

[Details of the Case:]

The [buyer], domiciled in Brignoud (Isère), imports Italian food products under the name Tomatopasta, for resale in France. To this end, he has business dealings with the Invernizzi Company the [seller], established in Moretta, Italy. **1**

According to the [buyer], this business relationship dates back twenty years. The Limited French Factoring Company International Factor France reports, in its submissions, «occasional commercial relations between tradesman and importer.» In a facsimile of 17 November 1992, the [seller] wrote the following:

> «… we must conclude that your way of working is not that of the good tradesman, which you were in the past.»

In October 1992, while the Carrefour Company, an important client of the buyer and which has a store in Echirolles, was organizing a fifteen-day Italian promotion, the [buyer] sent his order to the [seller]. **2**

By facsimile on 6 October 1992, the [seller] told the [buyer] that it did not have authorization to fulfill the order, because of the absence of [its principal] Mr. Invernizzi for a few days. On 12 October 1992, the [buyer] sent a supplementary order.

On 13 October 1992, the [seller] addressed a facsimile to the [buyer] indicating that it had sold its export receivables to a factoring company fifteen days earlier, and that it could not sell him anything until the company to which the invoices had been assigned, accepted him as debtor. It further specified that the period for such acceptance should take between ten to fifteen days. **3**

On 20 October 1992, the Carrefour company sent the following letter to the [buyer]: 4

> «We are presently in the middle of our 15 day Italian promotion and we are having delivery problems.
>
> «The orders we have sent have not been delivered. You tell us that you have been having problems with one of your suppliers, the [seller], but we regret to inform you that this is not our responsibility. At present, we are missing Italian products and there is a risk that we will be pursued for false advertisement.
>
> «We are withholding from you the sum of 30,000 *f* for damages and we can guaranty that henceforth you will no longer be working with Carrefour.»

The [buyer] then suspended his payments to the [seller]. The sum of 30,000 *f* [French francs], which had been withheld by the Carrefour company, was released eight months later. 5

On 5 and 10 November 1992, the [seller] warned the [buyer] that the invoice of 10 September 1992, numbered 3168, for the amount of 29,123,995 *IT £* [Italian Lira] and the invoice numbered 3365 of 28 September 1992, for the amount of 17,365 *f*, both to be paid by 12 November 1992, had been assigned to «Banca Commerciale Italiana,» to which the payments would have to be made. 6

The [buyer] acknowledged receipt of the letter, in the following terms: 7

> «I acknowledge the receipt of your letter of 10 November 1992.
>
> «I have taken good note that the two invoices that I owe you were assigned to the Banca Commerciale Italiana.
>
> «By your letter of last 15 October, you suspended your deliveries to me, under the pretext that my company was not guaranteed. It is for this reason that you have ceased making deliveries to me. I was very surprised by this; I thus suspended the payment of these two invoices.
>
> «In the course of next week I will send you an overview of the claims still owed to me by your company as well as the loss of profit caused by your discontinuance of deliveries. We are having problems with the grated Parmesan at this time, since its composition is not marked on the packaging.
>
> «Once I have established everything, I will send you a payment by check for the amount still owed to you.»

On 3 December 1992, the [seller] acknowledged the receipt of the letter of 25 November, with the following letter: 8

> «We acknowledge the receipt of your letter of 25 November 1992. We repeat that all our receivables have been assigned to the Banca Commerciale Italiana, to which we are sending your letter for acknowledgment.
>
> «For any information and all demands, including the agreements for the settlement of our invoices, you must address yourself to the «Banca Commerciale Italiana» via Torino no. 38/a Saluzzo, tel. (9175) 45501 fax 45952, and ask for Mr. Vola.»

On 5 April 1993, the Ifitalia company, a factoring company, appointed the French factoring company to collect the litigious receivables. On 21 April, the latter demanded, the payment of 29,123, 995 liras and 17,365 *f* from the [buyer]. It is acknowledged by both parties that the [buyer] made a payment of 16,000 *f* to the French factoring company on 26 May 1993. 9

[...]

The [buyer] concludes before the court, that the judgment should be reviewed, and demands 100,000 *f* damages from the French factoring company, and 3,000 *f* in accordance with Article 100 of the New Code of Civil Procedure. 10

He states, essentially, that the balance of account between the parties should be established in the following manner: 11

«Due from the [buyer] payment of 2 invoices of 10 September 1992 and 28 September 1992	119,299.68
Payment of 25 May 1993, to be deducted	60,000.00
Claims to be deducted	14,312.16
Claims for the delivery of grated parmesan, to be deducted	8,400.00

	36,586.92 f»

He indicates that the loss caused by the abrupt cessation of the deliveries justifies an indemnity of 36,586.92 *f* that cancels out the claim of the [seller]. He asks, moreover, that the French factoring company be ordered to pay him 100,000 *f*, for the commercial loss caused.

[...]

The French factoring company (Société Française Factoring, SFF) concludes that the judgment should be confirmed and demands 3,000 *f*, in accordance with Article 700 of the New Code of Civil procedure. 12

On the break-up of the commercial relations, it thus submits the following:

- The [buyer] attempts to invoke an alleged abusive discontinuance of the commercial relations between the [seller] and himself, to raise the defense of non-performance against the factor of the SFF company.

- The court will notice that the discontinuance of the commercial relations between [buyer and seller] occurred subsequently to the litigious invoices, following an impossibility for the [seller] to accept the orders sent by the [buyer], while awaiting the receipt of the [buyer] as debtor by the Ifitalia Factoring Company.

- The defense of non-performance should thus not be accepted for three reasons, firstly, the [buy-er] could not substantiate a contractual relationship with the [seller]; given that, in fact, we were dealing instead uniquely with occasional commercial relations between supplier and importer; and secondly, and in all cases, the [buyer] could only raise against the factor de-fenses with respect to the claim of which payment is demanded, which is not the event in this case; finally, it can be noted that the factor is subrogated only in the rights and actions of its adherent, but in no way in his obligations.

As to the claims, it indicates that «the claims of 13 July 1992 and 11 August 1992 correspond to anterior claims included in earlier invoices as commonly done.» Regarding the non-conformity of the delivery of Parmesan, it highlights the evolution of the grievances regarding first the lack of marking on the packaging as to the composition of the goods and then the marking of the [expiry] date. In the conclusions in response of 2 May 1995, the SFF adds that «the [buyer] is not able to show that the third claim of 22 September 1992 would be relevant to the cited litigious invoices.»

[...]

During the pleadings of 15 June 1995, the Court pointed out to the parties that the sales contract seemed to be governed by the Vienna Convention of 11 April 1980 and, in accordance with Articles 13, 442 and 444 of the New Code of Civil Procedure, invited them to make known what their position was with regard to the applicability of this text and the effects of the provisions on contractual relations. 13

The Court also invited the parties to make known their position on the content of the Ottawa Convention on International Factoring, of 28 May 1988, which had entered into force for France and Italy on 1 May 1995.

Regarding the Vienna Convention, the [buyer] wrote: 14

- The principles of responsibility of the seller enacted by the Vienna Convention seem to me to be identical to those of our internal law and consequently engage the responsibility of the [seller] concerning the non-conformity of the goods delivered and the brutal discontinuance of commercial relations.

Regarding the factoring operation, the [buyer] wrote:

- With regards to the factoring contract linking the [seller] to SFF, its validity is linked to the wording of a contract, that it seems to me, was not produced in the course of the hearing, and to the possible declaration anticipated by Article 18 of the Convention.
- Finally, the provisions laid down by Article 8 of the Convention, relating to assigned receivables, do not seem to have been satisfied.
- Article 9 allows all of the objections which may be asserted against the creditor to be asserted against the assignee.

[…]

The SFF wrote the following: 15

- From the beginning of the procedure, the parties and notably the [buyer] chose to subject their case only to French law.
- If, notwithstanding this choice, the Vienna Convention has to be applied, the [buyer's] argument should then be declared inadmissible and incorrectly founded.
- The arguments invoked by the [buyer] arise from the problem of the conformity of the goods.
- The Convention states that the goods must be delivered by the seller in conformity with the buyer's demands and that their conformity must be assessed within the time limit of two years, which begins to run from the date of delivery.
- This time limit is a prefixed time limit.
- In this case, the [buyer] did not invoke the problem of the conformity of the goods delivered until the appeal, thus more than two years have lapsed since their delivery and it is in any event outside the reasonable time limit anticipated by the Vienna Convention (Article 39), since the «non-conformity» of the goods was noticed by him at the time of delivery in 1992 (evidence no. 8 and 6).
- This defense and these counterclaims should thus be declared inadmissible and poorly founded.

- Concerning the provisions of the Ottawa Convention, the latter were perfectly respected as is witnessed by the stipulations of the contract between SFF and the [seller] and the afore-mentioned invoices (invoices and evidence 11, 12).

[For these Reasons, the Court:]

CONSIDERING THAT this dispute concerns questions relating, on the one hand, to a sale of goods in which the conformity of the goods is contested by the buyer, and on the other hand, to an abrupt discontinuance of the contractual relations between the seller and the buyer, as well as to the relations between a factoring company, the successive assignee of another factoring com-pany, and the assigned debtor, and finally to the responsibility of SFF for a commercial loss in which the [buyer] would be the victim; 16

THAT, to preserve the logical progression of this ruling, there is good reason to rule on these questions in the following order: 17

1. Applicable law to the factoring operation in the relations between the successive assignee, SFF, and the assigned debtor;

2. The possible claim of the [buyer] against the [seller], for the lack of conformity of the delivered goods;

3. The possible claim of the [buyer] for the abrupt rupture of the commercial relations by the [seller];

4. The right of the [buyer] to oppose its claims to SFF, successive assignee; and

5. The possible responsibility of the SFF company towards the [buyer] for commercial loss.

[Ruling on the questions considered:]

1. 18
CONSIDERING, on the law applicable to factoring, that the [seller] and the Société International Factors Italia (Ifitalia) concluded on 24 April 1992 (the date of 24 April 1990, featured on the translation is a clear substantive error) a contract having for object notably the foreign recov-ery of the receivables of the [seller] by the correspondents of Ifitalia;

THAT it is thus an international contract in nature; that it, in any case, became an international contract by its execution against the [buyer], domiciled in France;

THAT this contract does not hold any express clause stipulating the chosen applicable law; that, it does however contain references to several articles of the Italian Civil Code and both parties are domiciled in Italy; 19

THAT by virtue of Article 4, paragraph 2 of the Rome Convention on the Law Applicable to Contractual Relations of 19 June 1980, Italian law is applicable, being the law of the State

where the person due to make determining performance under the contract is domiciled, in this case the factoring company;

THAT in application of Article 13 of the Rome Convention which relates to subrogation, the law with regard to the obligation of the third party, the SFF, which paid the creditor, the [seller], «shall determine whether the third person [SFF] is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent,» that this refers to Italian law which governs the factoring contract; But that the law governing the claim, in other words «the law governing the relations between the creditor and the debtor «governs» the rights of the solvens against the debtor, in the same manner as the law governing the assigned claim determines the rights of the assignee against the debtor,» if the transfer of the receivables within the framework of the factoring contract had been realized by a transfer rather than by a subrogation (*see* Paul Lagarde, The New Private International Law of Contracts after Entrance into Force of the Rome Convention of 19 June 1980 [Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980], no. 60, Rev. crit. droit international privé 1991 p. 281); **20**

that the law governing the assigned claim is stipulated by the Vienna Convention on the international sale of goods as will be explained hereinafter; that this instrument is silent with respect to the assignment, by the creditor, of the right to payment; that **21**

in the absence of general principles applicable to this question, which is not contemplated by the Convention, there is reason to look to the rules on the conflict of applicable laws for the interna-tional sale of goods, contained in the Hague Convention of 15 June 1955, to determine the law that governs the sale contracts between the [buyer] and the [seller]; that, as will be explained hereinafter, this law is Italian law, as this is the law of the State where the seller is domiciled; **22**

THAT, however, neither of the parties in this case refer to Italian law; and that therefore French Law could be applied subsidiarily;

However, as has been suggested by the court, both the [buy-er] and SFF have accepted to examine the merits of their arguments with regards to the Unidroit Convention on international factoring; And that the factoring contract falls within the scope of material application of the Convention (Article 1); That indeed, the contract concluded between the [seller] and Ifitalia anticipates the collection of the receivables and the anticipated payment of the supplier (Article 6 of the contract); And that the receivables that give rise to this case, also fall within the geographic field of application of the Convention because they link a supplier and a debtor established in different States and that «those States and the State in which the factor has its place of business are Contracting States.» (Article 2(1)(a) of the Convention); **23**

CONSIDERING THAT the absence of any objection either on the part of the SFF company or the [buyer] to the application of the Unidroit Convention and their argumentation expressed with regards to this text in their deliberation notes of 29 June and 20 July 1995, lead the Court

to recognise their agreement so that the Convention, today in force, be applied to the case at hand, in an anticipated manner, notwithstanding the provisions of Article 21 of the Convention;

[...]

2. **24**
CONSIDERING, on a possible claim by the [buyer] resulting from the lack of conformity of the delivered goods, that the judgment of this question requires the preliminary determination of the applicable sales law;

THAT the company SFF points out «that the parties and notably the [buyer] had from the beginning of the procedure chosen to submit their relations only to French law;»

But that, as the contracts for the international sale of goods were concluded as of 1 January 1988, French law is stipulated by the Vienna Convention of 10 April 1980, as the conditions of applicability of this Convention are met; That the sale concluded between the [buyer] and the [seller] enters the ma-terial field of application of this instrument; That the seller and the buyer are established in two different States; That these States, France and Italy, were both parties of the Convention prior to the date of the conclusion of the sale; That the Convention is thus applicable to the sales con-cluded between the [buyer] and the [seller]; **25**

THAT MOREOVER, contrary to what SFF states, no document or behavior by the [buyer] can lead to the deduction, on the one hand, that he would have used the possibility offered by Arti-cle 6 of the Vienna Convention to derogate from this article, or that the law of the country of the buyer, applicable to merely domestic sales, would be applicable, contrary to conflict of law rules, in the absence of a choice of law, as laid down in the Hague Convention of 15 June 1955 on the law applicable to the international sale of tangible moveable goods; **26**

[...]

CONSIDERING, on the lack of conformity of the delivered goods, that on 20 July 1992, the [buyer] sent a facsimile to the [seller] to notify them that the delivered Provolone cheeses were mouldy and weighed 30 kg instead of the 20 kg ordered; That, by facsimile the same day, the [seller] offered to take back the contested goods on one of its next trips to Italy, and took up the obligation to allow the [buyer] a claim. That, by facsimile of 13 July 1992, the [seller] had agreed a claim of 693 000 lira, corresponding to six cartons of Ricotta cheese which had been returned; That the total amount of these claims, in French francs, 14,312.76 *f*, which according to the [buyer] the [seller] had agreed to, is not contested by SFF company; **27**

THAT the SFF company indicates, on one hand, that they «correspond to the goods cited in earlier invoices, as is commonly done»; but that the SFF had produced no earlier invoice establishing such a fact; that it indicates on the other hand, that «these claims cannot be invoked against SFF in its capacity as factor»; **28**

but that, moreover, such claims some liquid and due, by agreement between the parties, before the notification of the assignment, give rise to compensation under Article 9 paragraph 2 of the Ottawa Convention; 29

THAT, concerning the [buyer's] alleged claim of 8,400 *f* on the grated parmesan cheese, which had not been labeled in accordance with French Law on the composition and expiry date of food products, it is clear from an exchange of correspondence of 25 November 1992 between the [buyer] and the [seller], that the latter claims an agreement that the grated parmesan be packaged in «unmarked sachets»; But that, given the complaint of the [buyer], this agreement is not established; That it is thus appropriate to ascertain what the intent of the contracting parties was from the indications which they have been able to provide. 30

THAT it is indisputable, by virtue of the relations pursued by the parties for at least several months, that the [seller] knew that the parmesan sachets ordered by the [buyer] would be marketed in France; That this knowledge imposed the duty on him, according to the provision of Article 8(1) of the Vienna Convention, to interpret the order as pertaining to goods, which have to comply with the marketing regulations of the French market; 31

THAT in omitting to place labels on the sachets as to the composition and expiry date, the [seller] had delivered non-conforming goods in the meaning of Article 35 of the Vienna Convention which particularly regulates packaging;

That the buyer issued the written complaint the month following delivery; That this had thus been done within a reasonable time period in the sense of Article 39 of the Vienna Convention; 32

THAT moreover, the prefixed time period of two years mentioned in the second paragraph of this article does not envisage a legal action.

CONSIDERING, on the amount of the claim of 8,400.00 *f*, that [the SFF] contests neither the method of calculation, nor the sum; That, moreover, this sum results from references to the price featured on the invoices of the [seller] of 10 and 28 September 1992; That it follows that the [buyer] is owed from the [seller] the sums of 14,312.16 *f* and 8,400 *f*. 33

[...]

3. 34
CONSIDERING, as to a possible claim by the [buyer] for the sudden discontinuance of commercial relations by the [seller], that it results from the application of Article 9 of the Vienna Convention that the parties are bound by the practices that have been established between the two of them;

THAT it follows from this that the [seller], who had honored the orders of the [buyer] at least since July 1992, for many months, without demanding that his solvency be established, could

not refuse to deliver in October 1992, on the pretext that he had not been accepted as a debtor by a factoring company;

THAT if, as it is permitted to do, the [seller] decided to entrust the payment of the invoices abroad to a factoring company, it should have adopted a transitional arrangement which would not be liable to harm its clients; that, for example, it could have agreed with Ifitalia only to begin the assignment after the acceptance of its clients as debtors, without suspending commercial relations;

CONSIDERING, as to the damages incurred by the [buyer], that the retaining of a sum of 30,000 *f* for eight months by the Carrefour company, as well as the abrupt discontinuance of commercial relations with this client are established by a letter from the Carrefour company, reproduced earlier in this text; that the [buyer] made an exact appreciation of his damages of 36,586.92 *f*, the balance of the claim assigned by the [seller]; **35**

[...]

4. **36**
CONSIDERING, as to the rights of the [buyer] to invoke the claims of 14,312.16 *f*, 8,400 *f* and 586.92 *f*, against SFF the successor factoring company;

[...]

CONSIDERING THAT the claim of 8,400 *f* relates directly to a contract the payment of which is demanded by SFF; that considering the terms of Article 9, paragraph 1 of the Unidroit Convention, «the debtor may set up against the factor all defences arising under that contract of which the debtor could have availed itself if such claim had been made by the supplier;» that this claim resulting from the lack of conformity of the delivered goods in performance of the assigned contract can be invoked against the SFF;

[...]

CONSIDERING THAT the claim of 14,312.76 *f* corresponds to the claims by the [seller] – within the framework of contracts other than those for which the payment is demanded from the [buyer] – some of which are liquid and due, by agreement of the parties, before the date of transfer of the contracts which are the object of this case; that Article 9, paragraph 2 of the Convention, even if interpreted restrictively, authorizes this compensation; **37**

[...]

CONSIDERING, regarding the possibility for the [buyer] to set-off the 36,586.92 *f* claim, for the abrupt discontinuance of commercial relations by the [seller], against the claim of SFF held by virtue of the assignment of another contract, that the French law of factoring only allows such compensation of a claim, neither liquid, nor due at the time of payment with subrogation or for the assignment of the claim, where this claim has a connection with the obligations that result from the contract; 38

BUT THAT the term set-off used in Article 9 paragraph 2 of the Unidroit Convention covers broader situations as is clear from the terms that accompany it («any right of set-off in respect of claims existing against the supplier in whose favour the receivable arose») and from the negotiations that clearly establish that paragraph 2 of Article 9 envisages rights that arise from operations independent of the basic contract, which is the object of the assignment to the factoring company (see Aces de la conférence p. 291 et seq.); 39

THAT the text envisaging a right of set-off does not require that all the conditions of the compensation be fulfilled at the moment of notification of the assignment; That it suffices that the rights and actions which by nature give rise to a right to set-off, arose and were invoked prior to the assignment; That such is the situation of the [buyer] who, in stating that he suspended his payments, invoked against the [seller] the damage that was caused to him by the fact that there had been no delivery since 14 October 1992;

THAT the notices of the assignment of the receivables were not made by the seller until November 1992;

That the [buyer] thus has the right to compensation of the claim of 36,586.92 *f* for damages for the abrupt discontinuance of business relations; 40

[...]

5. 41
CONSIDERING, as to the demand of 100,000 *f* for damages raised by the [buyer] against SFF for commercial damage, that the judicial basis of the action is not given;

that in the absence of contractual links between the [buyer] and the Ifitalia company or the SFF, the assignee of Ifitalia, there are grounds to find that the action aims to repair the tortious wrong committed by the factoring company by forcing its client, the [seller], to suspend its commercial relations with the [buyer], in the absence of acceptance of the buyer as debtor by the factoring company and during the time necessary for such acceptance; that this tort committed in Italy, is governed by Italian law; that the parties did not give their points of view on the provision of Italian law applicable to such conduct; that it would be possible to invite them to do so; 42

BUT THAT the Court considers that the loss caused to the [buyer] was well repaired by the contractual damages already awarded against the [seller], and which can be invoked against SFF; that the examination of the content of the law applicable to the [buyer's] action against SFF is thus without purpose; that the [buyer], whose right to damages has been satisfied, must be nonsuited of his demand for damages; 43

[...]

CONSIDERING, as to the demand of the [buyer] for 3,000 *f* under Article 700 of the New Code of Civil Procedure by the [buyer], that there are grounds to allow it; 44

[For these Reasons:]

THE COURT: Publicly stating and by contradictory ruling, after having deliberated in conformity with the law: 45

REVERSES the deferred judgment;

NONSUITS the Societe Française de Factoring International Factor France of all its demands;

ORDERS IT to pay to the [buyer] 3,000 *f* under Article 100 of the New Code of Civil proce-dure;

ORDERS IT to pay the costs, with a deduction for the costs incurred to the President Mrs. Ramillon, in accordance with Article 699 of the New Code of Civil Procedure;

PRONOUNCED publicly by the president Mr. Beraudo, who signed with Mme. Combe, the clerk.