Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Renny and others v. *Moat from the Court of Queen's Bench for Lower Canada in the Province of Quebec; delivered 22nd March* 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

This is an appeal admitted by special leave of Her Majesty in Council from a judgment of the Court of Queen's Bench for Lower Canada, dated the 22nd of March 1879, whereby a judgment of the Superior Court, sitting in Review, dated the 31st of October 1878, was affirmed on appeal.

The Appellants were the Inspectors appointed under the provisions of the Canadian Insolvent Act of 1875, of the estate of William Patrick Bartley, an insolvent.

The Respondent Robert Moat was a claimant against the estate, and by his claim stated that the insolvent was indebted to him in the sum of 22,950 dollars 45 cents, and interest, from the 17th day of March 1876, at the rate of seven per cent., being the amount of an obligation executed by the insolvent in favour of Robert Hamilton, on the 20th March 1871, before Hunter, notary public, and transferred to him by deed of the 23rd June 1877.

The claimant further stated that he held as security for his claim a transfer and subrogation of a mortgage made by the said William Patrick Bartley in favour of the said Robert Hamilton, which said transfer was passed before the said notary, on the 23rd June 1877.

The obligation and mortgage to which the claim referred were created by a deed of the 17th March 1876, by which Bartley, the insolvent, acknowledged to have received from Hamilton the sum of 20,000 dollars, and promised to pay the same to him in five years from the date thereof, with interest thereon at the rate of seven per cent. per annum, from the 17th March 1871, payable half yearly, on the 17th of March and the 17th of September in each year, the first payment thereof to be made on the 17th day of September 1871, and by which deed Bartley mortgaged and hypothecated certain lands therein mentioned as security for the payment of the principal sum of 20,000 dollars and interest at the times therein mentioned. By the same deed the members of the firm of Mulholland and Baker became bail and security for Bartley to Hamilton for the due, faithful, and punctual payment of the said sum of 20,000 dollars and interest at the times in the deed mentioned.

The Appellants contested the claim of the Respondent, and alleged that of the sum of 20,000 dollars, referred to in the deed of obligation, the sum of 9,570 dollars and 20 cents was not paid to Bartley by Hamilton, but that the same was deposited (according to an understanding existing between the said parties at the time) in the Merchants' Bank of Canada, to the credit of Bartley, "subject to approval of Robert Hamilton."

That the total amount of indebtedness to Hamilton under the deed of obligation, on the 17th day of March 1876, for principal and interest, was the sum of 20,700 dollars and 7 cents, which was paid to him on that day in two separate amounts, namely, the sum of 9,087 dollars advanced for that purpose by the claimant, and the sum of 11,613 dollars and 7 cents, being the amount of the said deposit in the said bank with the accrued interest thereon, and which were drawn out of the said bank by means of the check of Bartley, and delivered over to Hamilton.

That the only amount advanced by the claimant, in connection with the payment of the said obligation, was the said sum of 9,087 dollars; the balance of said mortgage being paid by the insolvent himself, with the funds so deposited as aforesaid at his credit in the said bank.

That, having so paid the said sum of 9,087 dollars, the claimant was by law entitled to be subrogated in all the rights of Hamilton, under the deed of obligation, to the extent of the amount so paid, and the interest to accrue thereon at the rate in the deed stated, and no more. That with a view to securing such subrogation the deed of the 23rd day of June 1877 in the said claim referred to was executed, but in and by the said deed the parties thereto did falsely and erroneously declare that the total amount of the said obligation had been really paid by the claimant, whereas in truth and in fact he had only paid the said sum of 9,087 dollars.

That the deed of the 23rd day of June 1877 was not a deed of transfer from Hamilton to the claimant, but a mere deed of subrogation by the creditor to the claimant, a third party,

in terms of Article 1,155 of the Civil Code of Lower Canada, and did not and could not legally operate as a deed of subrogation beyond the amount so paid by the claimant, the remainder of the debt due to the creditor having been actually paid to him as aforesaid by the debtor himself (the said insolvent) out of funds at his own credit in said bank, and in no way lent or advanced by the claimant.

Wherefore the inspectors prayed, that by the judgment to be rendered on the contestation, it be declared and adjudged that the rights of the claimant, under the deed of subrogation of the 23rd day of June 1877, were limited and restricted to the sum of 9,087 dollars, and interest thereon at the rate of seven per centum per annum from the said 17th day of March 1876, and that the claim be reduced to that amount and interest, and, as regards the excess beyond that amount and interest, be dismissed, with costs.

The case was heard in the Superior Court in the first instance, by the Honourable Mr. Justice Mackay, who allowed the claim to the extent of only 9,087 dollars, and interest thereon at the rate of seven per cent. per annum from the 17th of March 1876, and maintained the contestation as to the residue of the claim. That judgment, so far as it related to the whole of the claim beyond the 9,087 dollars and interest, was reversed by a majority of the Judges of the Court of Review, one of the Judges, Mr. Justice Dunkin, dissenting. The judgment of the Court of Review was affirmed on appeal by the Court of Queen's Bench, the majority, consisting of the Chief Justice and Justices Monk and Ramsay, being in support of the affirmance, and Justices Tessier and Cross dissenting.

The sum of 22,950 dollars and 45 cents, which

formed the subject of the claim, consisted of the sum of 20,700 dollars and 7 cents, which were paid to Hamilton on the 17th of March 1876, for principal and interest, and 2,250 dollars and some odd cents on account of moneys which had been previously paid by Mulholland and Baker, as Bartley's sureties, to Hamilton, in discharge of former instalments of interest.

It was objected, on the argument of this appeal, that the 2,250 dollars odd had been repaid to Mulholland and Baker, and a credit which was given on the 17th of March 1876 by Mulholland and Baker in account with Bartley & Co., not with Bartley alone, was referred to. (*See* Record, p. 41.)

The short extracts from the accounts set out at p. 34 of the Record, and of which the dates of most of the entries are long after the date of the 17th of March 1876, are scarcely intelligible as they stand. It is, however, clear that it was never contended in the Courts below that the 2,250 dollars had been repaid to Mulholland and Baker, and in the deed of transfer of the 23rd June 1877, to which reference will be made, the amount was admitted by Bartley to be due. It was admitted in the Appellant's factum in the Court of Queen's Bench, p. 66, para. 2, that Mulholland and Baker had paid 2,100 dollars on account of the instalments of interest due on the 17th September 1874, the 17th March 1875, and the 17th September 1875, and there was no contention that they had been repaid. The 2,250 dollars were allowed both by the Court of Review and by the Court of Queen's Bench, and their Lordships are of opinion that there is no ground for the contention that they were repaid. Even the learned Judge of the Queen's Bench who dissented as to the 11,613 dollars was of opinion that the 2,250 dollars ought to be allowed.

There is not the slightest ground for contending, nor indeed was it contended, before their Lordships that Moat, the claimant, had himself paid to Hamilton any part of the debt due under the mortgage, although he advanced to Mulholland and Baker the 9,087 dollars with which that portion of the debt was paid off by them. It is clear, therefore, that Moat was not subrogated to the rights of Hamilton by a conventional subrogation within the meaning of Clause 1,155 of the Civil Code of Lower Canada. The only substantial question in this appeal is whether the sum of 11,613 dollars and 7 cents, part of the sum of 20,700 dollars and 7 cents paid to Hamilton on the 17th of March 1876, in discharge of the mortgage, was paid by Mulholland and Baker as the agents of Bartley, the insolvent, or on their own account, in discharge of the obligation under which they had become bound to Hamilton as sureties for Bartley. Upon that question of fact there are the concurrent judgments of the Court of Review and of the Court of Queen's Bench that the payment was made by Mulholland and Baker on their own account. Their Lordships, acting upon the sound rule by which they are usually guided in such cases, would not interfere with that finding, unless some error or miscarriage of justice were manifest. So far from that being the case, their Lordships, having carefully considered all the documents and evidence, are satisfied that the majority of the Judges, both in the Court of Review and in the Court of Queen's Bench, arrived at a just and correct conclusion. Independently of the recitals in the deed of the 23rd June 1877, there is ample evidence to warrant it.

It is true, as alleged in the contestation, that of the sum of 20,000 dollars mentioned in the deed of obligation and mortgage, 9,570 dollars

were deposited in the Merchants' Bank of Canada to the credit of the insolvent, subject to the approval of Hamilton; it is also a fact that of the 20,700 dollars paid to Hamilton on the 17th March 1876, on account of principal and interest, 11,613 dollars and 7 cents were paid by a cheque for that amount drawn by the insolvent on the Merchants' Bank of Canada against the sum of 9,570 so deposited to his credit, as above mentioned, and the interest which had accumulated thereon. That cheque was drawn by the insolvent in the office of Mulholland and Baker. It was made payable to Jackson Rae or order for Robert Hamilton, and was handed to Mulholland and Baker by the insolvent, he being at that time indebted to them in a much larger amount. They handed the cheque to Rae, who was the manager of the bank, and acted in the transaction as the agent of Hamilton (Record, p. 53), and Rae gave them a receipt for the cheque, by which he acknowledged that he had received it from them to be applied in discharge of the mortgage, and it was so applied. There is nothing in the evidence to lead to the conclusion that Mulholland and Baker received the cheque from Bartley as his agents, or that they, as his agents, paid it to Rae for Hamilton. There was only one receipt for the cheque for the 11,613 dollars and 7 cents, and the cheque for the 9,087 dollars which was paid by Mulholland and Baker to Rae at the same time, and which, beyond all dispute, was Mulholland and Baker's own cheque, and the same words were used in the receipt with reference to both cheques (Record, p. 6 D. 1.). It was contended that, as the cheque drawn by Bartley was made payable to Rae, or order, for Hamilton (Record, p. 82), Bartley could not transfer it to Mulholland and Baker without Rae's endorsement, and it was not so endorsed at the

time when it was handed over to them. It does not appear when it was endorsed. The insolvent no doubt knew that Mulholland and Baker were going to use it in discharge of their liability as sureties to Hamilton, and neither he nor they could have doubted that Hamilton, in the exercise of his control over the money in the bank, would consent to its being so used. The form of the cheque is not decisive of the question whether Bartley handed it to Mulholland and Baker, as his agents, for the purpose of paying it to Hamilton on his behalf, or to Mulholland and Baker on their own account in part discharge of the larger amount due from him to them.

If Bartley had intended that the cheque should be applied on his behalf in paying the debt for which he was liable as principal, and not by Mulholland and Baker, on their own account, in discharge of their obligation as sureties, there was no necessity for his handing the cheque to Mulholland and Baker. It was manifestly the intention of both parties that the mortgage should be kept alive, and they must have known that if the 11,613 dollars and 7 cents were paid with Bartley's money the debt would have been discharged *pro tanto*, and the mortgage subrogated and kept alive only for that portion which was paid by Mulholland and Baker. Besides, if Bartley intended to discharge the mortgage to the extent of the 11,613 dollars and 7 cents it would have been only reasonable that he should have required some discharge from the mortgage debt beyond the mere receipt given by Rae to Mulholland and Baker, but no such discharge was ever required by or given to him. If, on the other hand, Mulholland and Baker paid the cheque in discharge of their liability as sureties, the mortgage was not discharged, but they were at once subrogated to the rights of Hamilton by

Article 1166 of the Code, and required nothing more than a receipt for the money. Further, Bartley was credited in the books of Mulholland and Baker with the 11,613 dollars and 7 cents. It was contended that that was not done until a day or two after the cheque was handed to them, and then only under the advice of Mr. Abbott, their solicitor. The entries were, however, shown to Bartley, and there can be no doubt that he assented to and ratified what had been done. Mr. Baker in his evidence stated that Bartley was perfectly aware that the entries were made or intended to be made in their books, that the whole matter was discussed with him, that the intention was that Hamilton was to be paid off by Mulholland and Baker, and that they were to be subrogated in all Hamilton's rights which were to be kept alive. Besides all this evidence there is the recital in the deed of June 1877. It is there said, "And whereas the said parties of the second part" (that is, Mulholland and Baker) "as such sureties have at divers times paid in- "stalments of the interest on the said debt, and "finally paid the entire principal thereof to the "said party, of the first part," (that is, Hamilton,) "upon the agreement, and with the understanding "that they should receive a subrogation of his "rights under the said deed." Bartley personally intervened and signed that deed, and declared and acknowledged himself content and satisfied therewith, and to have been well and sufficiently signified in the premises. All this was done and passed in the office and in the presence of Hunter, a public notary, who signed the deed, and certified that the same had been duly read in his presence. The deed seems to have been an authentic document within the meaning of Article 1,207 of the Civil Code, and not having been contradicted or set aside as false upon an improbation, it may be a question whether, ac-

cording to Article 1,210 of the Civil Code, it did not make complete proof between the parties to it and their legal representatives of the facts mentioned in the recital. It is not necessary to hold that it amounted to complete proof. It is sufficient to say that it was strong evidence against Bartley, and in the absence of fraud or collusion, of which there was no suggestion or proof, it was also evidence against the Appellants. There was no evidence to show that Bartley was insolvent at the time when he intervened and signed the deed, or that at that time any of the debts due by him at the time he became insolvent had been contracted.

It was contended that any admission made by Bartley after the mortgage was paid off could not affect the question of subrogation, and that if the 11,613 dollars and 7 cents were really paid by him and not by Mulholland and Baker, no subsequent admission or ratification by him could convert a discharge into a subrogation. That contention may be admitted to be correct, upon the hypothesis that the amount was really paid by him; but his admissions, made without fraud or collusion, before he became insolvent, are evidence against him and the inspectors of the estate of what the real transaction was at the time when it took place.

Their Lordships concur with the majority of the Judges of the Court of Review and of those of the Queen's Bench that the cheque was made over by the insolvent to Mulholland and Baker towards the discharge of a larger amount due from him to them, and that the cheque having become their property, they applied it in discharge of the liability which they, as sureties for the insolvent, had contracted with Hamilton.

Their Lordships are clearly of opinion that the deed of 23rd June 1877 operated as a transfer to the Respondent of the rights to which Mulholland

and Baker were entitled under the subrogation, and that it vested in him the right to the principal sum of 20,700 dollars paid on the 17th of March 1876 by Mulholland and Baker to Hamilton for principal and interest, and to the sum of 2,250 dollars due on account of the instalments of interest previously paid by them, the two sums making together the sum of 22,950 dollars.

For the reasons above given, their Lordships are of opinion that the Court of Review was right in rejecting the contestation, and that the Court of Queen's Bench was right in affirming the judgment of the Court of Review.

They will, therefore, humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to order that the claim of the Respondent be admitted for the full amount of 22,950 dollars, and interest as claimed.

The Appellants must pay the costs of this appeal.