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In the Privy Council.

ON APPEAL

From the Court of Queen's Bench for Lower Canada in the Province of Quebec. (Appeal side.)

BETWEEN

L. J. FORGET & CO., (Plaintiffs) - - - - *Appellants'*

AND

J. H. OSTIGNY (Defendant) - - - - - *Respondent;*

CASE OF THE RESPONDENT.

1. This is an Appeal by Louis Joseph Forget (trading as L. J. Forget & Co.,) from a Judgment (dated the 27th September 1893) of the Court of Queen's Bench for Lower Canada, (Appeal side) affirming a judgment of the Superior Court dated the 19th December 1891 by which this action brought by the Appellant against the Respondent, was dismissed with costs. Record, p.157. Record, p.5.

2. The action was commenced on the 17th July 1890 and by it the Appellant sought to recover from the Respondent the sum of $1,926.87 in respect of advances and commissions alleged to be due and arising out of purchases and sales of shares by the Appellant, for the Respondent, on the Montreal Stock Exchange, between the 19th December 1882 and the 16th February 1886. A detailed account of the Appellant's claims against the Respondent, was delivered on the 6th September 1890. Record, p.9. Record, p.11.

3. By way of defence the Respondent delivered a plea dated the
Record, p.14. 29th September 1890, to which the Respondent refers. The chief defences raised by the said plea were ,—

(1.) That the transactions between the Respondent and the Appellant were gambling and betting transactions (*Jeux de Bourse*) and

(2.) That the Appellant's right of action was prescribed by the lapse of five years before action brought.

Record, p.31. 4. By letter dated the 2nd September 1885, the Appellant claimed payment from the Respondent of $1,575.30, as having been due to the Appellant since the 22nd February 1884. No transaction of any kind took place between the Appellant and the Respondent, within five years before action brought, except one with respect to ten shares of the Bank of
Record, p.144. Montreal. It was admitted by the Appellant in his Case on Appeal to the Court of Queen's Bench, that all the items making up the said sum of $1,575.30 were prescribed under " Art. 2260. Par. 4. C.C."

5. The facts as to the purchase and sale of the ten shares of the
Record, p.123. Bank of Montreal appear to have been as follows:—Rodolphe Forget the confidential agent of the Appellant had advised the Respondent to speculate in shares of the Bank of Montreal as appears by a letter dated
Record, p.37. 7th March 1885 in which the Respondent informed the said Rodolphe Forget that he could not find the money necessary to provide the
Record, p.47. "cover" required by the Appellant. On the 7th October 1885 the Respondent sent to the Appellant the sum of $100. The receipt of that cover was acknowledged in writing by the Appellant on the 9th October
Ibid. 1885 and the Appellant undertook to do the best he could for the
Ibid, p. 36. Respondent. On the 29th October 1885 the Appellant sent to the Respondent a notice of purchase of ten shares of the Bank of Montreal at the price (including brokerage) of $4,030. The same shares were on
Record, p.36. the 10th February 1885 sold by the Appellant at the price (less brokerage) of $4,150. and notice of such sale was sent to the Respondent.

6. The Appellant at the trial attempted to prove that the $100 so
Record, p.48. so sent by the Respondent to the Appellant, was in part payment of the prescribed claims of the Appellant and that by such payment
Ibid. the prescription was interrupted but the Appellant's Witness admitted that the sum of $100 was the exact margin required by the Appellant on
Record, p.6. the purchase of ten Bank of Montreal shares. The learned Judge at the
Ibid, p.168. trial found, as a fact, that the sum in question was sent by the Respondent not on account of the past transactions, but as cover in respect of the new
Record, p.188. transaction in the bank shares. This finding of fact was upheld by the Court of Queen's Bench on the hearing of the Appeal.

7. The Respondent admitted that he took no steps to recover from the Appellant the profit made by the transaction in the Bank of Montreal shares, and in fact he could not have done so as his claim being in respect of a gambling contract was ousted by Article 1,927 of the Civil Code. Record. p.69.

The Judges in both Courts held in law that the claim of the Respondent in respect of the said bank shares was founded on a gambling contract, in respect of which no action would lie, but nevertheless held that the failure of the Respondent to take such steps, amounted in law to an interruption of the prescription, and that consequently the claims of the Appellant were not in law prescribed. It is submitted on behalf of the Respondent that the decision of the learned Judges in both Courts was erroneous, and that the omission to sue a creditor for a debt, in respect of which they held that there was no right of action, cannot in any case be in law, an interruption of prescription. Record, p.6. Ibid, p.188.

8. On the other plea of the Respondent, that the transactions between him and the Appellant were gambling transactions, and gave no cause of action, all the Judges, except one, were in favour of the Respondents' plea and it is from such decision that the present Appeal is brought.

9. The facts are as follow :—At the time of the transactions in question, the Appellant was a stockbroker, and the Respondent was a bank clerk with a salary of $900 to $1,000 a year. A detailed account of the transactions between the Appellant and the Respondent, is printed in the Record. It was proved and found by the learned Judge of the Superior Court that on the transactions, the Respondent owed to the Appellant, the following sums at the respective dates set out below :— .... Record, p.11.

1883 January 16th	....	$ 9,784.37.	....	Record, p.186.
,, ,, 29th	....	$13,443.13.	....	
,, March 12th	....	$28,900.00.	....	

The same learned Judge also found that the Respondent was merely gambling, and had no intention of buying shares in the sense of taking delivery, and that the Appellant was aware of that fact. Ibid.

10. The nature of the transactions in question, will be seen from an explanation of the first transaction under date December 19th 1882 in respect of 25 shares in the Montreal Street Railway Company. The Respondent paid to the Appellant $62.50 by way of cover, and the said Appellant sent to the Respondent a notice of purchase dated 18th December 1882 of 25 shares at the price (including brokerage) of $1,631.25. The said shares were purchased from Messrs. McIver & Barclay by the Appellant who obtained delivery on the 19th December 1882. The Record, p.11. Record, p.32. Record, p.40.

Record, p.41. purchase money was borrowed by the Appellant from the Bank of Quebec at Montreal on the security of the shares in question, and others at 6½ per cent interest, and the Appellant in turn charged the Respondent 7 per cent. The said shares were on the same 19th December 1882 registered in the books of the Railway Company in the name of the Appellant and Record, p.49. were resold by the Appellant to the original Vendors on the 26th January Record p.42. 1883, the purchase money being credited to the Respondent. The shares Ibid, p.49. were never transferred to the Respondent and the Appellant never offered Ibid, p.50. to transfer them to the Respondent. The Appellant's confidential agent Ibid, p.62. Rodolphe Forget admitted that the Appellant never tendered shares for acceptance to any customer, and that the Appellant speculated with other persons in the same employment as the Respondent.

11. The course of dealing between the Appellant and his customers Record, p.99. is deposed to fully, by Charles Daveluy one of the Appellant's own Record,p.108 witnesses and also by Robert Terroux a witness for the Respondent.

12. By Article 1,927 of the Civil Code of Lower Canada, it is provided : " There is no right of action for the recovery of money or any " other thing claimed under a gaming contract or a bet."

The Courts below (after having disposed of the plea of prescription) treated the question before them as a question whether in fact the Appellant was seeking to recover money claimed under a gaming contract. The Judge of the Superior Court found the following facts :—

Record, p.8. (1.) That the Respondent had never had the intention of taking delivery, but merely to speculate on the rise and to settle according to the variation of prices ;

(2.) That the Appellant could not have been ignorant of the circumstances of the Respondent and that he encouraged the speculations of the Respondent by not fixing any date for the delivery of the shares ;

(3.) That each transaction between the Appellant and the Respondent was nothing else but a bet upon the rise of the shares in question, the Appellant undertaking to pay to the Respondent the difference of prices if they rose, and the Respondent undertaking to pay to the Appellant the difference of prices if they fell ;

(4.) That under these circumstances the purchase of shares by the Appellant had no other effect except to shield himself against the rise of price expected by the Respondent.

13. The Court of Queen's Bench (La Coste C.J., Baby Blanchet and Wurtele J.J., dissentiente Hall J.) held that the case turned on the appreciation of the evidence and the facts which had been established, and that the Respondent was bound to prove that the money claimed by the Appellant was exigible under a gaming contract or a bet. The same Judges further came to the conclusion that the learned Judge of the Superior Court had not incorrectly appreciated the evidence and refused to reverse his decision.

Record,p.185.

Record p.187.

The Respondent submits that the Judgments appealed against dated the 27th September 1893 and the 19th December 1891 respectively were and are right in point of law and that this Appeal ought to be dismissed with costs for the following amongst other reasons :—

REASONS.

1. Because the claims of the Appellant against the Respondent were prescribed by law before the commencement of this action.
2. Because prescription was not interrupted within the meaning of Article 2,227 of the Civil Code.
3. Because this action was brought for the recovery of money claimed under gaming contracts or bets for which money no action lies.
4. Because by the facts proved the Respondent has discharged the onus imposed upon him in the Courts below of proving that the transactions in question were in fact gaming contracts or bets.

ALEXANDER YOUNG.

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L. J. FORGET & Co. - *Appella*

AND

J. H. OSTIGNY *Responde*

Case of the Respondent.

SIMPSON & CO.,

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