Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forget v. *Ostigny, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 30th March* 1895.

Present:

The Lord Chancellor.
Lord Watson.
Lord Hobhouse.
Lord Macnaghten.
Lord Shand.
Lord Davey.
Sir Richard Couch.

[*Delivered by the Lord Chancellor.*]

The Appellant is a member of the Montreal Stock Exchange. The action which has given rise to this appeal was brought to recover a sum of $1,926. 87, the balance alleged to be due from the Respondent in respect of certain contracts entered into by the Appellant on his behalf and by his directions for the purchase and sale of shares in various Joint Stock Companies. The Respondent pleaded first:—that the claim was prescribed by lapse of time, and secondly:—that the transactions which gave rise to it were gambling transactions on the rise and fall of shares and that therefore the action could not be maintained.

In view of this latter defence it is necessary to state the facts with some particularity. The

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transactions between the parties commenced with the purchase by the Appellant in December 1882 of 25 shares of the Montreal Street Railway Company. Additional shares were subsequently purchased in the same undertaking. Purchases were also made of the shares of other Companies. The price paid for the shares purchased was debited to the Respondent by the Appellant with ¼ per cent. commission added. The shares so purchased were sold from time to time and the proceeds were credited to the Respondent less a commission of ¼ per cent.

It is not in dispute that all these transactions were entered into at the instance and on behalf of the Respondent. When a purchase of shares was to be made he furnished the Appellant with a small portion of the purchase money which would be required: thus in the case of the first transaction to which allusion has been made he paid $62. 50. In every case delivery of the shares was obtained by the Appellant from the member of the Stock Exchange from whom he purchased and the shares were duly paid for. The money necessary for this purpose beyond that supplied by the Respondent was raised by the Appellant by means of loans from a Bank, the shares serving as security. The loans needed for the Respondent's transactions were not always raised specifically upon the shares purchased for him. The Appellant acted as broker for many clients, and the advances which were required for the purpose of completing contracts entered into on their behalf were raised by hypothecating to a Bank their several securities and obtaining the advance of a lump sum.

When the shares purchased for the Respondent were sold they were redeemed from the Bank and delivered to the purchaser. In respect of the advances obtained from the Bank, the Appellant charged the Respondent 1 per cent. more

than the interest for which he had made himself liable to the Bank. If between the time of the purchase and that of the sale of particular shares dividends were paid upon them these dividends were credited to the Respondent.

It should be added, as reliance is placed upon the fact, that the Respondent was a bank clerk with a salary of $900 to $1,000 a year.

It is conceded that the only law prevailing in Canada upon which the Respondent can rely for the purpose of establishing that the Appellant is not entitled to recover the sum claimed is Article 1927 of the Civil Code of Lower Canada. It is in these terms :—

"There is no right of action for the recovery "of money or any other thing claimed under a "gaming contract or a bet."

In order therefore to sustain his defence it was incumbent on the Respondent to shew that the money sought to be recovered was claimed under a gaming contract or a bet. The learned Judge who tried the case, and on appeal the Court of Queen's Bench for Lower Canada (Hall J. dissenting), thought he had made this out—hence the present appeal.

The defence turning upon the question whether the claim is founded upon a gaming contract it is essential to ascertain the exact nature of the obligation relied on by the Appellant. Unless there was a gaming contract between the parties to this action so that the Appellant in order to make good his claim must rely on such a contract the defence obviously fails.

What then was the nature of the contract between these parties ?

The Appellant was employed by the Respondent as his mandatary or agent to make certain contracts of purchase and sale on his behalf. The contracts made, which were unquestionably within the authority given by the Respondent,

were certainly not gaming contracts as between the parties to them. They were real transactions, the shares purchased and sold were in every case delivered and the price of them paid or received as the case might be. All this is not in dispute. The Appellant having entered into these contracts as agent for the Respondent the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect of them. He was on the other hand exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the Respondent and did not involve any loss to the Appellant. If on the other hand the shares decreased in value while the Respondent sustained a loss no gain resulted to the Appellant. In neither contingency therefore did the Respondent's gain involve a loss to the Appellant. His remuneration was in any event a fixed commission of $\frac{1}{4}$ per cent. It would be of course an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the Appellant and the Respondent.

In the Courts below much stress was laid on the fact that the Respondent was known to the Appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the Respondent had in view not investment but gambling. The other circumstances mainly relied on were that the Respondent never asked for nor received delivery of any of the shares purchased; that the purchase money was raised by a loan procured by the Appellant; that the Respondent was not in a position to furnish the whole of the purchase money and in fact only provided the Appellant with a small margin.

It may well be that the Appellant was aware that in directing a purchase to be made the Respondent did not intend to keep the shares purchased but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on "the Stock Exchange;" but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its re-sale. Such dealings are of every day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint stock company. Nor again do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This also is an every day commercial transaction. For example: a merchant who has to pay the price of a cargo purchased before he re-sells it obtains in ordinary course the means of doing so by pledging the bill of lading.

Much stress was laid on the fact that the Respondent never asked for delivery of any of the shares purchased and that the Appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it, is no doubt an important test for determining whether it is a real one or

only a gambling arrangement under the guise of a commercial contract.

In the Act passed by the Dominion Parliament in 1888 (51 Vict., cap. 42) with a view of putting down what were then known as "bucket shops" it is provided (Section 1) that:—
"Every one who . . . . with the intent
"to make gain or profit by the rise or fall in
"price of any stock of any incorporated or
"unincorporated Company or undertaking,
" . . . . or of any goods, wares or
"merchandise makes . . . . any contract
"or agreement, oral or written, purporting to be
"for the sale or purchase of any such shares
"of stock, goods, wares or merchandise, in
"respect of which no delivery of the thing sold
"or purchased is made or received, and without
"the *bonâ fide* intention to make or receive
"such delivery; and every one who acts, aids
"or abets in the making or signing of any
"such contract or agreement is guilty of a
"misdemeanour."

A proviso was however added in the following terms:—"but the foregoing provisions shall not
"apply to cases where the broker of the pur-
"chaser receives delivery, on his behalf, of the
"article sold, notwithstanding that such broker
"retains or pledges the same as security for the
"advance of the purchase money or any part
"thereof."

Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case the Respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the

Appellant to deliver them to him. As has been pointed out he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It is unnecessary to inquire whether in pledging the securities of his clients for a lump sum to raise the moneys which he was authorised by them to raise, instead of obtaining separate loans on their several securities, the Appellant was acting within the authority conferred upon him, for it does not seem to their Lordships to have a material bearing upon the question whether the contract sued on was a gaming one.

The decisions in the English Courts are of course not authorities upon the construction of the Article of the Canadian Code. But the words of the English Statute relating to gambling contracts (8 & 9 Vict. c. 109) do not differ substantially from those found in the Code. That Statute renders null and void all contracts by way of gaming and wagering. The English authorities may therefore well be referred to as throwing light on the question what constitutes a gaming contract.

The case of *Thacker* v. *Hardy*, (L. R. 4 Q. B. Div. 685,) in the Court of Appeal in England, was very similar to that under consideration. The Plaintiff was a broker who purchased and sold stocks and shares on the Stock Exchange for the Defendant by his authority. He sued the Defendant for commission and for an indemnity in respect of certain contracts into which he had entered pursuant to the Defendant's instructions. The defence was founded upon 8 & 9 Vict., c. 109, s. 18.

Lindley J. held, and his judgment was affirmed by the Court of Appeal, that the Plaintiff was entitled to recover.

Bramwell L. J. said:—"The bargains made "by the Plaintiff upon behalf of the Defendant "were what they purported to be; they gave "the jobber a right to call upon the broker or "the principal to take the stock, and they gave "the broker the right to call upon the jobber to "deliver it."

He further said:—"I will assume that that "was the nature of the bargain between the "parties, and that by its terms the principal "would be entitled to call on the broker to "re-sell the stock, so that, instead of taking and "paying for it, the principal would have to "pay only the differences. In my opinion that "bargain does not infringe the provisions of "8 & 9 Vict., c. 109, which was directed against "gaming and wagering; for the principal might "take the stock which has been bought for him, "and hold it as an investment."

He points out too that there is no gaming and wagering in a transaction of the kind now in question. The passage is as follows:—"The "broker has no interest in the stock, and it does "not matter to him whether the market rises or "falls; but when a transaction comes within "the statute against gaming and wagering, the "result of it does affect both parties. In the "case before us, the broker does not wager at "all."

Cotton L.J. laid down what in his view was of the essence of a gaming contract in these terms:— "The essence of gaming and wagering is that "one party is to win and the other to lose upon "a future event, which at the time of the "contract is of an uncertain nature—that is to "say, if the event turns out one way A will lose, "but if it turns out the other way he will win. "But that is not the state of facts here. The "Plaintiff was to derive no gain from the "transaction; his gain consisted in the com-

" mission which he was to receive, whatever " might be the result of the transaction to the " Defendant. Therefore the whole element of " gaming and wagering was absent from the " contract entered into between the parties."

Even where a person is employed to enter into gambling contracts upon commission, it has been held by the Courts of this country that if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract and is therefore not null and void. The intervention of the Legislature was considered necessary in order to invalidate such contracts and by the Gaming Act 1892 any promise express or implied to pay any person any sum of money paid by him in respect of a contract rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum by way of commission or reward for any services in relation thereto is rendered null and void.

With regard to the plea of prescription the facts stand thus. After the transactions which gave rise to the debit balance against the Respondent were closed, he, in October 1885, sent to the Appellant $100 as margin for the purchase of 10 shares in the Bank of Montreal. He received notice in February 1886 that these shares had been sold at a profit of $150 and he acquiesced in this sum as well as the $100 which he had sent in the previous October being placed to the credit of his general account. The learned Judge who tried the case came to the conclusion that under these circumstances the plea of prescription could not prevail. This view was concurred in by the Court of Queen's Bench and their Lordships see no reason to differ from the decision thus arrived at.

For the reasons which have been given their Lordships think that the judgments of the Courts below ought to be reversed, and that judgment should be entered for the Appellant for the sum claimed, with costs in both the Courts below.

As regards the costs of this appeal, inasmuch as the Appellant was allowed to prosecute it, notwithstanding the small amount at stake, upon the ground that it involved a question of wide general interest, especially to those following the Appellant's calling, their Lordships think that the Appellant should under the peculiar circumstances bear the costs of the appeal on both sides.

They will humbly advise Her Majesty in accordance with the opinion they have expressed.