

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 1155 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, 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 first instance, by the Honorable Mr. Justice Mackay, who allowed the claim to the extent of only \$9,087, 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 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 \$22,950.45, which formed the subject of the claim, consisted of the sum of \$20,700.07, which were paid to Hamilton on the 17th of March, 1876, for principal and interest, and \$2,250 and some odd cents, on account of moneys which had been previously paid by Mulholland & 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 odd had been repaid to Mulholland & Baker, and a credit which was given on the 27th of March, 1876, by Mulholland & 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 had been repaid to Mulholland & Baker, and in the deed of transfer of the 23rd of 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 & Baker had paid \$2,100 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 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 was of opinion that the \$2,250 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 & Baker the \$9,087 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 Art. 1155 of the Civil Code of Lower Canada. The only substantial question in this appeal is whether the sum of \$11,613.07, part of the sum of \$20,700.07 paid to Hamilton on the 17th of March, 1876, in discharge of the mortgage, was paid by Mulholland & 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