

*payer en sa qualité de procureur du dit Aimé Massue aucune somme de deniers excédant l'intérêt à raison de 6 par cent par an sur le montant des dites obligations.*" The allegation was that the Appellant falsely pretending to be the attorney, received from them, not for Aimé Massue, but for himself, the Appellant, a sum of money that was not due to him. That Appellant has not admitted the receipt of any money at all for himself, and has therefore not justified the taking. Examined upon oath, the Appellant has admitted that the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration was received by him. The Appellant has said upon his oath, "*Et en sus des intérêts ci-dessus, je reçus des demandeurs en l'année 1857, une somme de £48, et en l'année 1858 une somme de £24, lesquelles dites deux sommes me furent ainsi payées par les demandeurs à moi personnellement, en considération des nouveaux délais que j'accordais aux demandeurs pour le paiement des dites obligations, et aussi de m'indemniser de mon trouble, frais de voyage et dépens.*" He has attempted an excuse by an "*arrangement avec les demandeurs, ayant été entendu entre ces derniers et moi que si je pouvais rencontrer soit par billet ou autrement les engagements que j'avais contractés, ils, les demandeurs, me paieraient cette somme pour m'indemniser du pourcentage que j'avais moi-même à payer.*" But this attempt not being alleged, it is not to be noticed, and therefore it is not proved. The Respondents properly speaking ought to have objected to the statements made by the Appellant, and there would have been nothing at all put upon the record; but although it has been taken in the deposition it must be rejected. To render a judgment in favour of the Appellant, it must be assigned as a reason that the arrangement has been proved. But there is no allegation to admit such proof; hence there being no allegation, and no proof of what ought to have been justified, the declaration is fully proved. The judgment contains a correct statement of the facts. It is as follows: The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon, considering that the said plaintiffs have proved and established that the said defendant did exact and receive from the said plaintiffs, while acting for and on behalf of the said Aimé Massue, the father of the said defendant, in transacting the business of his said father in relation to the obligations referred to in the declaration, the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration, and for which the said plaintiffs received no value whatever, or any consideration given; and considering that the said defendant applied the said sum of £96 to his own use, and which is admitted by the said defendant in his deposition as witness in this cause, the Court doth condemn the said defendant to pay to the said plaintiffs the sum of £96, with interest from 12th August, 1862. It might have been added as a *considérant* that the defendant hav-

ing denied the fact of payment, and not having pleaded in avoidance, no evidence adduced by him was admissible as not being alleged, and that having admitted the fact, he became liable to repetition by *condictio indebiti*. The Appellant swears: *J'ai perçu des demandeurs en sus des intérêts payés à mon père, une somme totale de £96. Pour ce qui m'a été payé personnellement, c'est-à-dire pour la dite somme de £96, je n'ai pas donné de reçu aux demandeurs.*" This case is precisely such as is stated in the Dictionnaire du Digeste of Thevenot-Dessaulles, Vol. 1, p. 103, No. 427, *Condition de la chose non due*. "*Celui qui prétend avoir payé indument doit prouver qu'il ne devait pas.*" Leg. 25, ff. De probationibus et praesumptionibus. "*Car la présomption est contre.*" Ibidem, "*lors du moins que le défendeur convient avoir reçu. Mais si, au contraire, le défendeur avait commencé par nier qu'il eût reçu, et que le demandeur eût prouvé le fait du paiement, alors ce serait au défendeur à prouver que ce qui lui a été payé, lui été réellement du.*" "*Petentim absurdum est, cum qui, ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse, probationem non debiti ab adversario exigere.*" As to the fact that there has been no excessive interest over 6 per cent, I hold that it does not touch the case at all, and that it has no application to the case of Nye & Malo. I am, therefore, of opinion to confirm the judgment, and must therefore dissent.

DRUMMOND, J., also dissented, concurring with Mr. Justice Aylwin.

MONDELET, J., was of opinion that the judgment should be reversed.

MEREDITH, J.—Thought it was only necessary to look at the declaration to see that the question of usury was the only question intended to be raised, and in point of fact it was the only question discussed before the Court at the argument. It was the point raised by the pleadings. In the plea, the defendant admitted having received the capital of the two obligations and legal interest, but denied that he had received anything more than legal interest. The parties themselves understood the case in this way, as was evident from their own statements. Defendant said he charged the extra amount as his commission. It was unnecessary for him to speak of usury, because plaintiff had made that the basis of his action. Where the plaintiff alleges a fact, the defendant is not bound to repeat it. Having made it apparent beyond the possibility of a doubt that usury was the basis of the action, the real question was, whether this interest having been exacted under a contract passed after 16th Vic., Cap. 80, it could be recovered back. His honor reviewed the legislation on the subject. The usury laws having been abolished, the amount was not recoverable. The judgment must be reversed.

DUVAL, CH. J. said the only witness plaintiff had was the agent, and he denied the fact that more than six per cent was charged. He said he devoted considerable time to the business, and the extra amount paid was to remunerate him for his trouble. It could not be interest