

31st of December, 1863, by *Smith, J.*, condemning the defendants jointly and severally to pay the plaintiff the sum of £3958, and interest. The following were the circumstances that gave rise to the action: On the 11th of November, 1845, by deed passed at Montreal, the plaintiff, *Kierzkowski*, acting as well for himself as for the *DeBartzch* family, including himself and wife, *L. T. Drummond* and wife, *S. C. Monk* and wife, and *Count Rottermund* and wife, acknowledged himself indebted to *Marie Louise Cousineau*, represented by her son and attorney, the Appellant, in the sum of £4,875, for money lent for the purpose of paying off mortgages on the *DeBartzch* property. This loan was to be repaid with interest in eight years. During the six months following the 11th of November, 1845, *Mad. Cousineau* paid £3,375 to hypothecary creditors indicated by the borrowers. In 1853, she died, and left the Appellant and two other children her universal legatees. On the 21st of October, 1862, the respondent as assignee of the rights of the *DeBartzch* family, instituted the present action against the Appellant as well personally as the legatee and heir of *Madame Cousineau* his mother, and against *Zephir Dorion*, his brother. In this action it was declared that although the deed of 11th November, 1845, stated that £4,875 had been paid to the *DeBartzch* family, in reality they had only received £3325, the balance, £1,550, being retained by *Dorion*, the attorney of *Mad. Cousineau*, as usurious premium upon the loan; and a claim was made to recover back from the Appellant as representing *Mad. Cousineau*, the sum of £5,329, which it was alleged had been repaid her in excess of the amount of the loan.

The defendant admitted in his plea that a sum of £1,500 had been paid to him by the borrowers, but he alleged that this sum was not retained out of the capital of the loan made by his mother, but that it was paid to him by the borrowers as an indemnity for the loss of his time, and for his trouble in negotiating the loan, and that his mother, or himself as her legatee, could not be held responsible for it in any way. The defendant also represented the long period of time that had elapsed before the plaintiff instituted the

action. The judgment of the Court below having held that the £1,500 was exacted by *Mad. Cousineau* as usurious interest, the defendant appealed.

*MEREDITH, J.* (dissenting). It is evident that this case must be disposed of in exactly the same way as though 16 Vict. Cap. 80, had not been passed. According to my view, the plaintiff having a valid transfer of the rights of the *DeBartzch* family, had a right of action to recover the excess of interest paid to *Madame Cousineau*. The Appellant says the condemnation should not have been joint and several against the heirs; and, further, that they should not have been condemned to pay interest from the date of the deed of 1845. I think both these propositions well founded, and that the judgment should be rectified in these respects. Interest should only be computed from service of process.

*DUVAL, C. J.* It is undoubted that the action *condictio indebiti* is given to the debtor in a case like this, which, through a misconception on the subject of usury, was made an exception to the general rule that the *condictio indebiti* is not given to the debtor who has paid a sum of money with his eyes open. This exception was made because it was strangely thought that usury was forbidden by the laws of God, parties who took it being liable to a criminal prosecution in France, and to excommunication. These antiquated notions rested upon principles which are now known to have been erroneous. Still, it would be the duty of the judges to yield respect to the law and to aid a party in recovering money though paid voluntarily and in a manner highly beneficial to his interests, if the case came under the law. We come, then, to the consideration of the facts.

As to *Zephir Dorion*, brother of the agent who managed the loan, there is no proof against him whatever, and therefore the action against him should have been dismissed. The real actor was *J. Bte. T. Dorion*, who carried the whole matter through. I am convinced that his mother knew nothing of the usurious transaction. He admits that he got more than six per cent., and that he pocketed the surplus. His admission must be taken against himself. The case would then