

PROVINCE OF CANADA,
LOWER CANADA TO WIT.

In the Queen's Bench,

APPEAL SIDE.

ALBERT G. WOODWARD,
Plaintiff in the Court below,
APPELLANT.

HANNAH BELKNAP, es qualite,
Defendant in the Court below,
RESPONDENT.

RESPONDENT'S CASE.

WOODWARD, Plaintiff in the Court below, sued Defendant, on an account of £93 4 0 for goods sold, orders paid, &c., all of which was alleged to have accrued against Defendant's husband, before his decease, except £1 5 4 charges for goods had immediately after his decease. The Defendant was sued solely in her quality of tutrix to the minor children of her late husband, Joseph Bailey. There is no direct proof of her quality, nor is it specially denied. The Defendant's special plea, was to the effect that Plaintiff was indebted to the estate of the late Joseph Bailey in the sum of £18 8 0 price of pails sold him, and in £28 15 0 for waggon, horse, and other articles sold him, and in two certain sums of money, namely, £79 16 4 and £6 5 0; the former received 24th May, 1853, and the latter 13th August, 1853, by Plaintiff of Nelson & Butters of Montreal, to and for the use of the late Joseph Bailey. The first two items mentioned above are acknowledged by the Plaintiff and credited in his account, and of the cash the receipt of £20 is also admitted in Plaintiff's account sued upon. The main issue between the parties was upon the remaining £66 1 4 which Plaintiff pretends to have accounted for to the late Joseph Bailey. The proof of this fact devolved upon him. How has he attempted to establish it? Not by producing any voucher or receipt of any kind, but by evidence of the vaguest and most inconclusive character. He says he received the moneys as a friendly act, and has attempted to prove that persons very frequently take moneys in this manner without exacting a receipt upon delivery of the money. The most that could be inferred from such proof under any circumstances, is that persons are frequently careless and do business in a very insecure manner. But unfortunately for him, his own acts preclude any such inference as that the money was taken simply as a friendly act. He carried an order from Bailey to Nelson and Butters, and gave them a receipt which was a discharge from Bailey to them. Is it a reasonable inference that having given such a receipt, as a business man, he would not, had he paid over the money to Bailey, have taken a receipt from him? But there is a still stronger presumption against Plaintiff from his own acts. According to his own statement he kept £20 of that money. If it were brought simply as the act of a friend, why was any of it retained? By what right? There is another significant fact. In an account rendered long prior to the institution of this action by Plaintiff, produced by Defendant in her Exhibit No. 2, there is no sum of money credited to Bailey, but there is an entry on the credit side, in the following words:

"Cr. by contra acc.

1853, May 26."

This shews that Plaintiff was intending to credit Bailey's account, which had not then been furnished, and afterwards there was something else to credit on 26th May, 1853, two days after he received the sum of £79 16 4 of Nelson & Butters in Montreal, being just about the time he would return to Sherbrooke. All these facts preclude the inference that this money was taken by him as a friendly carrier and delivered to Bailey. It strongly favors the supposition that he retained the money, to be accounted for on settlement. This view of the case is rendered more probable from the fact that Bailey was at the time carrying on a Pail Factory, and Woodward as a trader and dealer in provisions, was furnishing supplies for his men, and Bailey died in 1854, before any settlement could take place. The Plaintiff has placed much emphasis upon the fact that the charge for these moneys does not appear in Bailey's books, until entered by his representatives. This proves too much for Plaintiff's purpose, if the sums £79 16 4 and £6 5 0 should appear as charged in Bailey's books if had by Woodward, then *a fortiori* the £20 had by him, which is credited, should appear in Bailey's books, because this £20 according to Woodward's pretensions, must have been had by him of Bailey, by his express consent, and as a matter of course, would have been charged. So much for the probabilities of the case. Respondent takes, however, bolder ground. She maintains that the proof by Nelson & Butters, that Woodward received these sums of money, and gave a formal receipt therefor, devolves upon him the necessity of proving, in a direct manner, that he accounted for the same to Bailey.

If any other ground than this were admissible there would be no safety in business transactions. If one person receives money for the use of another, proof of the receipt of this money must devolve upon the recipient the necessity to account. And how account? By shewing after a man is dead how great or how moderate was the friendship existing between the parties, in order to measure the probabilities of their abandoning the ordinary precautions which men usually take in their dealings with one another? Appellant demands reversal of the final judgment because the Honorable Judge in the Court below refused the application to examine witness Burns *a second time*. This refusal was most proper. There were no facts stated that could be proved by Burns, and even if there were, if these were facts within the knowledge of witness, when first examined he was bound to state the whole truth, and Plaintiff was required to know what he could state; and further, there is affidavit of defendant showing good grounds to suppose that injustice would be done her if Burns were examined a second time.

The Plaintiff attempts to prove that late Joseph Bailey's circumstances were such that he could not have spared the money charged to Woodward. This is not proved. It was shown that at times he was in need