

PRIVY COUNCIL.

March 22, 1881.

Present: SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH.

RENNY et al. v. MOAT.

Subrogation.

The following is the judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Renny and others v. Moat, from the Court of Queen's Bench for Lower Canada, in the Province of Quebec; delivered 22nd March 1881. (See 2 Legal News, p. 97, for judgment of the Court of Queen's Bench.)

PER CURIAM. This is an appeal admitted by special leave of Her Majesty in Council, from a judgment of the Court of Queen's Bench for Lower Canada, dated the 22nd of March 1879, whereby a judgment of the Superior Court, sitting in Review, dated the 31st of October 1878, was affirmed on appeal.

The Appellants were the Inspectors appointed under the provisions of the Canadian Insolvent Act of 1875, of the estate of William Patrick Bartley, an insolvent.

The Respondent, Robert Mowat, was a claimant against the estate, and by his claim stated that the insolvent was indebted to him in the sum of \$22,950.45, and interest, from the 17th day of March 1876, at the rate of seven per cent., being the amount of an obligation executed by the insolvent in favour of Robert Hamilton, on the 20th March 1871, before Hunter, notary public, and transferred to him by deed of the 23rd June 1877.

The claimant further stated that he held as security for his claim a transfer and subrogation of a mortgage made by the said William Patrick Bartley in favour of the said Robert Hamilton, which said transfer was passed before the said notary, on the 23rd June 1877.

The obligation and mortgage to which the claim referred were created by a deed of the 17th March 1876, by which Bartley, the insolvent, acknowledged to have received from Hamilton the sum of \$20,000, and promised to pay the same to him in five years from the date thereof, with interest thereon at the rate of seven per cent. per annum, from the 17th March 1871, payable half yearly, on the

17th of March and the 17th of September in each year, the first payment thereof to be made on the 17th day of September 1871, and by which deed Bartley mortgaged and hypothecated certain lands therein mentioned as security for the payment of the principal sum of \$20,000 and interest at the times therein mentioned. By the same deed, the members of the firm of Mulholland & Baker became bail and security for Bartley to Hamilton for the due, faithful, and punctual payment of the said sum of \$20,000 and interest at the times in the deed mentioned.

The appellants contested the claim of the respondent, and alleged that of the sum of \$20,000, referred to in the deed of obligation, the sum of \$9,570.20 was not paid to Bartley by Hamilton, but that the same was deposited (according to an understanding existing between the said parties at the time) in the Merchants' Bank of Canada, to the credit of Bartley, "subject to approval of Robert Hamilton."

That the total amount of indebtedness to Hamilton under the deed of obligation, on the 17th day of March 1876, for principal and interest, was the sum of \$20,700.07, which was paid to him on that day in two separate amounts—namely, the sum of \$9,087 advanced for that purpose by the claimant, and the sum of \$11,613.07, being the amount of the said deposit in the said bank by means of the check of Bartley, and delivered over to Hamilton.

That the only amount advanced by the claimant, in connection with the payment of the said obligation, was the said sum of \$9,087; the balance of said mortgage being paid by the insolvent himself, with the funds so deposited as aforesaid at his credit in the said bank.

That, having so paid the said sum of \$9,087 the claimant was by law entitled to be subrogated in all the rights of Hamilton, under the deed of obligation, to the extent of the amount so paid, and the interest to accrue thereon at the rate in the deed stated, and no more. That with a view to securing such subrogation the deed of the 23rd day of June 1877, in the said claim referred to was executed, but in and by the said deed, the parties thereto did falsely and erroneously declare that the total amount of the said obligation had been really paid by the claimant, whereas in truth and in fact he had only paid the said sum of \$9,087.