

Filion made another obligation in favor of De Beaujeu for £467, making, when added to the balance due on the former obligation, £1559, for which Filion gave a general hypothec on his property. It was alleged that at the time these deeds were passed, Filion was proprietor and in possession of the land now owned by the defendant. De Beaujeu, père, died in 1832, leaving to Madame de Beaujeu the usufruct of all his property, including the claim against Filion, who previous to this date, had sold to third parties all the property hypothecated in favour of De Beaujeu. On the 26th of December, 1839, the *détenteurs* of this property, including the defendant, by *acte de transaction* with the plaintiff, G.S. De Beaujeu, (acting in his own name, and as attorney for his mother, the *usufruitière* under the will,) acknowledged themselves to be the proprietors of these lands, and that said lands formerly belonged to Filion, and were included in the general hypothecation of his property under the obligation. It was further agreed, with the view to avoid an action *en déclaration d'hypothèque* on the part of Madame de Beaujeu, that the *détenteurs*, in case there remained a balance due after Madame de Beaujeu had discussed the property of Filion, should each pay her one-eleventh part of such balance, in four instalments, the first of which was to be payable three months after the discussion, and the remainder annually. This agreement was made with the condition that Madame de Beaujeu should deduct one-fourth from the balance of her claim; the whole without novation of Madame de Beaujeu's hypothecary claim on the property.

On the 19th of February, 1847, Mad. De Beaujeu died, leaving her property by will to her son, the plaintiff, and her daughter; and on the 18th of August, 1859, the plaintiff instituted the present action against the defendant for the sum of £474 personally due under the *acte de transaction*, and for £1,355 for his (the plaintiff's) claim under the obligation and mortgage. The defendant pleaded, first, that he had purchased the property from Filion in 1826, prior to the obligation of 1829, and that on the 23rd of September, 1829, Filion transferred to DeBeaujeu, père, the balance due

for said land, and that by taking this transfer, DeBeaujeu had bound himself not to bring any hypothecary claim against the property. Further, that at the date of the *transaction* of 1839, the defendant had acquired the prescription of ten years against any claim under the mortgage of 1821, and that he had been induced to become a party to the *transaction* through erroneous and fraudulent representations. The defendant's second plea was that the plaintiff could bring no action against him until he had discussed the property of Filion. This exception being maintained, and it being also held by the judgment of the Court below that the plaintiff had no hypothecary right of action, he instituted the present appeal. The grounds of appeal were that the discussion of Filion's property was clearly established, and that the hypothecary right of action was acknowledged in the *acte de transaction*.

DRUMMOND, J., after stating the facts, said: We are all unanimous in the opinion that the defendant was not bound to point out the effects of Filion that could be discussed, as the plaintiff pretends, and we think that the proof of discussion is not sufficient. Without entering into the other points of the case, we think there was no error in the judgment, and that it must be confirmed.

Duval, C. J., Meredith, and Mondelet, JJ., concurred.

R. & G. Laflamme, for Appellant.

Doutre & Daoust, for Respondent.

J. B. T. DORION, (defendant in the Court below,) Appellant; and KIERZKOWSKI, (plaintiff in the Court below,) Respondent, (2) ZEPHIR DORION, (defendant in the Court below,) Appellant; and THE SAME, Respondent.

Usurious Interest—Premium.

An action by assignee to recover back usurious interest under the old law.

Held, that the money having been paid by only one of the assignors and his wife, the assignee could not legally claim under an assignment from the whole family.

Quære as to premium charged by agent.

These were appeals from a judgment of the Superior Court, rendered at Montreal on the