

obligation with hypothec, Mulholland & Baker having become security, and contained in addition the following enunciation:—"And whereas the said parties of the second part as such sureties have at divers times paid instalments of the interest on said debt, and finally paid the entire principal thereof to the said party of the first part upon the agreement and with the understanding that they should receive a subrogation of his rights under the said deed." Further, that Moat had advanced the money for the payments, and it had been agreed that he should receive the subrogation instead of Mulholland & Baker. It went on to declare that Moat was subrogated in the rights of Hamilton, Bartley consenting.

Bartley having become insolvent, Moat, on the 2nd March, 1878, filed a claim on his estate for \$22,950.45, claiming to be a hypothecary creditor for that amount on the real estate described in the obligation of the 20th March, 1871. Renny *et al.*, the inspectors of the estate, contested the claim, setting forth the manner in which Hamilton had been settled with on the 17th March, 1876, and the facts so appearing in proof, the Superior Court (Mr. Justice Mackay) on the 14th May, 1878, rejected all the hypothecary claim, save for the \$9,087. The case being afterwards heard in review, the Court there, Mr. Justice Dunkin dissenting, reversed the first judgment, and maintained the claim of Moat for the full amount. It is from the latter judgment that the present appeal has been taken by the inspectors, Renny *et al.*

I think the different members of the Court are agreed as to the manner in which the payment of \$11,613.07 was made, that is, that it was not made by Mulholland & Baker with their own money, but by Bartley with the money of Hamilton. The controversy turns chiefly upon the effect to be given, under the circumstances, to the deed of the 23rd June, 1877. This deed, which is styled a transfer and subrogation, purports to deal with two distinct transactions which it is necessary to separate for the right understanding of the legal relations of the parties to each other. It is most appropriately termed a transfer as regards the dealing between Mulholland & Baker and Moat, and it is enunciatory of an alleged subrogation as regards the dealing

between Mulholland & Baker and Hamilton. Mulholland & Baker borrowed money from Moat, and proposed to give him a claim they held against Bartley, which they said was secured by a mortgage Bartley had given to Hamilton, they being entitled, as they alleged, to represent the rights of Hamilton, whom they had paid. This proposal Moat accepted after he had loaned the money, but whether before or after made no difference, because if the security they so offered was on the condition they represented, they had the right to transfer it, and if the mortgage which had been given to Hamilton were then existing and legally vested in them (Mulholland & Baker) it would undoubtedly pass by their conveyance, but as they could convey no more rights than they had themselves, it was fairly incumbent on Moat to see to the condition of the security at the time he accepted it. Mulholland & Baker represented to Moat that they had been subrogated in the rights of Hamilton as the creditor of Bartley with hypothec upon immoveable property. This was either true or not true. If true, Mulholland & Baker were in a position and had a right to convey the claim, with its accessories; but if untrue, as, for instance, if the claim had been in part extinguished by a payment not proceeding from Mulholland & Baker, in such case, as they could convey no more rights than they were themselves possessed of, they could not vest Moat with what had already become extinct and was non-existent. True it is, that Bartley, the debtor, himself recognized the existence of the claim, and he was no doubt bound personally by his declaration; but, however much he was so bound personally, he could not, by this false declaration, restore the hypothec which had been so extinguished. He could have created a new one, but to resuscitate the one that was dead was beyond his power. He became bound towards Moat for the claim he recognized, and for the consequences of declaring that the claim and hypothec existed; but he could not by such declaration make the hypothec revive which, by the fact of payment, was dead and annihilated. The like may be said of Hamilton's declaration. If he were paid by Bartley, and not by Mulholland & Baker, he had neither claim nor hypothec to subrogate to anyone, and, moreover, his interposition was altogether