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CODES.

A correspondent of the *Albany Law Journal* protests against Mr. Field's new Civil Code, asserting "that it will injure our business. It "makes the law too plain; too easily under-"stood. Any man of common understanding "can read it and know just what the law is. "Now, if a layman wants to know what his "rights are or what the law is upon any given "subject, he has to apply to a lawyer who ex-"amines the statutes, the common law and the "reports, and writes out an opinion or brief. "This new Civil Code is a wholesale brief. "The whole of the civil law is boiled down "and so worded as to condense all the common "law, statute law and decisions on the subject "to date."

Mr. Field must be endowed with a wonderful genius for code-making if the adoption of his code has the effect, in the long run, of doing away with, or even of greatly diminishing litigation. Codes, like other acts of the legislature, may clear up some points to which special attention has been directed, but taking them as a whole, it is usually found that the Courts and the lawyers have abundant occupation in finding out what the codifiers meant, and in applying the rules which they have laid down, to the varied business of life. This seems to be the experience of all code-governed countries hitherto; nor do we imagine that an end to litigation is likely to be reached by any Code of the future.

THE COPPERS BURIAL CASE.

A person named Coppers has attained in the United States a like posthumous fame to that which followed Guibord in Canada. The circumstances are not unlike. Mr. Coppers had bought a lot in Calvary Cemetery (New York State), owned and controlled by the trustees of St. Patrick's Roman Catholic Cathedral. Now, one of the rules of the Church, and one of the by-laws of the Cemetery, is that no Protestant or Freemason shall be buried in consecrated soil. Several members of Mr. Coppers' family were buried in the lot, but the difficulty arose only with regard to his own interment. He died a Protestant and a Freemason, and the trustees of the Cemetery stopped the funeral procession at the gates, and refused to permit the interment to take place. It appears that the only evidence of title held by the deceased was a simple receipt for the purchase money of the burial plot. A *mandamus* was applied for to allow the burial, and Justice Westbrook granted the writ. This judgment has now been reversed in appeal, the Court holding that the only right acquired by the purchase of the lot was that of burial and use in conformity to the rules of the Cemetery Association; and that the regulation forbidding the burial of Protestants and Freemasons was not unlawful. Judge Davis remarked: "If I were called upon, in this case of Dennis Coppers, to criticise the good sense and reason of the rules, I should certainly differ from the appellants, for I can see no good reason why the fact that Coppers was in his life a Freemason, should prevent the burial of his body, after death had separated him from all such societies, by the side of his wife and children. It may have been a harsh and uncharitable thing to have done; but the law is not changed because the consequences of upholding it seem severe or cruel. The religious corporation owning the cemetery have seen fit to make the rule. The purchaser took his rights subject to it."

APPEAL TO THE PRIVY COUNCIL.

Apart from the merits of the appeal (as to which the judgment of the Court of Queen's Bench, 22 L. C. Jurist 201, is affirmed), the judgment of the Privy Council, in the case of *Cushing & Dupuy*, re-states the principle as to the admission of appeals to England where the right of appeal has been taken away by Canadian Statute. In matters of insolvency, the judgment of the Queen's Bench is made final by 40 Vict. c. 41, s. 28. Their lordships hold that the Parliament of Canada had power so to take away the right of appeal; but the Queen could nevertheless as "an act of grace" allow an appeal (i.e. grant leave to appeal) from any judgment of a Colonial Court, even where the right of appeal is expressly taken away by a statute not *ultra vires*.

NOTES OF CASES.

MONTREAL, March 31, 1880.

CANADA SHIPPING CO. v. V. HUDON COTTON CO.

Action by principal on contract made by agent in his own name without disclosing his agency.

MACKAY, J. The defendants bought a cargo of coal from Thompson, Murray & Co. The defendants weighed all the coal as it was delivered, and found the quantity considerably under that stated in the broker's note. They declined to pay for more than the weight as they found it, and then the present action was instituted. But the plaintiffs in the suit were not Thompson, Murray & Co., but the Canada Shipping Company, who sued as if the transaction had been theirs. The suit was the first intimation that the Hudon Cotton Company had that the Canada Shipping Company had anything to do with the coal. The action was met by a first plea, that the defendants never had anything to do with the Canada Shipping Company; that they contracted only with Thompson, Murray & Co. His Honor was of opinion that this plea must prevail. English authorities had been cited to show that in England the principal may adopt the contract, as had been done here. But when the writers on the French law were referred to (and this was the law that governed the present case), it appeared that our jurisprudence was different. The action should be brought on the contract. Here there was no intimation in the broker's note, or in the bill of parcels, that the Canada Shipping Company had anything to do with the transaction. Troplong, Mandat, Nos. 519-523, was cited by his Honor. The action must be dismissed.

The judgment is as follows:—

"The Court, etc..

"Considering that plaintiffs have failed to prove liability of defendants' Company towards them, as alleged;

"Considering that the sale of coals in this cause was by Thompson, Murray & Co. to defendants, and that the broker's notes, and also letter of 13th August, 1879, show that; considering that from them the defendants could not discover the plaintiffs as the vendors;

"Considering that Thompson, Murray & Co. sold the coals referred to to the defendants' Company; that Thompson, Murray & Co. kept silence as to the existence of quality of mere agents in them, acted in their firm particular name, and did not take quality of agents in or at the contract of sale; that Thompson, Murray & Co. ought, under the circumstances, to be held for all the purposes of this case or suit, the veritable sellers (*vide* No. 522, Troplong, Mandat), and so the defendants' first plea must be maintained;

"Considering that in and at that sale of coals, Thompson, Murray & Co. did not engage *pour autrui*, nor did defendants promise towards any *commettant*, but only towards Thompson, Murray & Co.;

"Doth dismiss plaintiffs' action with costs."

Davidson, Monk & Cross for plaintiffs.

Brique, Choquet & McGoun for defendants.

SUPERIOR COURT.

MONTREAL, May 21, 1880.

DUNKERLY v. LORD et al.

Charter-party—Loading "with all dispatch"—Delay caused by vessel having to wait for her turn to load.

The demand of plaintiff was for fifteen days' demurrage at £50 stg. per day. The defendants chartered the steamer Tagus on the 27th May, 1873, to take a cargo of coal from Sydney, Cape Breton, to Montreal, and the charterers undertook that the vessel was to be loaded with all dispatch at Sydney.

The defendants pleaded that the vessel was to be loaded according to the custom of the port, and of the mines of Sydney, namely, in her due turn, with other vessels there loading coal; that on the arrival of said vessel at Sydney, the master was informed that three weeks would elapse before the Tagus would be entitled to her turn, which was on 4th July, and she was then loaded with all dispatch.

TORRANCE, J. Looking carefully at the charter-party, the Court sees nothing to qualify the undertaking by the charterers that the vessel was to be loaded with all dispatch at Sydney. The custom of the port, and the crowd of vessels which might have been before the Tagus and entitled to precedence, did not modify the undertaking for dispatch. The authorities of plaintiff *Ashcroft et al.* v. *The Crow Orchard Colliery Company*, 9 Q. B. Law R. 540, (1874) and *Randall* v. *Lynch*, 2 Camp. R. 355, appear to support this pretension which is only reasonable. If the charterers made an improvident contract they could only blame themselves.

Judgment for $3,650, equal to £750 sterling.

A. H. Lunn for plaintiff.

W. H. Kerr, Q.C.
C. C. Carter } for defendants.

O'HALLORAN v. BARLOW.

Dilatory exception—Action for money attached in hands of defendant.

This was the merits of a dilatory exception. The plaintiff demanded $25,000.

The defendant did not deny the debt, but pleaded that an attachment had been lodged in his hands for the same sum in another case to which the now plaintiff was party, and he prayed that all proceedings in this case be stayed until a decision on the merits of the other case.

The defendant cited C. C. P. 120, Sub-sec. 2 and 3.

TORRANCE, J. The pretension of the defendant, that the proceedings in this cause be stayed until a decision in the other case, is perfectly reasonable. The authorities cited by plaintiff do not touch the present case. It would be unreasonable here to condemn the defendant to pay the plaintiff the sum of $25,000, when in the other case a contest is going on which may end in the now defendant being ordered to pay the sum to another party. The plaintiff is party to the other suit, and should have it settled first.

Exception maintained.

A. D. Taylor for plaintiff.

T. W. Ritchie, Q. C., for defendant.

JOHNSTON v. SCOTT et vir.

Married woman—Authorization of wife by husband to make note.

This was an action against a married woman *séparée de biens*, to recover $320.55, alleged to be due on a note signed by her, and endorsed by her husband.

The plea was that she had not been authorized by her husband to sign the note—that she got no value, and that it was signed by her for a debt of her husband.

TORRANCE, J. The evidence of record is a note signed by the female defendant, endorsed by her husband, and a letter from her to the plaintiff, to the effect that in consideration of his discounting the note at 45 days, endorsed by her husband, she would hold in trust for plaintiff, until the note was retired, certain furniture. Attention is also called to the 13th interrogatory put to the female defendant, which she answers in the affirmative, to the effect that the object of obtaining said money, was the preservation of certain real property which she had acquired and partially paid for, with the approbation of her husband, and which, without the making of a further payment on account thereof, she was in danger of losing.

The evidence by the husband for or against his wife is here of no value—C.C. 1231. The note and letter signed by the wife speak for themselves; and as to the authorization of the husband it is abundantly proved by his endorsement of the note. The formal express authority required by the custom of Paris is no longer necessary. C. C. 177 is clear, and the commissioners for the codification so intended. Judgment for plaintiff.

F. W. Terrill for plaintiff.

M. Hutchinson for defendant.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

April 15, 1880.

Present:—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.

CUSHING, Appellant, & DUPUY, Respondent.

Appeal to Privy Council—Power of the Crown to admit an appeal where the appeal is denied by Canadian Act—Sale without delivery.

PER CURIAM. This appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing the judgment of a Judge of the Superior Court, which had been given in the Appellant's favor, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of Canada, intituled "An Act respecting Insolvency" (38 Vict., c. 16).

These proceedings were commenced by a petition of Mr. Cushing, the Appellant, to the Superior Court, praying that Mr. Dupuy, the official assignee of the estate of the insolvent firm of McLeod, McNaughten, and Leveillé, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused, on the ground that, under the Insolvency Act, its judgment was final. The Appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to

grant, reserving to the Respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points: first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by Art. 1178 of the Code of Civil Procedure, from final judgments rendered on appeal by that Court, is taken away by the Insolvency Act; and, secondly, if that be so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the Insolvency Act enacts as follows:

"In the Province of Quebec all decisions by a Judge in Chambers in matters of Insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of the Parliament of Canada, 40 Vict. c. 41, it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:

"The judgment of the Court to which, under this section, the appeal can be made shall be final."

This Court, in the Province of Quebec, is the Court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded: (1) the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the British North American Act, 1867, which confers and distributes legislative powers. By Section 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of Canada, and by Section 92 exclusive authority in certain others upon the Provincial Legislatures.

Section 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces; and, for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"21. Bankruptcy and Insolvency."

Section 92 enacts,—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next herein-after enumerated; that is to say,—

"13. Property and civil rights.

"14. The Administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the Appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Courts of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with

insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code of Civil Procedure. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the Province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion act creates. Such a provision in no way trenches on the royal prerogative.

Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38th Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (*See* the Lower Canada Statute, 34 Geo. 3., c. 30.) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is in their Lordships' view unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative; since the 28th section of the Insolvency Act does not profess to touch it, and they think, upon the great principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* v. *Aylwin* (2 Knapp's P. C., 72) which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuvillier* v. *Aylwin* arose upon the Lower Canada Colonial Act, 34 Geo. 3, c. 6, which enacted that the judgment of the Court of Appeals should be final in all cases under the value of £500, and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the Rolls in his judgment rejecting the petition are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

In re Louis Marois (reported in 15 Moore, P. C. 189) upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier* v. *Aylwin* the very point was decided against the petitioner, said:

"If the question is to be concluded by that decision, this petition must be at once dismissed, but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the

Rolls is contained in a few lines; and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown."

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier* v. *Aylwin* could be sustained or not, it is obvious that, at the least, they regarded it as being open to review.

In *Johnston* v. *The Minister and Trustees of St. Andrew's Church* (L. R. 3 Appeal Cases 159), upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act, establishing that Court, which enacted that its judgments should be final and conclusive, saving any rights which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said :—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier* v. *Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case, lately before this Committee requires consideration, *Théberge and another* v. *Landry* (L. R. 2 Appeal Cases, 102). It was an application for special leave to appeal against a judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by section 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. The decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown :—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away, except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

It was not suggested that an appeal would not have lain to the Queen in Council under the Insolvency Act of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned Counsel for the Appellant drew attention to the Act of the Parliament of Canada, 31 Vict., c. 1, which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-section 33 of section 7 of that Act is as follows :—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the

rights of Her Majesty, her heirs, or successors, unless it is expressly stated that Her Majesty shall be bound thereby."

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of Insolvency, Her authority in that respect is unaffected by it.

The order for leave to appeal granted in the present case will consequently stand.

Upon the merits of the appeal the following are the principal facts:—Messrs. McLeod, McNaughton & Léveillé, who carried on business as brewers in Montreal, became insolvent on the 19th July, 1877, and on the same day their estate and effects including the plant, material, and effects which are the subject of these proceedings, were seized by the Respondent, as official assignee under a writ of attachment in insolvency. Thereupon the Appellant, who is a notary, demanded from the assignee the delivery of the above-mentioned plant and effects, on the ground that they had been sold to him by the insolvents on the 14th March, 1877, about four months before the insolvency. He claims them as owner under a contract of sale, in the petition which gives rise to this appeal.

The contract on which the Appellant relies is contained in a notarial instrument, by which the insolvents purport to bargain, sell, and assign to the Appellant the plant, material, furniture, and effects (described in detail in the bill of sale) lying and being in and about their brewery. Some of these effects are valued in the bill of sale, the total of these values amounting to $4,800; others are not valued. The consideration is thus stated in the deed:—

"The present bargain and sale is made in manner aforesaid, for and in consideration of the sum of one dollar currency, cash in hand, paid at the execution hereof, and for other good and valuable consideration heretofore had and received, the receipt whereof is hereby acknowledged, whereof quit, and in further consideration that the said purchaser shall endorse the paper of the firm of McLeod, McNaughton & Léveillé, which he agrees to do on demand, for a sum which, together with present unsecured endorsements, shall not exceed in all two thousand dollars."

Authority is given to the Appellant by the deed to take possession of the effects.

On the same day a lease was made by the Appellant to the insolvents of the same plant and effects for three years at a yearly rent of $100.

The petition of the Appellant alleges that he took possession of the effects, but in fact no removal or change of possession whatever took place, and the plant and effects remained in the possession of the insolvents, precisely as before, up to the time of their insolvency. All that the petitioner in his evidence states with regard to possession is, that he went over the effects, and verified their existence.

The general question was raised, and much discussed in the Courts below, whether delivery or déplacement of the thing sold was necessary to pass the property in it. It was contended that the Canadian law which required déplacement had been altered in this respect by the Canadian Civil Code, as the French law had been by the Code Napoléon.

Art. 1472 of the Canadian Code is as follows:

"Sale is a contract by which one party gives a thing to another for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject nevertheless to the provisions contained in Article 1027."

Art. 1025 was also referred to.

Art. 1027 is as follows:—

"The rules contained in the two last preceding Articles apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special conditions contained in the Code for the registration of titles to and claims upon such property. But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the things, although his title be posterior in date; provided, however, that his possession be in good faith."

The question was debated in the Courts below whether, under the law established by these Articles, déplacement or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the Appellant's construction of these Articles to the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or déplacement, they agree with the opinion of Chief Justice Dorion (in which Justices Cross and Tessier concurred) that the transaction in question was not a genuine but a simulated sale, and, if at all real, was a contrivance intended to obtain, under color of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (*See*, as to pledge, Arts. 1966-1970, Canadian Civil Code.)

In examining the character of the transaction, it is in the first place to be observed that the alleged sale was not for a price in money, nor for anything equivalent to money; nor was the consideration fixed and certain, but wholly indeterminate, the amount depending on future contingencies. The considerations expressed in the instrument are, (1) one dollar, which of course is merely a nominal, and not a serious part of the consideration; (2) "other good and valuable consideration heretofore had and received;" the nature and amount being both unexpressed, and (3) what appears to be the real consideration, viz., that the vendee should endorse the paper of the firm, which he agreed to do on demand, for a sum which, together with present unsecured endorsements, should not exceed in all 2,000 dollars. This agreement of the Appellant to give his endorsements by way of accommodation to the firm is obviously a consideration of an indeterminate character. Suppose he refused to give them, the remedy would be an action for breach of the agreement, in which the damages would be uncertain. Again, he does not bind himself to pay the bills he may endorse, and the holders might in the first instance choose to sue the firm. The ultimate extent of the liability on the agreement to indorse is plainly uncertain. This vague and contingent liability contains none of the elements of a fixed price, which is one of the essential incidents of the contract of sale. (*See* Pothier, Traité du Contrat de Vente, Part I., Sec. 2, Art. 2, secs. 1, 2, 3.)

But, however inconsistent the consideration expressed in the bill of sale may be with the idea of a sale, it would be fit and sufficient to support a contract of pledge for securing the Appellant against loss arising from his endorsements of the paper of the firm; and that this, if it were at all real, was the nature and object of the transaction, is shown by other circumstances attending it. The value of some of the effects (for what reason does not appear) is stated in the deed, and this value alone amounts to $4,800. The rest is not valued, but obviously must have been of substantial value. It is scarcely to be supposed that all these effects would have been absolutely sold to the Appellant for a contingent consideration which could not exceed $2,000.

Then, on the same day, the whole of the effects are leased to the insolvents for a yearly rent of $100. As the Chief Justice points out, this rent would return the supposed owner of the plant and stock 1½ or 2½ per cent. only upon their value, whilst these implements would come back to him at the end of the term deteriorated by wear and tear. Such a rent he considers to be illusory. Under colour of this lease the insolvents were able to retain the plant and carry on their business as usual.

It is to be observed that a transaction which presents on the face of the documents so anomalous a character has received no extraneous support or explanation. The appellant gave no evidence of any antecedent consideration, or of the extent of his endorsements of the paper of the firm, or of any circumstances to explain the alleged purchase.

It is scarcely necessary for their Lordships to say that, supposing (as they have assumed) the law to be that the property in the thing sold passes by a genuine contract of sale without delivery, even as against third persons, yet the circumstance of there being no change of possession must still be one of the material facts to be regarded in determining the question whether any particular sale is real or simulated.

In the present case their Lordships, for the reasons they have stated, agree with the majority of the Judges of the Court of Queen's Bench in their conclusion that, whatever may be the real nature of the transaction in question, it has not the indicia of a *bonâ fide* sale.

They will, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.