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HODGE v. *THE QUEEN.*

The following is the conclusion of Dr. Wharton's note upon this case (pp. 169-170):—

The rulings of the courts in the United States sustaining the positions taken above, are numerous. Many are the reported cases in which sentences to hard labor have been sustained, but not one can be found in which the power to impose hard labor was not given by statute. It is true that where labor is part of the discipline of a particular prison, then parties committed to such prison are obliged to submit to such discipline, though it is not part of the specific sentence. But this is a matter of discipline, shifting with the prison, some prisons (aside from statutory requisitions) requiring only that each prisoner should keep his own cell in order, others requiring that prisoners shall take part, according to direction, in the general work of the institution. But, be this as it may, no court can impose hard labor as a condition of punishment unless this power be specified by statute. See *Exp. Karstendick*, 93 U. S. (3 Otto) 396; *Exp. Pearson*, 59 Ala. 654; *Exp. Simmons*, 62 Ala. 416; *Hannahan* v. *State*, 7 Tex. App. 664; *Boone* v. *State*, 8 Lea (Tenn.) 774; *State* v. *Barnes*, 37 Ark. 448; *Re Ryan*, 45 Mich. 173. In 1847 the question arose almost in this shape in *Daniels* v. *Commonwealth*, 7 Pa. St. 393, in which case we have the following opinion from Rogers, J.: "The twenty-first section of the Act of July 12th, 1842, directs that every person convicted of fraud as therein prescribed shall be imprisoned in the penitentiary or in the county jail, at the discretion of the court, not exceeding one year, or by fine not exceeding three times the value of the money or property or other thing so obtained; or by both fine and imprisonment. To the punishment awarded by the Act there is superadded in the sentence, 'hard labor,' which, as the defendant contends, is not warranted by the statute. That there may be imprisonment without labor is a proposition which need only be stated; and whether it be a less punishment, as is contended, or a greater punishment, would seem to be immaterial. In the *King* v. *Bourne*, 7 Ad. & El. 58, a judgment was reversed because the court sentenced the offender to transportation for seven years, in a case punishable only with death. The courts proceed on the safe principle that the punishment only which the statute awards can be inflicted, the court having no power to alter or vary it, and, consequently, it would be a usurpation of an authority not delegated, which cannot be tolerated in a government of laws. Is, then, the sentence illegal? This is a question which we think is virtually decided in *Commonwealth* v. *Kraemer*, 3 Binn. (Pa.) 584. In that case the judgment was reversed. The crime of which the defendant was convicted was perjury, punishable by fine and imprisonment at hard labor; yet, as the Act prescribed no particular kind of treatment as to diet or discipline, a sentence which adjudged that the convict shall be confined, fed, clothed and treated as the law directs, was reversed as erroneous. In the argument an exception was taken that the defendant was sentenced to 'hard labor,' the word 'hard' going beyond the letter of the Act. On inquiry, it was found that the exception was not well taken, as these words appeared in the original roll. But had it been as was assumed, we are warranted in saying the judgment would have been reversed on that ground alone. The reasoning of the judges, who delivered their opinions *seriatim*, applies with full force to the present case. But as repetition adds no additional force to an argument, I shall content myself with referring generally to the cases cited. But it is denied that the case of *Commonwealth* v. *Kraemer* applies; because, as is said, it was ruled on the construction of the Act of 1792, and that the question now raised depends on various Acts subsequently passed, constituting one entire system. That it is a rule of construction that statutes are not to be taken according to their very words, but their provisions may be extended beyond, or restrained within the words, according to the sense and meaning of the legislature, apparent from the whole statute, or from other statutes

created before or after the one in question. That the intention of the legislature must govern, and to this intention, a literal construction of any statute must yield; and to discover the true meaning of the statute, it is the duty of the court to consider other statutes, made *in pari materia*, whether they are repealed or unrepealed. *Church* v. *Crocker*, 3 Mass. 21; *Holbrook* v. *Holbrook*, 1 Pick. (Mass.) 254. These principles are not denied, and in the application of them the counsel for the Commonwealth insists that the Act under which sentence was passed, authorized the court to imprison the defendant in the penitentiary or county jail; that by that Act, for the establishment of penitentiaries, labor is made part of the sentence of every person confined therein; and that it is an important branch of the penitentiary system; that the courts have power to sentence the defendant to imprisonment in the penitentiary, and that labor would have been necessarily a part of the punishment; that although the legislature do not in the Act expressly authorize a sentence to labor, yet it may be inferred that it was so intended, in consequence of authority being given to imprison a defendant in the penitentiary; that it being established that labor was a part of every sentence to the penitentiary, it necessarily followed that a sentence to imprisonment in the county prison, under the act of assembly, would authorize a sentence to labor, because it must be inferred that it was the intention of the legislature to make the punishment the same, whether the confinement was undergone in the county prison or the penitentiary. This is a strict summary of the argument in favour of the Commonwealth, in which I agree there is much force; yet we think it would be attended with risk to yield to such nice speculations, as to the intention of the legislature, in a criminal case. It is better to confine ourselves to the act, which must be our guide in inflicting the punishment, which is fine and imprisonment without labor; the latter being an addition not warranted by statute. The late venerated Chief Justice never ventured to sentence a convict without having the Act inflicting the punishment before him, and his sentence was, as near as could be, in the words of the Act—an example worthy of imitation, and, if strictly observed, would save the court some trouble, besides contributing to a more satisfactory administration of justice. But what is an unanswerable argument against the view taken on behalf of the Commonwealth, is that in some counties of the State, labor is not a part of the punishment, and the consequence would be, unless we adhere to the punishment inflicted by the Act itself, that the same offence would be differently punished in different parts of the State. This, surely, the legislature did not intend, as it is of some consequence the law should be uniform. We cannot, at any rate, infer such to be their intention, unless their meaning is so clearly expressed as to lead us necessarily to such a construction. If a prisoner sentenced to fine and imprisonment, who is put to hard labor, will have a right to complain, is a question not now before us, and it will be time enough for us to decide it when it arises."

This ruling applies without qualification to the facts presented in the case immediately before us.

NOTES OF CASES.

COUR DU BANC DE LA REINE.

EN APPEL.

QUÉBEC, 7 mai 1884.

DORION, C.J., RAMSAY, TESSIER, CROSS et BABY, JJ.

CHOQUETTE (déf. en Cour inférieure) appelant, et HÉBERT (dem. en Cour inférieure) intimé.

L'Acte Electoral Fédéral—Dépôt.

Jugé: Que lorsque dans une action pénale d'après l'acte électoral fédéral tel qu'amendé par 46 Vict. ch. 4, s. 1, un demandeur par une seule et même action demande le recouvrement de plusieurs pénalités ou amendes, il doit faire, avec son præcipe, un dépôt de $50 pour chacune des dites pénalités dont il demande le recouvrement.

Les faits de la cause sont ceux-ci: M. Hébert, notaire de Montmagny, avait intenté contre M. Choquette, avocat et candidat aux dernières élections fédérales pour le comté de Montmagny, une action au montant de

$12,760, étant pour autant de pénalités de $200 que le dit Hébert voulait recouvrer du défendeur et appelant. Avec son præcipe le demandeur Hébert ne fit qu'un dépôt de $50.

Cette action fut rencontrée par une exception à la forme, allant à dire qu'un dépôt de $50 devait être fait pour chaque pénalité de $200 comprise dans la somme de $12,760, montant réclamé du défendeur.

L'Hon. Juge Angers débouta cette exception à la forme avec dépens, et déclara le dépôt de $50 suffisant.

M. Choquette porta sa cause en appel et quatre des honorables juges sur cinq déclarèrent le dépôt insuffisant, l'exception à la forme bien fondée et déboutèrent l'action du demandeur Hébert avec dépens contre lui tant en Cour inférieure qu'en Cour d'appel.

A l'appui de sa plaidoirie M. *Choquette* cita les autorités suivantes :

37 Vict., Acte Elec. Fédéral et ses amendments, ss. 92, 109, 111, 112, 123.

46 Vict. ch. 4, s. 1.

Legal News, Vol. III., page 195, *Tarte & Cimon.*

C. C. art. 12 et autorités ci-dessous.

Voici le jugement de la cour d'appel :

" La cour après avoir entendu les parties par leurs avocats respectifs sur le mérite, examiné le dossier de la procédure en cour de première instance ainsi que les griefs d'appel produits par le dit appelant et les réponses à iceux, et sur le tout mûrement délibéré ;

" Considérant que le demandeur intimé a réuni dans son action plusieurs demandes pour pénalités et amendes, pour autant de contraventions aux lois d'élection des membres de la chambre des Communes parlement du Canada, et qu'il n'a déposé que la somme de cinquante piastres afin de garantir le défendeur appelant en cas que le demandeur intimé ne réussit pas dans sa demande ;

" Considérant que le demandeur intimé était tenu de donner caution au montant de cinquante piastres pour chacune des pénalites ou amendes réclamées par l'action avant l'institution de la dite action ;

" Considérant qu'il y a erreur dans le jugement rendu par la Cour supérieure à Montmagny le 17 novembre 1883 : Cette cour casse et annule le dit jugement et procédant à rendre le jugement que la dite cour supérieure aurait dû rendre ; Maintient l'exception à la forme produite par le défendeur appelant, et déboute l'action du demandeur intimé avec dépens de la cour supérieure et d'appel contre le dit intimé, et la cour ordonne le renvoi du dossier à Montmagny.

" *Dissentiente* M. le juge Baby."

Pacaud & Choquette, procureurs de l'appelant.

Pelletier & Bédard, procureurs de l'intimé.

(P. A. C.)

COURT OF QUEEN'S BENCH.

MONTREAL, May 19, 1884.

DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.

ABBOTT ès qual. et al. (defts. below), Appellants, and McGIBBON ès qual. (plff. below), Respondent.

Will—Power to divide among children—Exercise of power.

Where an estate was devised to A in trust, with power to divide among A's children in such proportion as A should appoint by his will, and in default of such appointment the estate to go to the children share and share alike : Held, that an appointment by will to certain of the children, to the entire exclusion of one or more, was a valid exercise of the power.

The appeal was from a judgment of the Superior Court, Montreal, Dec. 13, 1882, reported in 5 Legal News, page 431.

RAMSAY, J. This is an action by the tutor of Humphrey Gordon Eversley Macrae, claiming on behalf of his ward one-fifth part of a legacy under the will of the grandfather of the minor, William Macrae, as being one of the children of John Octavius Macrae, son of the testator. The clause of Wm. Macrae's will under which respondent claims is as follows :—

" I give and bequeath unto my executors " hereinafter named, for the use, benefit and " behalf of the children, issue of the present " or any future marriage of my son John " Octavius Macrae, one-third of the residue " and remainder of my estate and succession, " to have and to hold the same upon trust ; " firstly, to invest the proceeds thereof in " such securities as to them shall seem suffi- " cient, and from time to time to remove and " re-invest the same, and during the life of my

" said son, John Octavius Macrae, to pay the " rents and revenues derived therefrom to my " said son for his maintenance and support, " and for the maintenance and support of his " family. And secondly, upon the death of " the said John Octavius Macrae, then the " capital thereof to his children, in such pro- " portion as my son shall decide by his last " will and testament; but in default of such " decision, then share and share alike, as their " absolute property forever."

J. O. Macrae, on the 5th April, 1880, made his will by which he disposed of the above trust funds thus: " I will, bequeath, direct and appoint that my son John Ogilvy Macrae, and my three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, shall be entitled equally, share and share alike, to the trust fund over which I have a power of appointment under my father's will." On the 25th January, 1881, J. Oct. Macrae had a son, to wit: the said Humphrey, and on the 12th May, 1881, J. Octavius died.

It is contended that by the will of William Macraé a substitution was created in favour of all the children of John Octavius, that the *grevé* had power to distribute the fund in reasonable proportions, giving a substantial part to each, but that he could not exclude any one or more of the children, nor could he give merely an illusory sum to one or more, thus practically excluding him. That as John Oct. Macrae had excluded one of the children, he had not executed the power conferred upon him by the will of William Macrae, and that therefore the children came in share and share alike.

Appellant, on the other hand, contends that the right to distribute the fund among the children of John Octavius " in such proportion as my said son shall decide by his last will and testament," permitted John Octavius to select those of his children he chose.

Curious to say, this question of purely French law has been argued and decided in the court below without reference to a single French authority; but we have been referred to the English law as " written reason " " of the highest value." It will readily be admitted that written reason, wherever it comes from, is of the highest value, and not the less valuable because it is very scarce; but unfortunately the English law referred to seems to be nearly akin to unreason. It is only by the help of repeated legislation that the law there has come down to that reason from which I apprehend our law starts. It was, therefore, quite unnecessary for us to make any Act similar to the English Act, 37 & 38 Vic. cap. 37.

Under the Roman Law, and under the old *régime* in France, there was a great question as to the effect of the substitution of the children, or of a class, as for instance, relations, and at last it seems to have been determined, that when the children of the *grevé* were called *nominatim* they held of the original testator, and that the father could not affect the disposition. When the children of the *grevé* were called *collectively*, there was great difference of opinion as to whether the father could select among the children, so as to give to some and exclude others. Although the affirmative of the proposition cannot be supported on a strictly logical argument, it seems to have prevailed. The argument, such as it was, is as follows: The object of the testator is the governing consideration in the interpretation of wills (*ff* de Reg. jur. xii.); creating a substitution in favour of children or of relatives indicates an intention of keeping the property in the family, therefore when the *grevé* selects one or more in the class named, but particularly among his children he is giving the most beneficial effect to the disposition of the testator. This argument is to be found in 1 Du Perier Liv. 3, Qu. 2.

The following are some of the authors who have supported the affirmative:—

" Si le testateur en faisant le fidéi-commis a usé d'un nom collectif, et sans nommer les personnes, a généralement appelé les enfants de l'héritier, ou ceux de la famille, en ce cas l'héritier est en faculté d'élire tel des substitués que bon lui semblera; d'autant qu'en cette disposition, le testateur n'a pas considéré les personnes, mais la qualité des fidéi-commissaires, laquelle se trouvant toute semblable en chacun d'eux, il est suffisamment satisfait à la volonté du défunt par l'héritier qui transporte tout l'héritage à un des substitués: *Verum est enim in familia, vel liberis*

reliquisse, licet uni reliquerit, dit Martian. Et c'est à cette espèce que les réponses de Papinian et autres Jurisconsultes doivent être rapportées. (Arrêts d'Olive, Livre 5, ch. xiv, p. 705.)

"Il est vrai que si le testateur n'a point appelé les fidéi-commissaires en particulier, mais en général, par un nom collectif, et que la restitution soit conçue en termes fidéi-commissaires, dirigés à la personne de l'héritier, comme s'il l'a chargé de laisser les biens à ses enfants, ou à ceux de la famille, il peut choisir entre ses enfants au premier cas, ou parmi ceux de sa famille, au second, celui qui lui sera le plus agréable, et il satisfait à la volonté du testateur, pourvu qu'il ne mette pas les biens hors de sa famille, ou s'il les laisse à l'un de ses enfants." (Ricard, Tom. II, Traité III, ch. xi, Part II, No. 63.)

It will be observed, however, that this is not exactly the question here. There is a special power given to select, and so far as I know the exercise of that power to favour one to exclude absolutely another has never suffered any difficulty. See du Perier already cited, p. 257-8: "Mais ces mêmes lois nous font voir aussi qu'il n'est pas absolument nécessaire que la faculté du choix et de l'élection soit donnée expressément par le testateur, et qu'elle le peut être tacitement, et par les conjectures tirées des termes de sa disposition et de la qualité des personnes et autres circonstances, qui montrent que l'élection favorise l'intention et la disposition du testateur, qui est une proposition d'autant plus équitable, qu'il s'en peut rarement ensuivre de fâcheux inconvénients; et qu'au contraire elle peut produire de très-bons effets....

"C'est pourquoi encore que régulièrement l'héritier grevé n'ait point de choix et d'élection quand le testateur ne la lui a pas donnée. Cette règle doit cesser quand les circonstances de la disposition font voir que l'élection n'est point opposée à l'intention et à la fin que le testateur s'est proposée; et c'est ainsi que Berengarius Fernandus l'a entendu, et que les arrêts du Parlement de Toulouse l'ont jugé, comme il parait par le discours de tous ces auteurs," &c.

But it may be said that giving one child is not giving each a proportion. The answer is, not strictly, but it is an exercise of the power as substantially as if the *grevé* had given a nominal sum, which evidently he had a right to do. To adopt the notion of English equity, now abandoned, would be to involve ourselves needlessly in a labyrinth of troubles, into which we are not invited by any authority of our law. To contend that the original testator's manifest intention was to be defeated because of the failure to do what is meaningless, appears to me to be untenable under any reasonable system of law, and certainly cannot be entertained for an instant under ours.

The following is the judgment of the Court:—

"Considering that the late William Macrae, in and by his last will and testament executed before witnesses, on the 3rd of March, 1868, gave and bequeathed unto his executors for the use, benefit and behalf of the children, issue of the then present, or any future marriage of his son, John Octavius Macrae, one-third of the residue and remainder of his estate, to pay the rents and revenues thereof to his said son, during his lifetime, and after the death of the said John Octavius Macrae, to pay the capital thereof to his children in such proportion as the said John Octavius Macrae should decide by his last will and testament, but in default of such decision, then share and share alike, as their absolute property for ever;

"Considering that it is also in evidence that the said John Octavius Macrae was twice married, firstly to Dame Victoria St. George Ritchie, of which marriage there was issue four children, to wit: Lucy Caroline Macrae, now of age, and one of the defendants (now appellants), John Ogilvie Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae, who are still minors, and are now represented by their tutor, Harry Abbott, the other defendant (appellant); and secondly, on the 29th Nov. 1879, to Dame Mary Ann Jennay, of which marriage there is issue one child, to wit: Humphrey Gordon Eversley Macrae, born on the 25th of January, 1881, and now represented by his tutor, the plaintiff (respondent) in this cause;

"Considering that the said John Octavius Macrae died on the 12th of May, 1881, after having made his last will and testament of

date the 5th of April, 1880, whereby he directed that his son John Ogilvy Macrae, and his three daughters—Lucy Caroline Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae—should be entitled equally, share and share alike, to the trust fund over which the said John Octavius Macrae had a power of appointment, under his father's will;

"Considering that the said John Octavius Macrae had by law under the disposition of the will of his late father, William Macrae, not only the right to apportion between all his children as well those of his then existing marriage or of any future marriage, but also the right to dispose of said property in favor of one or more of his said children to the exclusion of the others as he has done by his said last will;

"And considering that the respondent in his said capacity has no right to any portion of the property claimed by his action, and that there is error in the judgment rendered by the Superior Court, etc., etc. This Court doth reverse," etc., and action dismissed.

Judgment reversed.

Tait & Abbotts for Appellants.

Girouard, Wurtele & McGibbon for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

MOFFATT ès qual. (deft. below), appellant, and BURLAND (plff. below), respondent.

Powers of assignee of insolvent—Concealed Sale.

1. *A person holding property as trustee under a deed of conveyance from an insolvent firm is by law entitled to ester en justice for the protection of the rights conveyed to him by such deed; and accordingly in the present case it was held that such trustee was entitled to plead in his own name to an action of revendication based on a pretended sale from the insolvents to the plaintiff.*
2. *Though déplacement is no longer necessary to the validity of a sale, yet where there is no déplacement fraud and simulation are easily presumed; and where a pretended sale was a mere contrivance intended to obtain, under color of a sale, a security upon the effects, and thus avoid the delivery of possession which is essential to the validity of a pledge, it was held inoperative.*

The appeal was from a judgment of the Superior Court, declaring the respondent proprietor of certain machinery, lithographic printing presses, etc.

RAMSAY, J. This is an appeal from a judgment maintaining a *saisie-revendication* of certain articles used in the business of lithography. The action is directed against the members of a firm formerly existing under the style of Gebhardt & Co., and against the appellant, assignee of the firm, to whom all the property has been absolutely transferred for certain purposes.

The appellant alone pleaded, setting up that the deed on which respondent relied was fraudulent and simulated as between him and Gebhardt & Co. The judgment maintained the action on two grounds; the first of which was that the plea of simulation and fraud was no answer to the action in the mouth of appellant, because he was only a trustee, and that, under Art. 19, C.C.P., no one can plead in the name of another. It is perfectly true that no one can plead in the name of another, but Moffatt pleads in his own name under the deed of conveyance to him of the rights of all the parties. He has, therefore, a legal title, and I think he can plead in his own name, and no one has an interest to raise the question, and certainly not the parties to the deed of trust, one of whom is the respondent. The case of *Brown & Pinsonneault* is not in point, and *De Chantal & Thomas* is, if anything, against respondent's pretension. It seems to me a more subtle question presents itself, and that is, how far, under a joint assignment of the kind, and representing Gebhardt & Co. as well as the creditors, the appellant can urge the fraud and simulation of Gebhardt & Co. We think he can, and for this reason—that the assignment conveyed to Moffatt the rights of the creditors, who could contest the validity of the deed between Gebhardt & Co. and Burland, and that Gebhardt & Co. being parties to the deed did not of itself affect the rights of the creditors conveyed to Moffatt.

We next come to the question of fraud and simulation. It is admitted that there was no *déplacement*, but it is contended that *déplacement* is no longer necessary under the Code, which makes the purchaser proprietor of the thing sold by the consent of parties alone, without even tradition, and much more, then, without *déplacement*. This view seems to have the express letter of the law in its favour, so that the remaining in possession by the vendor under a lease becomes only an indication under certain circumstances of simulation, and not a presumption. But in the Supreme Court, in the case of *Bell & Rickaby*,* a doctrine was held, which practically brings us back to the old rule, for there is really no difference in saying that without an effective tradition by *déplacement* the sale shall not affect third parties, and saying that where there is no *déplacement* fraud and simulation will be presumed. It is true that, in the case of *Cushing & Dupuy*,† the Privy Council did not go quite so far, and they found proof of simulation (not fraud, for it was not pleaded) in the absence of price. They said it was pledge, and the pledge was not transferred. That is, without any allegation of fraud, they said a contract was not that which the parties said it was. Although it would be possible to draw an argument in support of the opinion I expressed with the majority of the court in the case of *Bell & Rickaby*, and with the minority in the case of *Cushing & Dupuy*, I do not think this would be fair to the parties. It seems to me that both of our courts of appeal have declared themselves against concealed sales, and I am very glad they have been able to find law for it, which I willingly take from them on trust. In several cases we have applied the doctrine in the most absolute form. I may instance a case decided at Quebec; and again, recently here, in the case of *Thibaudeau & Mailly* (January, 1883), we held that, without fraud, where the object of a relative was to aid his kinsman, the deed would be considered simulated. This is going back to the old law *sans phrase*.

We are, therefore, to reverse the judgment with costs.

* 2 Supreme Court Rep. 560.
† 3 Legal News, 171.

The following is the judgment of the Court:—

"Considering that it appears by the evidence adduced in this cause that the pretended sale by the firm of G. J. Gebhardt & Co. to the Canada Paper Co. (limited), by the deed executed before Beaufield, notary, on the 27th April, 1880, of the plant, machinery and other movable effects enumerated in the list or schedule thereto annexed, comprised the whole or nearly the whole of the stock-in-trade, plant, machinery and effects at the time in use by the said firm of G. J. Gebhardt & Co. for the carrying on of their business, and without which they could not have carried it on;

"Considering that the sum of $5,000 which the said firm of G. J. Gebhardt & Co. thereby acknowledged to have received from the Canada Paper Company as the consideration of the said pretended sale of said plant, machinery and effects was a fictitious price, the said plant, machinery and effects being at the time worth more than double that amount, and that said sum of $5,000 was not then actually paid by the said Canada Paper Company, and that the true consideration for said pretended sale consisted of advances partly then already made and partly thereafter to be made by the said Canada Paper Company to the said firm of G. J. Gebhardt & Co.;

"Considering that it appears by said evidence that it was understood by the parties at the time of the execution of the said deed, that when the advances so made and to be made by the said Canada Paper Company to the said firm of G. J. Gebhardt & Co. should be reimbursed, the Canada Paper Company would reconvey the said plant, machinery and effects to the said firm of G. J. Gebhardt & Co.;

"Considering that it is made to appear by said evidence and the circumstances under which the said deed was passed, that the sale thereby pretended to have been made was simulated, and that the parties to the said deed intended thereby not to actually sell but only to pledge the said plant, machinery and effects as security for the reimbursement of the said advances;

"Considering that the said parties to the said deed gave to the transaction the form of

a sale in order to avoid the necessity for an actual delivery to and a possession by the pledgee of the said plant, machinery and effects, as required by article 1970 of the Civil Code, to entitle the pledgee to a privilege and preference over the property so pledged;

"Considering that under the circumstances and without an actual delivery and possession by the pledgee of the property, the said deed can have no operation as against the rights and recourse of the creditors of the said firm of G. J. Gebhardt & Co., or to bar or obstruct their remedies in regard to it;

"Considering that by deed executed before Isaacson, notary, on the 13th day of June, 1881, the said firm of G. J. Gebhardt & Co. and the partners thereof sold, assigned, transferred and set over and delivered up to the appellant in this cause all their stock-in-trade, goods, chattels, fixtures, plant, book-debts, notes, accounts, books of account, and all other their personal estate and effects, including the whole or what remained as representing the plant, machinery and effects enumerated in the list or schedule annexed to said deed so executed on the said 27th day of April, 1880, and including all the plant, machinery and effects claimed by and seized at the instance of the respondent under the writ of *saisie-revendication* issued in this cause, to have and to hold the same upon the trusts and for the purposes mentioned in the said deed so executed on the 13th day of June, 1881, more especially for the benefit of the creditors of the said firm of G. J. Gebhardt & Co.;

"Considering that at the time of the issuing of the writ of *saisie-revendication* in this cause and the seizure thereunder made at the instance of the respondent, the appellant was lawfully in possession of all the moveables, effects and property claimed by the respondent, and seized at his instance under the said writ of *saisie-revendication*, and was so in possession and of right held the same under and in virtue of the said deed so executed before Isaacson, notary, on the 13th day of June, 1881, and from having had the same delivered to him in pursuance of the said deed, whereby and by reason of said delivery and possession, and the right thereby and by the said deed vested in him, he acquired a right of property and of possession in and over said plant, machinery and effects, including those so claimed and seized in this cause, and that by priority and preference over any claim or pretention thereto on the part of the said Canada Paper Company or assigns;

"Considering that the respondent, as a creditor of the said firm of Gebhardt & Co., was a party to the said deed of sale and conveyance so made to the appellant, bearing date the 13th day of June, 1881, and consented thereto; and considering that the appellant is entitled to oppose to the said respondent all the objections he might have opposed to the said Canada Paper Company, and to contest the validity of the said deed of pretended sale of date the 27th day of April, 1880;

"And considering that the appellant is not a mere attorney, but on the contrary is vested as trustee for the creditors of the said firm of G. J. Gebhardt & Co., with all the rights purporting to be conveyed to him by the said deed executed before Isaacson, notary, on the 13th day of June, 1881, and is by law entitled to *ester en justice* for the protection of said rights;

"And considering that there is error in the judgment rendered by the Superior Court in this cause at Montreal on the 28th day of February, 1882, the Court of Our Lady the Queen now here doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action and demand *en revendication* of the said respondent, and doth award to the appellant *main-levée* of the seizure of the goods and chattels, property and effects seized in this cause, and doth condemn the respondent to pay to the appellant as well the costs incurred in the Court below as in this Court. (The Hon. Mr. Justice Monk dissenting)."

Judgment reversed.

Dunlop & Lyman, for appellant.

S. Bethune, Q. C., and *J. Doutre, Q. C.*, counsel.

Archibald & McCormick, for respondent.