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MALICIOUS PROSECUTION.

Actions of damages for malicious prosecution are surprisingly numerous in our Courts, and although the leading principles which apply to cases of this description are tolerably well settled, we find judges frequently coming to different conclusions as to the proper mode of disposing of them. A recent case before the Court of Appeal in England—*Hicks* v. *Faulkner* (46 L. T. Rep. N. S. 127), which affords the latest exposition by the English judges of an important doctrine in connection with this branch of law, is worthy of attention. The defendant prosecuted the plaintiff for perjury alleged to have been committed in an action for rent brought by the defendant against the plaintiff's father. The plaintiff was acquitted, and thereupon sued the defendant for damages for malicious prosecution. The jury were directed that in an action for malicious prosecution, the plaintiff must prove affirmatively the absence of reasonable and probable cause and the existence of malice. The learned judge then told them if they came to the conclusion that the plaintiff had spoken the truth, but that the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the upshot of a fallacious memory, and acting upon it he honestly believed that the plaintiff had sworn falsely, they would not be justified in finding that the defendant had maliciously, and without reasonable and probable cause, prosecuted the plaintiff. This was held a right direction by the Court of Appeal. The authorities referred to were *Mitchell* v. *Jenkins*, 5 B. & Ad. 594; *Lister* v. *Perryman*, 23 L. T. Rep. N. S. 269; *Turner* v. *Ambler*, 10 Q. B. 252; *Bromage* v. *Prosser*, 4 B. & C. 255.

TESTS BEFORE JURIES.

Baron Huddleston lately gave rise to some criticism by the report that he had sanctioned a test of skill in the presence of the jury. The case which was being tried was *Belt* v. *Lawes*. Mr. Belt, who is a fashionable sculptor, was suing the *Vanity Fair* newspaper for libel in alleging that he is not an artist of merit, and that his pretended works are executed by talented subordinates. It was suggested during the trial that Mr. Belt might give a practical proof of his skill in the presence of the jury, and Baron Huddleston is reported to have said, "If the jury express a wish to see Mr. Belt put to the test, I shall certainly not prevent it."

The *Law Times* thereupon observed: "The above case is probably the first in which it has been suggested that an artist whose skill is impugned should prove it by practical operations in court. The inconvenient results which would probably flow from such a practice are obvious. The practical operation would not be recorded, although it might produce different impressions upon different minds. The operator and his friends might consider the test conclusive in his favor; another view might be taken by the other side. How move against a verdict based on this operation on the ground that it was against the weight of evidence? If the test is to be applied to a sculptor, why not to a *prima donna?* We have known of a case in which an *artiste* sought damages for wrongful dismissal, and the justification was that she could not sing. Would a judge have allowed her to sing to the jury? If so, the rule might be extended without limit, with consequences terrible to contemplate."

Baron Huddleston would now have it understood that he was wrongly reported, and when, at Carnarvon, in an action for personal injuries against a railway company, the plaintiff's counsel asked the Judge to allow the plaintiff to walk across the court before the jury, with a view to convince them that his lameness was not assumed, Baron Huddleston declined to allow the test, and observed that ever since he had been reported to have said, during the hearing of the case of *Belt* v. *Lawes*, that he should allow the plaintiff to make a bust of him (Baron Huddleston) in court, he had been pestered to allow all kinds of tests to be gone through in Court before the jury; and he wished it to be known that the press had entirely misrepresented him in this matter, and that he had never indicated that he should allow such a course to be taken."

THE LEGAL POSITION OF THE SUEZ CANAL.

International rights over artificial waterways from sea to sea, and their relation to those of the power owning the territory in which such ways are situated, will probably form an important branch of the international law of the future. At present there are hardly any instances upon which a discussion of such rights can be founded. But in view of the important questions which must soon be settled as to the Suez Canal, it may be interesting to examine what the legal position, so far as law can be held to apply to a subject matter so new and so anomalous, of that undertaking is.

The relations of the company to the Egyptian government and its suzerain are defined by concessions granted by the Khedive in 1854 and 1856, and finally ratified by the Sultan's firman of the 22d February, 1856.

The most important articles provide that the canal shall be kept open at all times as a neutral channel to the merchant ships of all nations without distinction or preference, the company being allowed to charge a toll not exceeding 10 francs per ton. The company is declared to be an Egyptian one, and all disputes between it and the Egyptian government or third parties are to be decided by the local tribunals according to the laws of the country and to treaties; but as regards its internal affairs, and the rights of its shareholders, it is declared to be a French Société Anonyme, and subject to the laws regulating such societies. The canal and its dependencies are made subject to the police of the Egyptian government, in the same manner as the rest of its territory. Certain land upon the banks is given up to the company, but the government reserves power to take back and occupy any points of strategic importance, agreeing not to interfere with the navigation of the canal. The concession terminates at the end of ninety-nine years, unless a fresh agreement is entered into, and it is provided that the 15 per cent. share of profits given to the Khedive is to be increased by 5 per cent. on every such fresh agreement till it has reached 35 per cent.

There is nothing in this concession which in any way abandons the sovereign rights of the Egyptian government or its suzerain, the Sultan, over the canal, nor which gives any rights to any other Power. It is simply a private contract between the Khedive and the company, ratified by the Sultan. Acting upon this view the company, soon after the opening of the canal, obtained leave from the Sultan to charge a sur-tax of one franc per ton for the passage of vessels, and they then further increased the toll without such leave by charging upon what they considered the actual capacity, instead of, as at first, upon the registered tonnage of vessels using the canal. The Sultan, pressed by the Powers to put an end to this exaction, called a Conference in October, 1873, at Constantinople, to agree upon a general standard of tonnage. The Conference wisely refused to embark upon this general question, but agreed upon a mode of measurement which they considered fair for the Suez canal, and recommended the Porte that the company should be compelled to adopt this measurement, and at the same time should be allowed to charge a sur-tax of three francs per ton, to be reduced upon a sliding scale as the tonnage of ships using the canal increased. The Porte accepted these recommendations, and at the same time voluntarily declared that the Turkish government would not allow any increased toll to be levied without its consent, and would come to an understanding with the principal Powers interested before coming to a decision.

The Powers throughout the negotiation recognized the absolute right of the Porte to regulate the tolls, and the recommendations of the Conference were carried out as the act of the Porte. The company refused to accept the terms agreed upon, and even issued a notice that the canal would be closed. They only yielded under pressure of the dispatch of an Egyptian force to seize the canal; and accepted the new dues only under protest until 1876, when an agreement was come to slightly modifying in the company's favor the terms imposed by the Conference. About the same time a dispute arose as to jurisdiction, the company claiming to have all disputes in which they were concerned tried by the French Consular, instead of the Egyptian, Court. The French government, however, repudiated any claim that the company was solely under French jurisdiction, and the controversy came to an end on the establishment of the international tribunals in Egypt in 1874. The purchase of the Khedive's shares by the English govern-

ment, though it gave that government a *locus standi* to enforce the rights of the company in the agreement with the Khedive and the Sultan, could not affect its international position, and some negotiations, which were started shortly before that purchase, for the handing over the management of the canal to an International Commission, fell to the ground before the decided opposition of the Porte. At the outbreak of the Russo-Turkish war M. de Lesseps proposed a general agreement between the European governments that the canal should at all times be open for ships of war as well as of peace, the disembarkation only of troops and munitions of war being forbidden. Lord Derby, however, refused to entertain the proposal of any such agreement, and contented himself with a notice to both the belligerent governments that any attempt to stop the canal would be incompatible with the maintenance by Her Majesty's government of passive neutrality. It would seem, therefore, that there are no special international obligations affecting the Suez canal at all. It is simply a part of the territory of Egypt and her suzerain, the Sultan, subject in all respects to their control, but leased for ninety-nine years to a company formed under and governed by French law, upon terms which, in so far at least as regards the tolls to be levied for passage, the Sultan has voluntarily declared he will not alter without consulting the Powers. It is also subject to whatever rights of user can be claimed over it by international law in consequence of its being one of the highways of the world, and the only passage between two open seas, which rights have been to some extent recognized by the voluntary declaration of the Sultan above referred to. What the measure of such rights may be it is impossible to say, but they cannot be greater than those which obtain in a natural strait between two seas where both shores are in the territory of the same power. It seems to be the accepted opinion of jurists that in such a case, while the territorial power has no right to prevent the passage of merchant ships, no other power has a right to claim passage for ships of war, or troopships. In law, therefore, as well as in fact, the canal can only be kept open for English troopships and ships of war either by special treaty with all the European powers or by England's possessing in some form or another the control of the territory within which the canal is situated.—*London Law Times.*

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, January 31, 1882.

JOHNSON, TORRANCE, RAINVILLE, J J.

[From S. C., Montreal.

LA MUNICIPALITÉ DU VILLAGE DE LA POINTE CLAIRE v. LA CIE. DU CHEMIN DE PEAGE DE LA POINTE CLAIRE.

Injunction—Removal of a work completed—Interest of party complaining.

This case was inscribed by the defendant on a judgment of the Superior Court, Montreal Papineau, J., Dec. 24, 1881 :—

JOHNSON, J. This was an application for a writ of injunction to order the removal of certain turnpike gates, and to restrain and forbid the taking of tolls at them; and it was refused by the learned Judge to whom the application was made, on the grounds that may be shortly stated as: 1st, that the statute of 1878, c. 14, authorizes injunctions only to *suspend* certain acts, proceedings and operations (Sec. 1st), and 2ndly, as regards the tolls, on the ground that they were taken from the public, and not from the party plaintiff, who had no right to complain on their own behalf.

The case was argued here altogether upon the questions of the right—1st, to erect the gates, and 2ndly, to exact the tolls, as if an injunction would be granted in all cases where a violation of right had been committed, without respect to rules of expediency and justice. Now, the reasons assigned by the learned Judge for refusing the writ were certainly of a very grave character, and should have been argued. There were two things asked:—first, it was asked to enjoin the removal of the gates which were already constructed and put up; secondly, to enjoin the non-exaction of tolls. The learned Judge below held, as regards the gates, that he could not grant an injunction to remove a thing already done and accomplished. As respects the exaction of toll, that question stood upon a different ground altogether: it was a thing which was being done, and which it was possible, as far as the nature of it went, to stop, pending the trial

of the question of right; but the injunction was refused on the ground that the party asking for it was a municipal body from whom no toll could be asked.

The first point is whether an injunction (which by the express terms of our statute can only suspend the exercise of an asserted right until the legal existence of that right is determined) can properly issue to remove and undo what is already completely done and accomplished. The power given by our statute is in express terms, and is only that of "ordering the *suspension* of any act, proceeding, operation, work of construction, or demolition," &c., &c. (Sec. 1.) This is the only power given as regards this class of cases where physical acts are complained of, and this is, as a general rule, in complete accord with the English law. "It is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order. In interfering by interlocutory order the court does not profess to anticipate the determination of the right; but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime *in statu quo*." This is the general rule expressed in the words of a well-known *ex professo* treatise—on injunctions—by Mr. Kerr, p. 12, and based upon a large number of leading cases which are cited, and are of binding authority.

But although this is the general rule of our statute, and seemingly of the English law also, I am not prepared to say that there can be no case in which a defendant can be compelled to restore a thing which has been already done to its former condition, and so effectuate the same results as would be obtained by ordering a positive act to be done. Whether our statute permits it—or, indeed, whether our statute is the limit of the law of injunctions in this country, are very important questions which we do not now decide. As regards the highly artificial rules of the law of injunctions in England, it is certain that the courts of equity there have had to adapt their proceedings to the varying necessities of justice in a great variety of cases, and on referring to the treatise already quoted, we find at p. 230 that the thing asked for here may be sometimes allowed. "Though a court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, it may, by framing the order in an indirect form, compel a defendant to restore things to their former condition, and so effectuate the same results that would be obtained by ordering a positive act to be done. The order when so framed is called a mandatory injunction. The jurisdiction has been questioned; but its existence must be admitted beyond all doubt. It must, however, be exercised with caution, and is strictly confined to cases where the remedy at law is inadequate, &c. * * * * * If there is a full and complete remedy at law, there is no case for a mandatory injunction."

If, then, our law permits this particular form of injunction in any case, we should have to see, before granting it, that there was no adequate remedy at law,—which can never be admitted in the present case, where besides the direct action, there is the summary indictment for nuisance in obstructing a highway, if the plaintiff's pretensions are well founded. Therefore, on the first point, I am against the petition for injunction, but not for the reason assigned in the judgment. I do not venture to say, however, that it is a bad reason, under our statute, if that is the limit of our jurisdiction; but I have doubt upon the point, founded on the authority of the cases cited in note at p. 232 of Kerr, to the effect "that there is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the finding of the bill."

The second point, as to the exaction of the tolls, rests on different ground. If this were asked by an individual from whom toll had been exacted or demanded, there might be no difficulty; but it is asked by a municipality in its corporate capacity, and which as such could certainly never be called upon to pay toll at a turnpike gate, and is therefore without interest. That ground of the judgment, therefore, should be maintained. Of course we express no opinion as to the right; we only say the exercise of the right is not, under the circumstances, by injunction; that the remedy by action, or by indictment, is open; and we will not interfere with the discretion exercised by the Judge below in

refusing the writ. It will perhaps not be considered obtrusive, if I note here that under the municipal code of the Province this case seems to be expressly provided for by articles 386-7 and 88.

Judgment confirmed.

R. & L. Laflamme for plaintiff.
St. Pierre & Scallon for defendant.

COURT OF REVIEW.

MONTREAL, January 31, 1882.

JOHNSON, RAINVILLE, PAPINEAU, J J.

[From S.C., Montreal.

Dame R. GORRIE et vir v. OGILVY, & TEMPEST, *mis en cause.*

Husband and wife—Payment by wife of husband's debt.

JOHNSON, J. By this action, Mrs. Grant (*née* Gorrie) sought to set aside a deed of transfer and subrogation made by her in favor of the defendant on the 10th October, 1873. She alleged that she was *séparée de biens* from her husband, who carried on business as a haberdasher, under the firm of W. Grant & Co., and the defendant was one of the firm of Ogilvy & Co., doing business here, and also at Manchester in England; and that by the deed in question she had transferred, with promise of warranty to him, "all the right, title and interest "of her, the said Dame Rachel Gorrie, in her "capacity of, and as one of the legatees and "legal representatives of her father, the late "Daniel Gorrie, deceased, in his lifetime of the "City of Montreal, esquire, to the sum of $3,000 "currency, part and parcel of the amount com-"ing to her under and by virtue of a certain "sale by authority of justice, of certain real "estate, the property of the estate of the said "late Daniel Gorrie, sold at the office or auction "rooms of John J. Arnton, auctioneer, on Tues-"day, the 10th of June, 1873, with all interest "to accrue thereon from the date of the trans-"fer—subrogating the said John Ogilvy in all "her rights, claims and privileges as to the "said sum and interest." And she alleged further that in the deed, the transfer was declared to have been made for and in consideration of the like sum of $3,000 paid in cash at the time of passing it, whereas that declaration was false, and she has never, either then, or before, or since received anything from the defendant in the way of consideration. Then it is further alleged that this transfer was procured from her by the solicitations and importunities of the defendant and of the plaintiff's husband; and that the sum transferred was applied *to pay or* to secure (*sic*) a debt due by her husband to the defendant,—she herself owing him nothing; and finally, it is said this deed being in reality made to secure her husband's debt, it is void by law; and Tempest, the *mis en cause*, who was appointed by the deed to receive and pay over the money transferred, and who has paid it, is put into the case to look after his interests if he should have any.

The plea admits the deed, but alleges a good and valid consideration. Then it relates the history of the transaction: that Grant, as long back as 1868, had a credit at Ogilvy & Co.'s to the extent of $8,000, for part of which Mr. Gorrie, his father-in-law, had given his note as a security, and there was a writing between Gorrie and Ogilvy & Co., evidencing that Gorrie's liability was in no case to exceed the $4,000; that after this Ogilvy & Co. continued to supply goods to Grant & Co. up to the time of Gorrie's death in June, 1872; that he died intestate, and Mrs. Grant, the plaintiff, became entitled, as one of the heirs, to a sum of over $3,000, and Grant being then indebted to Ogilvy in some $14,000, and Gorrie's estate being liable for the $4,000 which had been guaranteed by the note, the plaintiff freely and voluntarily offered to give up $3,000, which she inherited, and it was agreed that in consideration of her transferring the amount so coming to her, Ogilvy & Co. should credit Grant & Co. with that sum, and Gorrie's estate, and also his daughter, the plaintiff, as one of the heirs, should be released from liability. That further goods were supplied to Grant & Co., who continued in business and continued to make a livelihood out of it up to the time of his insolvency.

It must be said that the precise ground of action on which the plaintiff relies, is not stated with conspicuous clearness in this declaration. It says the deed was made as a security, *or* as a payment, *or* was obtained unduly, without her free consent. Of these three different grounds, which is the one relied upon? The effect of the wife having become security for her husband's debt might be very different from that of her

having paid his debt; and the third ground would be different from both the others. However, this declaration is pleaded to, such as it is; and the plea, though it contains a good deal that is superfluous, contains also something that is very precise. It says plainly that the transfer, or renunciation, or subrogation, or whatever you may call it, was made to pay the husband's debt. The declaration says so too. It is true it says other things besides: but it certainly says, as one of them, that it was made as a payment of the husband's debt *pro tanto*. Then why go into the question whether this was a security or suretyship? There is one thing upon which both parties agree—though they may agree upon nothing else. The plaintiff says it was a payment, and the defendant says so too. There would remain nothing then, apparently, but the question of law whether a wife may lawfully pay her husband's debt. Undoubtedly, however, what the plaintiff meant to rely upon, at the time of the hearing, was that this instrument was a security given by the wife, by which she had contracted an obligation prohibited by the terms of the law. It is very probable that the true ground of the action was not clearly discerned at the moment it was instituted. The same may perhaps be said of the defence, for the plea was changed or supplemented after the *enquête*. However that may be, the substantial question submitted or intended to be submitted to us now, is whether this instrument was a security for, or simply a payment of, the husband's debt. I will not now discuss the question of law. It has been very fully discussed in previous cases, with the result now familiar to the profession, that a payment made by the wife is perfectly lawful. Whether we look at the narrow text of the code, or the ordinance, 4 Vic., c. 30, sec. 36, which it reproduces, or whether we go back to the source of the law, (the Senatus-consultum Velleianum) or look at it as it prevailed in France, or in parts of France, up to the time of its repeal by Henri IV, in 1606, or finally look at the more recent decisions in this country, we find the line of demarcation clear as to what the wife might, and what she might not do. Wherever the rule of the Roman law prevailed, she could renounce: she could pay; but she could not engage or bind herself. Of course, in this country, she could do much more before the passing of the 4 Vic., c. 36, for the repeal in France, or in parts of France, of the *senatus consultum velleianum* by the edict of 1606 left her unrestricted until the partial reimposition of the Roman rule of law by the ordinance of 1841.

The question is, therefore, as to the extent of the restriction operated by the ordinance; and the reasoning of the present learned Chief Justice of this Court, then a judge of the Court of Appeals, in the case of *Boudria* v. *McLean* (6 L. C. J., p. 73), appears to me unanswerable. He said, in commenting on the ordinance:—"The "Legislature in order to facilitate the alienation "of real estate, have abolished general hypo- "thecs, restricted the number of privileges, and "made many other changes of the same kind; "and by the clause which immediately pre- "cedes that under consideration, have given "married women a power of an extraordinary "character, and one certainly liable to some ob- "jections; namely, that of barring their dower "not only for themselves, but for their child- "ren; and it cannot be supposed that, at the "same time they conferred this new and ex- "traordinary power upon married women, they "intended to deprive them of a right of a much "less dangerous character, which they enjoyed "under the common law; and the continuation "of which was quite as necessary for the object "the Legislature had in view as was the grant- "ing of the new, and, in some respects, objection- "able power which is expressly given."

That was a case, as is well known, where the power which was in question was the renunciation of the wife's *hypothèque* for her *reprises matrimoniales*; but the reasoning is as conclusive in the present case as it was in that. Therefore, if this instrument which it is sought to set aside by the present action was an obligation by which she bound herself to her husband's debt, it was void. If, on the other hand, it was a payment, she has no action. The debt which she transferred is proved to have been paid. What obligation could she contract? By law she was only *garant* that the money she transferred was due. There was no *garantie conventionnelle*. It was a payment, and the mode of payment was by the renunciation and transfer of the money coming to her, and putting her husband's creditor in her place; and of course it is none the less a payment, because she herself may have owed no debt at the time; for

payment may be made to a stranger, without even the debtor's knowledge.

The Court attaches no importance to the word "security" being used in the books of account. If learned counsel can differ as to whether it was a security or not, the point may well have perplexed a commercial clerk. It was contended also that the plea should not have been allowed to be amended. We all think otherwise. The amendment appears to be a mere condensation of the first; and if it had remained as it was, it could not have affected the result of the case. The point of non-consent is also without foundation. If this lady was asked to pay her husband's debt, she had power to do so, or to refuse. The law permits it, and there is nothing whatever in the evidence as to the want of her free consent. Under Art. 989, a contract is none the less valid because the consideration is not expressed, or is incorrectly expressed in the writing which is the evidence of it. These are all the points in the case, and our judgment is to confirm with costs.

Judgment confirmed.

L. H. Davidson for the plaintiff.
Kerr & Carter for the defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, November 22, 1881.

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

THE MOLSONS BANK (claimants on the insolvent estate of U. J. Robillard), Appellant, and DAME VIRGINIE LANAUD, (creditor and *cessionnaire*), Respondent.

Warehouseman—34 *Vict.*, *c.* 5, (*Can.*)

By the Statute 34 *Vict.*, *c.* 5, *s.* 48, *the owner of goods giving a warehouse receipt as warehouseman is put in the same position as any other warehouseman so doing.*

Under Sect. 50, *the bank does not forfeit its right of pledge by not selling the goods within six months.*

RAMSAY, J. This case comes up on the contestation of appellants' claim against the estate of an insolvent. The Bank, appellant, held two warehouse receipts granted by the insolvent to the Mechanics Bank, and transferred to appellants. The validity of one of these receipts is alone contested, being No. 22 of the record. It bears date 11 Nov. 1878.

The respondent, who is the wife of the insolvent, was not only a creditor of his estate, she was also *cessionnaire* of his estate under the insolvency and undertook to pay 25 per cent on the unprivileged debts. Her contestation sets up that the amount due the bank is not $5,500 but the smaller sum of $3,538.20, by reason of payments made on account, and it is admitted that this is correct. She also says that she is only obliged to pay 25 per cent of this balance of $3,538.20 or $884.55, the said warehouse receipt being null, prescribed and extinguished more than six months before the insolvency. She also says that the transfer to appellants from the Mechanics Bank was subsequent to the insolvency of the latter, and that she has a right to set up against the appellant what she could have set up against the Mechanics Bank.

On these issues the case was heard, there being no difference as to the facts.

The Superior Court dismissed the claim, on the ground that it appeared that the receipt was given by the insolvent, and that he was not a warehouseman, and that he could not give such a receipt and keep possession of the things.

It is quite evident by the facts relied on by both parties that the insolvent gave the warehouse receipt of goods in his own warehouse. It nowhere appears whether the insolvent was a warehouseman or not. There was no issue raised on this point, and the respondent admits by part of her plea that the receipt unless prescribed is a warehouse receipt. The particular wording of the judgment gives rise to some difficulty. It says: "*le dit failli* n'avait pas droit, n'étant pas une des personnes mentionnées dans le dit acte, de donner aucun reçu d'emmagasinage, tout en gardant la possession des marchandises." If it is intended to say that not being one of the parties mentioned in the act, the insolvent could not therefore give a receipt and keep possession of the goods, I think that the judgment goes too far, for it purports to decide a fact which is not in issue; but if it is intended to decide that no one can give a warehouse receipt, as warehouseman of his goods, then we have a new question and one of some moment.

Before proceeding to examine this second view I may observe that in the case of *Robertson & Lajoie*, this court held that the parties signing the receipt could not pretend against a

holder in good faith that the signers were not warehousemen. The dissent turned entirely on a question of pleading, and I do not understand there was any difference among the members of the Court as to the point now in question. Now it appears that the respondent is exactly in the position of the person who signed the receipt. She is the *cessionnaire* of the person who signed it, and her position of creditor is merged in that of *cessionnaire*. On the other point we must have recourse to the Statute, (34 Vic., cap. 5, sect. 48), and it seems to put the owner of the goods giving a warehouse receipt in precisely the same position as any other warehouseman so doing.

We then come to the so-called prescription. The whole question turns on the effect to be given to Sect. 50. "No cereal grains or goods, wares or merchandize shall be held in pledge by the Bank for a period exceeding six months, (except by consent of the person pledging the same)," (I presume in writing) etc. It is clearly intended that the Bank shall sell, after notice of ten days, within six months from the pledging. But what is the penalty of the bank allowing the six months to elapse? Respondent contends that it is the forfeiture of the right of pledge. On the other side it is contended that the bank can then be obliged to sell. I am at a loss to conceive on what principle it can be contended that the bank shall forfeit its pledge by not selling within the six months. It is vain to seek any guide from the history of the enactment or from its principle. There are evident reasons why a bank should not be allowed to hold the article pledged until it is reimbursed its advances, but I cannot see any reason for compelling the bank to sell perhaps to its own loss and to the detriment of its customer and of his creditors.

The question is only important in this case if the consent must be in writing. If there be no need of a writing, Robillard's acquiescence would necessarily be presumed. But it seems strange to pretend that the failure to make a private writing of this sort should operate the loss of the pledge. It seems hardly necessary to say that if a written consent were necessary the consent of the 28th May came too late. It was too late to keep alive the warehouse receipt, and it could not be a new receipt, for then it would be for past advances.

I am, therefore, of opinion that the receipt is not *prescribed*.

It does not appear what respondent could have validly opposed to a claim in the name of the Mechanics Bank, so it is unnecessary to discuss the question as to how far the respondent could set up any defence she might have to an action by the Mechanics Bank. I fancy, however, it will be admitted that she could set up any equitable reason for a discharge.

The judgment is as follows:—

"The Court, etc.

"Considering that by the warehouse receipts given by Ulysse J. Robillard, an insolvent, and which are mentioned in the pleadings in this cause, the said Ulysse J. Robillard has acknowledged himself to be a warehouseman, within the terms of the Banking Act;

"And considering that it has not been pleaded nor proved that he was not such a warehouseman;

"And considering that the Mechanics Bank acquired, under the said warehouse receipts, a pledge on the barley and the plaster therein mentioned for the payment of the notes thereby secured, which pledge was duly transferred with the said notes by the said Mechanics Bank to the Appellants;

"And considering that the prescription invoked by the Respondent has been interrupted as well by the agreement of the 15th April, 1879, as by the letter of the 28th May, 1879;

"And considering that under the circumstances the Appellants were entitled to the preferences, claimed in and by their claim against the estate of the insolvent Ulysse J. Robillard;

"And considering that there is error in the judgment rendered by the Superior Court, sitting at Montreal on the 31st January, 1881, doth annul and reverse the said judgment:

"And proceeding to render the judgment which the said Superior Court ought to have rendered, doth maintain the claim of the Appellants for the sum of $3,715.96, to wit: 1st, the sum of $3,582.52, balance due on a note of the said U. J. Robillard, dated at Beauharnois the 11th of November, 1878, for a sum of $5,500, payable in four months from date, on account of which said sum of $3,582.52 the said Appellants are entitled to retain the sum of $2,824.22 proceeds of the 5,592½ bushels of barley covered by the warehouse receipt of the said U. J. Robillard, dated the 11th November, 1878, the said Appellants ranking as an ordinary creditor for the balance $758.30; and, 2nd, the sum of $133.44, balance due on $600, amount of another note of said U. J. Robillard, dated at Beauharnois, the 5th of March, 1879, payable in three months from date, for which said sum of $133.44 the said Appellants hold the said warehouse receipt of the insolvent U. J. Robillard for 600 barrels of plaster, dated the 5th of March, 1879, and on payment of said sum of $133.44 the said Appellants shall release said plaster, the whole in accordance with the admissions filed by the parties in the Court below, dated the 11th of November, 1880;

"And this Court doth condemn the said Respondent to pay to the Appellants the costs incurred as well in the Court below as on the present Appeal."

Judgment reversed.

Maclaren & Leet for Appellants.

Doutre & Joseph for Respondent.