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*Jan'y 22.

*April 15.

PHILO D. BROWNE, *et al*.....APPELLANTS;

AND

CHARLES A. PINSONEAULT, *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Lease, cancellation of—Rendering of Account—Art. 19, *C. C. P. L. C.*

S. on the 1st August, 1868, transferred to Appellants (Plaintiffs,) as trustees of *S's.* creditors, his interest in an unexpired lease he had of a certain hotel in *Montreal*, known as the *Bonaventure* building, and in the furniture. On 1st April, 1870, *A. P.*, the proprietor, after cancelling, with the consent of all concerned, the several leases of the said building and premises, gave a lease direct for a term of ten years to one *G.*, at $6,000 a year, of the building, and also of the furniture belonging to *S's.* creditors, and on the same day by a notarial deed, "*agreement* and *accord*," *A. P.* promised and agreed to pay to Appellants, as trustees of *S's.* creditors, whatever he would receive from the tenant beyond $5,000 a year. In February, 1873, the premises were burned, with a large proportion of the furniture, and Appellants received $3,223 for insurance on fixtures and furniture, and $791, being the proceeds of sale of the balance of the furniture saved. The lease with *G.* was then cancelled, and *A. P.*, after expending a large amount to repair the building, leased the premises to *L. P. & Co.* for $6,000 a year from October, 1873. Appellants thereupon, as trustees of *S's.* creditors, sued Respondents representing *A. P.*, and called upon them to render an account of the amount received from *G. & L. P. & Co.* above $5,000 a year. The Superior Court of *Montreal* held that Appellants were entitled to what *A. P.* had received from *L. P. & Co.* beyond $5,000; and on appeal to the Court of Queen's Bench, (appeal side,) this judgment was reversed.

Held,—Affirming the judgment of the Court of Queen's Bench (appeal side,) that the lease to *G.* terminated by a *force majeure*, and

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*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

that the obligation of *A. P.* to pay Appellants the sum of $1,000 out of the said rent of $6,000 ceased with the said lease.

2. That the fact of Appellants having alleged themselves in their declaration to be the "duly named trustees of *S's.* creditors," did not give them the right to bring the present action for *S's.* creditors, the action, if any, belonging to the individual creditors of *S.* under Art. 19, *C. C. P. L. C.*

APPEAL from a judgment of the Court of Queen's Bench, (appeal side), Province of *Quebec*, rendered on the 22nd June, 1877.

The facts of the case are the following :—

On the 10th February, 1866, *Mr. Pinsoneault* leased a building in the City of *Montreal*, known as the *Bonaventure* building, to *Thomas L. Steele* for 7 years from 1st May, 1866, that is to say, up to the 1st May 1873, at the rate of $3,250 a year, and on the 1st November, 1868, two years afterwards, this lease was extended for another period of seven years, from the 1st May, 1873, that is to say, up to the 1st May, 1880, the rent stipulated for the extended term being $5,000. On the 1st August, 1868, *Steele*, who had made improvements, transferred his interest under the above lease and in the furniture to the appellants, *P. D. Brown*, *Alexander Holmes*, *John Barry and Henry Millen*, "acting as "Trustees for and on behalf of divers firms and persons, "creditors of the said *Thomas L. Steele*, under a certain "paper writing or memorandum of agreement made "and entered into by and between the said *Thomas L.* "*Steele*, and his creditors, and hereunto annexed," to secure a sum of about $14,000.

The appellants thereupon, in their capacity of Trustees, sublet the premises to parties who, by reason of various assignments, were, on the 1st April, 1870, represented by one *Oviatt*. By notarial agreement of 1st April, 1870, the late *Alfred Pinsoneault* and appellants consented to cancel and set aside all the above mentioned leases, and consented that the hotel and furniture, (except the

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billiard tables,) should be leased by *Pinsoneault* to one *F. Gerriken*, from 1st April, 1870, to 1st May, 1880, at an annual rent of $6,000. To this agreement *Mr. Oviatt* intervened, and consented to the cancellation of the leases, and to the new lease to *Gerriken*. The subtenants also intervened and consented to the arrangement.

On the same date, 1st April, 1870, *Pinsoneault* leased the hotel and property to *Gerriken* for the time above mentioned, ten years and one month, from 1st April, 1870, at an annual rent of $6,000, payable quarterly, and on the same day a notarial compromise or *transaction*, called *acte d'accord*, was also passed between the late *Pinsoneault* and the appellants.

This *acte d'accord*, after reciting that it had been agreed that the old leases should be cancelled and that a new lease of the building and of the furniture belonging to the Estate *Steele* should be granted to *Gerriken* for ten years at $6,000 a year, *Mr. Pinsoneault* to pay over to the Estate *Steele*, the difference between the rent under the old and that under the new lease, proceeds as follows :—

"Now these presents, and I the said Notary, witness, "that the said party of the *first* part agrees with the "said party of the *second* part, that the said *Alfred* "*Pinsoneault* will pay over and account for to the said "parties of the second part the difference between the "said rental, so payable by the said *Thomas L. Steele* "($5,000), and the amount of rental payable hereunder "($6,000), by even and equal quarterly payments after "the first day of May next, on which day one month's "rent becomes due, the proportion whereof is to be "handed over to the said parties of the second part, as "soon as received by the said *Alfred Pinsoneault*, im- "mediately on receipt thereof by the said *Alfred Pin-* "*soneault* from the *then tenant or tenants of said*

"*premises.*" * * * * It is further agreed that, upon "the expiration *of the said lease to the said Frederick* "*Gerriken*, the said *Alfred Pinsoneault* shall deliver over "to the said parties of the second part the several articles "of furniture mentioned in the said lease in the state "and condition in which they then shall be found to "be, and the said parties of the second part hereby "acknowledge to have received from the said *Alfred* "*Pinsoneault* the sum of twelve hundred and seventy-"three dollars and fourteen cents in advance of the "proportion of the said several instalments so to be-"come payable to the parties hereto of the second part "hereunder, which said amount is to be deducted from "the first payments which shall fall due to them here-"under, and the same shall bear interest at the rate of "*seven per centum per annum* until fully paid."

The building was partially destroyed by fire on the 17th March, 1873, and a large portion of furniture was burnt. On the 27 April, 1873, the furniture and effects remaining after the fire were sold by auction, and the proceeds, viz : $791, were paid to *Steele's* Trustees.

The appellants claimed from the Insurance Companies about 5,000. They obtained $3,223 by way of compromise, for loss on the improvements made by *Steele* and for loss of rental.

On the 29th August, 1873, Mr. *Pinsoneault* caused a notarial protest to be served on the appellants. This protest, after reciting the main facts of the case, the fire, the receipt by the appellants of the proceeds of the sale of what remained of the furniture, proceeds as follows:

"That the said improvements in said hotel had been "insured by the said Trustees and representatives "of the said Estate *Steele*, who agreed, *after* the *said fire*, "to hand over the amount of said insurance to the said "*Alfred Pinsoneault*, to enable him to replace the said

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" improvements in their original condition before the " fire.

" Wherefore, I, the said Notary, at the request afore- " said, and speaking as aforesaid, do hereby notify the " said Trustees and representatives of the said Estate " of the said *Thomas L. Steele* that unless, within fifteen " days from the date hereof, they put in the hotel furni- " ture of the same description and nature as that " belonging to them and which was in the said hotel " before the fire as aforesaid, and unless they pay him, " the said *Alfred Pinsoneault*, an amount sufficient to " place the said improvements in the same condition " in which they were before the fire, he will consider " the arrangements between them at an end and act " accordingly."

The appellants took no notice of this protest.

Subsequently, on the 2nd September, 1873, *Pinsoneault* brought an action against *Gerriken* to have the lease declared resiliated on account of the fire, and the following admission was fyled in this case;

" That, in the action of *Pinsoneault* vs. *Gerriken en* " *résiliation* of lease, *Gerriken* pleaded that the lease " was already destroyed from the date and by the effect " of the fire, whereupon *Pinsoneault* prayed *acte* that " he was free to consider lease resiliated for the future, " which *acte* was granted to him by the Court."

Mr. *Pinsoneault* expended after the fire, $10,292, and on 3rd Oct., 1873, gave a lease to *Linton, Popham & Co.*, for seven years for $6,000 a year. The appellants received their proportion of what *Pinsoneault* had been paid up to the time of the fire.

The action was brought in the Superior Court, *Montreal*, by the Appellants, *Philo. D. Browne, et al*, acting in their quality of Trustees duly named of the creditors of *Thomas L. Steele*, against the Respondents, children and legal representatives of the late

Alfred Pinsoneault, to enforce the notarial contract (*acte d'accord*) entered into between the appellants *esqualité* and their late father, and claimed an account from the respondents for the rent by them, or their *auteur*, received from *Gerriken* and from *Cooper, Linton and Popham*, the tenants occupying the building in question during the period extending from the 1st February, 1873, to the 1st May, 1875.

The respondents pleaded that under the *acte d'accord Mr. Pinsoneault's* liability was to terminate with the lease to *Gerriken*, and that the appellants treated the fire as having terminated that lease, by having received the proceeds of what remained of the *Steele* furniture, and by claiming from the Insurance Company and compromising with them for the insurance on the improvements and on the rental, which amounts they retained and refused to give up to *Mr. Pinsoneault*, although called upon to do so by the notarial protest of the 29th day of August, 1873, and they concluded that they are not liable to account for any rent from and after the date of the fire.

After issue joined, the appellants, on the 10th May, 1875, brought an incidental or supplementary demand, setting up that the respondents themselves had been paid by the new tenants, *Linton & Co.*, under the lease, additional rent, making in all $6,000 for the whole year, from the 1st May, 1874, to the 1st May, 1875, taking conclusions to the same effect as in the principal action.

To this supplementary demand the respondents pleaded the same plea precisely as in the principal action.

On the 23 November, 1875, judgment was rendered in the Superior Court (*Johnson*, J.) holding the respondents liable to account for any rent received from *Gerriken* by the late *Alfred Pinsoneault* between the 1st

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February and the 1st May, 1874, and liable, also, for the proportion of rent received by themselves from *Linton & Co.*, from 1st May, 1874, till the 1st May, 1875, and condemning respondents to render an account of said rents within fifteen days of the date of the judgment, and in default thereof, to pay the sum of $1,000, which was the proportion of rent coming to appellants from the amount paid by *Linton & Co.*, to respondents.

No account was rendered by respondents, and on the certificate thereof, the case was inscribed on the principal and on the incidental demand. On 31st January, 1876 the final judgment was rendered against respondents for $1,000, the proportion of rent coming to appellants on the whole sum of $6,000 received from *Linton & Co.*, as rent from 1st May, 1874, to 1st May, 1875.

On appeal to the Court of Queen's Bench for *Lower Canada* (appeal side) this judgment was reversed, and the appellants (plaintiffs) thereupon appealed to this Court.

Mr. *Robertson*, Q. C. for Appellants:—

The *acte d'accord* contains no such condition as is set up in the plea, namely, that *Pinsoneault* was to pay over the $1,000 to the 1st May, 1880, "on condition "that the lease to the said *Gerriken* should continue in "force for that period of time."

There is no evidence of record to show the lease to *Gerriken* from *Pinsoneault* was cancelled by judgment of the Superior Court.

The plea alleges *Gerriken* took an action in the Superior Court, under the No. 7, to have the lease resiliated, which action is still pending, and that *Pinsoneault* brought an action *en resiliation* and in damages, under the No. 2,705, which is still pending. The admission (No. 4) admits that *Pinsoneault* took an action in August, 1831, under the No. 1,731, for the

resiliation of the lease, and admission No. 11, that *Gerriken* took his action *en resiliation* at the time mentioned in the plea, but no copy of judgment *en resiliation* was fyled, and no proof of resiliation whatever was produced, nor even alleged in the pleadings; nor is there anything to support the statement in the third *considérant* of the judgment of the Court of Queen's Bench that the lease to *Gerriken* was "annulled by judgment "of the Superior Court." Nor is there any proof before this Court when, or in what action, such judgment in resiliation was rendered; nor whether it was for the *force majeure* assumed in the judgment now appealed from, or for non-payment of rent, or for the reason set up in the plea, namely, "that the premises were "becoming damaged."

A resiliation, brought about by *Pinsoneault* and *Gerriken*, voluntarily, on the day after the lease, or by reason of actions instituted 18 months after it, to which the now appellants were not parties, should not bind the appellants, or free the now respondents, from their obligation to hand over the proportion of rent received from *Linton & Co.*, under the new lease.

If a *force majeure* prevented rent from accruing from the date of the fire down to the 1st May, 1874, *Pinsoneault* and the appellants must suffer proportionally; but when the premises were repaired, and rent began to run under the lease to *Linton & Co.*, the obligation to hand over to appellants their proportion continued in force.

By the *acte d'accord Pinsoneault* was to pay over "the difference between the said rentals of $5,000 and $6,000," and this was to be paid immediately on receipt thereof by the said *Alfred Pinsoneault* from the then tenant or tenants of the said premises.

It was not stipulated as a condition that, if *Gerriken* ceased to be tenant, the appellants' rights should cease,

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and *Pinsoneault* be entitled to the whole rent. The consideration given by the now appellants to *Pinsoneault* extended over the whole period of the long lease, and so the agreement to pay over the proportion of rent must be held to extend over the same period. Hence the importance of this appeal, which will practically decide the right of the appellants to obtain $1,000 per annum during the whole period of the long lease.

The notice served on the appellants, of the 9th August, 1873, by the Notary *Philips*, was to the effect that if they "did not put in the hotel furniture of the "same description and nature as that belonging to them "and which was in the said hotel before the fire, and "unless they pay him, the said *Alfred Pinsoneault*, an "amount sufficient to place the said improvements in "the same condition in which they were before the fire, "he will consider the arrangements between them at "an end, and act accordingly, and will hold them liable "and responsible for all costs."

Messrs. *Linton & Cooper's* lease, as appears by its terms, was for a boot and shoe manufactory, and *Pinsoneault's* consent to fit up and have it used as such factory must be held as clearly shown by the lease itself. To demand of the appellants to put into such a factory the furniture of an hotel would be wholly useless, if not absurd. Both *Pinsoneault* and the now Appellants must be held to have acquiesced in the lease to *Linton & Cooper* for a factory. The rent was equal to that paid when the premises were used as an hotel; the risk of fire and cost of insurance were less, and the notice as to putting in furniture must be held as waived by the subsequent appropriation of the premises to the purposes of a factory.

Mr. *Barnard*, Q. C., for Respondents:

The first point is: whether, under words "tenant or

tenants" in the *acte d'accord*, it can be held that "tenants" include those who would occupy after *Gerriken's* lease should come to an end.

The *acte d'accord* speaks of a lease to *Frederick Gerriken*, and shows intention to confine agreement to that lease. The words "or tenants" is used because there were sub-tenants, and this explanation reconciles these words with the whole terms of the lease. "At expiration of lease," means expiration of lease to *Gerriken*.

The words "from the then tenant or tenants" mean *Gerriken* and his sub-tenants. *Pinsoneault* made nothing out of this arrangement.

The conduct of the parties immediately after the fire shows how both parties understood it. The $1,000 was the consideration for the improvements made and for furniture. The Trustees took away their furniture when lease to *Gerriken* was at an end by fire. They also took the insurance money which represented their improvements.

It has been stated this contract came to an end in a manner unforeseen by the parties, and the dissenting judge thought the Court could deal with the matter in the same way the parties might have done, if they had foreseen the event. But then the Estate *Steele* should have restored *Pinsoneault* to his original position, and this they refused to do.

Action was badly brought. No action *pro socio* for account can be brought unless the Plaintiff himself offers an account.

Pepin v. *Christin* (1); *McDonald* v. *Miller* (2); *Miller* v. *Smith* (3).

Appellants contend there was no evidence that lease was resiliated by *force majeure*, or resiliated at all. But there is no doubt the lease has been resiliated,

(1) 3 L. C. Jur. 119. (2) 8 L. C. R. 214.
(3) 10 L. C. R. 304.

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and the Plaintiffs have so treated it in their proceedings, and that lease was at an end was assumed by both parties.

The 8th admission by the parties is to the following effect: That in the action of *Pinsoneault* v. *Gerriken en resiliation* of lease *acte* was granted to *Pinsoneault* by the Court that he was free to consider the lease resiliated, as the lease had been destroyed by the effect of the fire.

The only complication as to this part of the case is that Mr. *Gerriken* also brought an action against *Pinsoneault* asking for the resiliation of the lease, and judgment on that action was also rendered on the same day, by the same judge, who appears to have been puzzled by the fact that while the parties both asked for the same thing, each contested the action of the other.

The result, however, of the two actions was that the lease was resiliated from the date of *Gerriken's* demand, and judgment for rent up to that time was given in favor of Mr. *Pinsoneault*, whose claim for damages, however, was rejected. The conclusion arrived at was based, it seems, on the view taken by the judge of the law as to the effect of a fire. Had the whole building been destroyed, the lease would have been resiliated *de facto* without any action being necessary. But as the building was only partially destroyed, an action was necessary, and the tenant must pay his rent up to the date of his demand, although he proved that the damages done had absolutely rendered the premises uninhabitable.

Under any circumstances, the action of the Appellants, as brought, should have been dismissed, because, under our law, no one can sue *par procureur*. *Code of Procedure*, art. 19. Here the action, if any, belongs to the individual creditors of *Steele*.

Mr. *Robertson*, Q. C., in reply:

If *Pinsoneault* could lease the property at all

for $6,000, my client has a right to claim his share. There is no condition in the written contract that he would cease to be entitled to his share the moment the lease to *Gerriken* terminated. The reason that Plaintiffs sued *as Trustees* of *Steele's* creditors is because *Pinsoneault*, by the *acte d'accord*, agreed to account to them as such Trustees.

The judgment of the Court was delivered by TASCHEREAU, J.:—

This action is based upon a certain *acte d'accord*, passed on the 1st April, 1870, between the late *Alfred Pinsoneault*, of the one part, and the Plaintiffs, present Appellants, acting in their quality of Trustees of *Thomas L. Steele*, of the other part, and calls upon the Defendants, present Respondents, as the legal representatives of the said *Alfred Pinsoneault*, to render an account, and pay over certain rents received, and which, it is alleged, the said *Pinsoneault* had agreed to pay over to the Appellants by the said *acte d'accord*.

In the Superior Court, the Plaintiffs obtained a judgment against the Defendants, but in the Court of Queen's Bench this judgment was reversed and the Plaintiffs' action dismissed with costs. The Plaintiffs now appeal to this Court from the judgment of the Court of Queen's Bench.

I am of opinion that the appeal must be dismissed. The Plaintiffs sue "in their quality of Trustees duly named of the creditors of *Thomas L. Steele*." The rule with us, contained in art. 19 of, the *Code of Procedure*, is that no one can sue *par procureur*. Of course, in certain cases, when specially authorized by law to do so, Trustees of certain public bodies may sue and appear before the courts as such. So can an assignee, under the Insolvency Acts. But here the Plaintiffs

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have no such standing. They are merely the attornies of *Thomas L. Steele's* creditors. It is true that *Pinsoneault* passed the deed of April, 1870, with them, acting in their quality of such Trustees. But that does not give them the right to appear as such before a court of justice. It is not, because in a deed *A* appears as attorney of *B*, that he may, on that deed, sue as such attorney. In this very deed of April, 1870, *Honoré Cotté* appeared as attorney of the late *Pinsoneault*, who was absent. It could not be pretended that *Cotté* could sue the Appellants on that deed, in his said quality of attorney. For the same reason, the Appellants cannot sue *Pinsoneault*, or his representatives, on this deed, in their quality of Trustees of *Steele's* creditors. Upon this ground alone the Plaintiffs' action cannot stand.

But I go further, and say that, on the merits of the case, the Plaintiffs' action was rightly dismissed. I fully concur in the remarks which the learned Chief Justice of the Court of Queen's Bench made at the rendering of the judgment in the court below. It appears that on the 10th February, 1866, *Pinsoneault* leased a building called the *Bonaventure* building, or *St. James' Hotel*, to *Thomas L. Steele* for seven years, from 1st May, 1866, at the rate of $3,250 a year, and that on the 7th March, 1868, this lease was extended for another period of seven years, that is to say, up to the 1st May, 1880, the rent for these last seven years being $5,000. In 1868, *Steele* transferred his interest in the said lease to the Plaintiffs, acting as Trustees for his, *Steele's*, creditors. In 1870, the Plaintiffs and *Pinsoneault* passed the *acte d'accord* in question. By this deed the lease of November 1st, 1868, of this building, until the first of May, 1880, was cancelled, and a fresh lease of it made by *Pinsoneault* to one *Gerriken* for the unexpired term, that is to say, up to

the first May, 1880, at the rate of $6,000 a year. It was agreed that the fixtures and furniture then in the building should remain during *Gerriken's* lease. *Pinsoneault* agreed to pay to the Plaintiffs whatever he should receive from the tenant beyond $5,000 a year. In 1873 this building was burnt, with a large portion of the furniture. *Pinsoneault* received his insurance on his property, and the Plaintiffs received $3,223 for insurance on furniture, as well as another sum of $791, by the sale of furniture, saved from the fire. The lease to *Gerriken* was terminated by the said fire, and was subsequently annulled by a judgment of the Superior Court. *Pinsoneault* expended $10,292 in repairing the building, and leased it to *Linton, Popham & Co.*, for $6,000 a year, from October, 1873. The Plaintiffs have received their proportion of what *Pinsoneault* had been paid up to the time of the fire, but now claim an account of what he has received since the fire, both from *Gerriken* and from *Linton, Popham & Co.*, *above* $5,000 a year. To the Plaintiffs' demand, the Defendants have pleaded that they have received nothing from *Gerriken* since the fire, and that, the lease to *Gerriken* having terminated by the fire, the Plaintiffs were not entitled to any portion of the monies received by them, the Defendants, since.

I think that the Plantiffs, under the circumstances, have no claim against the Defendants. They have received over $4,000 for the furniture and fixtures which were in the building at the time of the fire. Though summoned to do so, they refused to replace in the said building an amount of furniture equal to that which stood therein before the fire. They have treated the lease to *Gerriken* as terminated by the fire. I do not see how they can now claim from the defendants $1,000 a year on a property on which *Pinsoneault* has expended $2,000 more than he received to secure a new tenant. *Pinsoneault* has

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taken back his property, the Plaintiffs their furniture, and the contract between the parties has been put an end to by a contingency not provided for.

I am of opinion the appeal should be dismissed with costs.

Appeal dissmissed with costs.

Solicitors for Appellants: *A. & W. Robertson.*

Solicitor for Respondents: *Edmund Barnard.*