DAME EMILY SWEENY ET AL.....APPELLANTS; 1885

AND

THE BANK OF MONTREAL.....RESPONDENTS.

*Feb. 10.
*June 22.

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

*Stock held in trust—Purchase of by a bank—Effect of—Mandatary and pledgee, obligations of a—Action to account—Arts.* 1755, 2268, *C.C. (P.Q.)*

S. brought an action against the Bank of Montreal to recover the value of stock in the Montreal Rolling Mills Company, transferred to the bank under the following circumstances: S.'s

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Taschereau JJ.

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money was originally sent out from England, to J. R. at Montreal, to be in invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company, as follows: "J. Rose in trust," without naming for whom, and paid for it with S.'s money. He subsequently sent over the certificates of stock to S., and paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends on these shares, credited them to J. R., who paid them to S. J. R. subsequently became insolvent, and S., not receiving her dividends as usual, sued the bank for an account.

*Held*, reversing the judgment of the court below, Strong J. dissenting, that there was sufficient to show that J. R. was acting as the mandatary or agent of S., and the Bank of Montreal, not having shown that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canda, rendered on the 25th September, 1884, confirming a judgment of the Superior Court rendered at Montreal on the 24th December, 1881, dismissing the present appellant's action, so far as the present respondent was concerned, with costs.

The action in the court of original jurisdiction was brought by the present appellant against Wentworth J. Buchanan, bank manager, the Bank of Montreal the present respondent, James Rose, merchant, and the Montreal Rolling Mills Company, a body politic and corporate, defendants.

The following are the material facts of the case as proved at the trial by documentary and oral evidence:

On the 18th March, 1871, Messrs. Crawford and Lockhart, of Belfast, in Ireland, remitted to the Bank of Montreal (the respondent) as directed by the Sweeny family, to the credit of James Rose, the sum of £2,040 11s. 1d.; and the following entry was made in the books of Morland, Watson & Co., in which firm Mr.

Rose was a partner, in the following words:

1871. March 31. James Rose ex deposit Crawford & L. 20 March.....£2,040 11s. 1d.

$9,930.71

On the 25th March, 1871, Messrs. Crawford and Lockhart remitted to the respondent, at Montreal, the balance due to the Sweenys to Mr. Rose's credit, notifying him thereof by letter of that date.

This amount was also carried into the books of Morland, Watson & Co., to the credit of Mr. Rose under date of April 14th, 1871.

Against this amount Mr. Rose drew on the 4th April $4,000, which amount on that day he expended on four shares of stock of the Montreal Rolling Mills Company, of the value of $1,000 per share, as appears by the account of James Rose (in trust) in the books of that company.

On the 11th April, 1871, Mr. Rose obtained from the Montreal Rolling Mills Company a certificate numbered 1008, by which, under the hands of its president and secretary, it was certified that on that day James Rose, in trust, was the holder of three shares in its capital stock, whereof the full value of $1,000 per share had been paid.

This certificate was subsequently sent to the present appellant by Mr. Rose, and he paid her the amounts of the dividends declared previous to the 1st January, 1880.

On the 3rd June, 1876, Mr. Rose in trust, transferred to the defendant W. J. Buchanan in trust 250 shares, each of $100 fully paid up, in the capital stock of the Montreal Rolling Mills Company—(the value of the shares having been before that time changed from $1,000 to $100 per share. This stock was given apparently as collateral security for advances made at

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the time or to be made thereafter by the respondent, on the notes of one James Howley indorsed by Mr. Rose to Mr. Rose personally.

There was another transfer of shares in the Montreal Rolling Mills Company's stock made on the 13th March, 1879, making in all 310 shares paid up in full transferred to Mr. Buchanan in trust for the respondent.

From the establishment of the Rolling Mills Company, up to March, 1873, Mr. Rose had twenty-five shares of $1,000 each fully paid up, which, in the last mentioned month were changed as already mentioned into two hundred and fifty shares of $100 each fully paid up, and he never sold or transferred any of the said shares until he transferred them as already mentioned on the 3rd of June, 1878, to Mr. Buchanan in trust for the respondent--the said 250 shares being the only fully paid up shares he possessed at the time of the said transfer.

The appellant was unaware of the transfer to Mr. Buchanan until the beginning of the year 1880.

On the 27th January, 1881, protests were served on the respondent and the Montreal Rolling Mills Company, and in May of that year the action in the court below was instituted.

The conclusions of the declaration, which set out the facts hereinbefore recited, prayed that the appellant might be declared the owner and proprietor of thirty shares of the said stock of the Montreal Rolling Mills Company. That W. J. Buchanan and the respondent be ordered to transfer the same to the said appellant and the Montreal Rolling Mills Co. to accept such transfer and make such entries and in default defendants be adjudged, &c., to pay to appellants the sum of $3,900 value of said shares with costs.

To this action the respondent pleaded alone, setting up:—

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1o. That Rose being indebted to it in a sum exceeding $30,000 transferred to the bank as security therefor, 250 shares of the capital stock of the Montreal Rolling Mills Company of the par value of $25,000, which shares are now legally held for the said bank as collateral security for such debt which still remains wholly unpaid.

That the defendants now pleading are ignorant whether, and consequently deny that the shares referred to in the plaintiffs' declaration formed part of the said two hundred and fifty shares, as to all of which no trust whatever was disclosed to the said bank, the said James Rose dealing with the same as his own property."

Then followed a denial of plaintiffs' allegations not specially admitted.

To this plea the plaintiff answered generally.

The Superior Court dismissed the plaintiff's action on the ground that Rose could always dispose of those shares as he has done for there was no *cestui que trust* disclosed and no acceptance of any trust, the oral testimony of Rose himself being inadmissible to prove acceptance.

The Court of Queen's Bench for Lower Canada affirmed the judgment of the Superior Court.

*W. H. Kerr* Q.C. for appellants.

*Robertson* Q.C. and *Laflamme* Q.C. for respondents.

The points relied on by counsel are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—It cannot be disputed, I think, that a sum of money belonging to the plaintiff came to the hands of James Rose; that he on the 11th of April, 1871, invested such money in shares in the stock of the Montreal Rolling Mills Company in and for the benefit of, and in trust for, the said plaintiff, and the same was

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entered in the books of the said company in the name of the said "James Rose in trust," and the certificate issued by the said company certified that "James Rose in trust" was "the holder" of the said shares, which certificate Rose handed to plaintiff as showing her stock in the said company for whom plaintiff swears he bought it. That Rose paid plaintiff the dividends on this stock up to or near the 6th of January, 1880, and his answer to the question: "By whom were the dividends received?" Was: "It was received by me from the bank." Q.—"You received it from the bank of Montreal?" A.—"Yes." Q.—"That is you received the dividends on the whole stock?" A.—"Yes, on the whole stock." Q.—"You transferred this stock to the bank of Montreal?" A.—"Yes." Buchanan endorsed the dividend cheques over to Rose; and Rose says:—"They were paid to me up to that time and I paid them to her as I got them."

On the 3rd of June, 1876, Rose transferred the stock to W. J Buchanan "in trust" at the company's office. The transfer was signed "James Rose, in trust;" and on the 13th of March, 1879, in same manner other shares, as security for the benefit of the Bank of Montreal for a private indebtedness of Rose to the bank, as collateral security for advances made by the bank to him. Though standing in the books of the Rolling Mills Company "in trust," and though the transfer was signed by "James Rose in trust," and transferred by that transfer to Buchanan in trust, no enquiries appear to have been made as to who was interested in the stock or on what trust it was held, or whether Rose owned the stock or had a right to transfer it for an indebtedness of his own. Mr. Buchanan is asked, Q.—"Did he give you to understand that this stock was "stock belonging to himself, or did he deal with it as "some one else's? Was there any question of its belong-

"ing to any one else, or of any one else having any "interest in it?" And he answers: "He offered this "stock to us as security." The question was not put to him, "Do you own this stock?" The learned Chief Justice of the court below seems to assume that it was not proved that Rose was ever requested to invest plaintiff's money in Montreal Rolling Mills stock, nor that she ever accepted or ratified the pretended trust; but to my mind the evidence is clear on both these points. She had the money in Rose's hands to invest for her; he does do so, in this stock in his own name in trust for her; he transmits her the certificate of ownership of the stock, showing it is held in trust by him, and she receives through him from time to time the half yearly dividends. I cannot conceive stronger evidence of the acceptance, adoption and ratification of Rose's acts on her behalf than this conduct of plaintiff. The plaintiff adopted and enjoyed the benefit of the investment. If there ever was a case where the maxim, *Omnis ratihabitio retrò trahitur et mandato priori æquiparatur*, is applicable, I think this is that case.

There can be no doubt the transfer of this stock by Rose for securing his private indebtedness was a flagrant breach of trust, and the simple question is which of two innocent parties must bear the loss caused by the gross fraud of Rose.

There can be no doubt that the bank had full actual notice of the existence of a trust of some description, a trust for some one not disclosed. They could not obtain a transfer at the company's office without seeing there, if they chose to look, that the stock was registered in the name of Rose in trust, but without that, the very transfer on which they took the stock showed that Rose was dealing with trust property and transferring property he held in trust and which the assignee well knew, for Mr. Buchanan himself thus expresses it:—

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"He transferred the stock to me in trust. There was a transfer of two hundred and fifty shares of Montreal Rolling Mills stock; the transfer was signed by James Rose in trust, and he transfers it by that transfer to me in trust."

I am quite prepared to adopt the language of the court in *Shaw* v. *Spencer* (1), "that where one known to be a trustee is found pledging that which is known to be trust property to secure a debt of his own, the act is one *primâ facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has the right to give it." It would and should then hardly be disputed, as was suggested in this same case, if the words had been in trust for Emily Sweeney, the duty of enquiry would be cast on the creditor, but the effect of the words "in trust" as there suggested is the same. They must mean in trust for some one whose name is not disclosed, and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known.

As pledging trust property is *primâ facie* unlawful, where is the hardship of imposing on the person taking the security the duty of inquiry and the burden of ascertaining the actual position of the property instead of remaining in ignorance without even, as Mr. Buchanan says, putting the question to him: "Do you own the stock?" The assignee having the notice that this stock was held by Rose in trust, when he sought to deal with it for his own private benefit, in my opinion the duty of inquiring as to the nature, character and limitations of the trust was imposed on the person taking it as security for such an indebtedness.

When there is actual notice that a trust exists and

(1) 100 Mass. R. 389.

the use to be made of the trust property is *primâ facie* a misappropriation, to refrain from asking any question of Rose as Buchanan says, or making any inquiry whatever, is to my mind not only a want of ordinary prudence but gross negligence.

I cannot understand how in any system of jurisprudence a creditor can receive from a trustee by way of pledge for securing a private debt due by the trustee trust property knowing the same to be property held in trust and hold such property against the *cestui que trust* the beneficial owner thereof by force of a transaction on its face so dishonest and fraudulent.

Buchanan does not pretend he did not know it was held in trust. After answering as before, he is then asked—

Is it a very common thing for stock to be standing in that way in trust? A. It is very often done; it is frequently so with bank stocks.—Q. And there is never any inquiry as to who the party is, when it is put in that way? A. No; it is done without hesitation. An advance is made without hesitation on stock when it is put in that way and no questions are asked.

In the case of *Mangles* v. *Dixon* (1) it was held that the assignee of any security, (that is, when the assignee has only an equitable right, as an assignee of a bond,) stands in the same position as the assignor as to the equities arising upon it. How different the idea of Mr. Buchanan from that of Lord St. Leonards, who in that suit, at p. 732, as to right of parties when they have actual notice of equities, as when parties have notice that property is held in trust, says:

They are bound by the notice which they have; for equity will not permit a man to shut his eyes to a fact of which he has been informed, and therefore if he has notice he is bound by the knowledge he has thus acquired.

If the bank, knowing in this case, as they must have done, that Rose was borrowing money for his own private use on a pledge of property belonging to another,

(1) 3 H. L. Cas. 702.

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which he held in trust, and that he was thus dealing with it for his own benefit and as his own property, chose to advance money on such property under such circumstances and ask no question, they cannot, in my opinion, be said to have taken it in good faith, and cannot be in a better position in reference to it than Rose himself, and as he had no beneficial interest in the property they can claim none, but must be held to have taken the property charged with the trust, and so are bound to account for it to the plaintiff as the *cestui que trust* entitled to the beneficiary interest therein.

I do not think Rose, in this case, could claim under any law to be entitled to pledge for advances for his own personal benefit property held in trust for and belonging to another, any more than Barrow in the case of the *City Bank* vs. *Barrow* (1), to which my brother Taschereau has called my attention, could pledge the property in his hands belonging to another, and that, consequently, the bankers in this case, as the bankers in that, cannot set up any title to the stock as derived from him against the real owners.

I am, therefore, of opinion that the appeal should be allowed.

STRONG J.—For the reasons given by the learned Chief Justice of the Court of Queen's Bench, and also for some additional reasons, I am of opinion that the judgments of the courts below ought to be affirmed. Before proceeding to consider the various points of law which have been raised in argument, it may be well to remark that the decision in this case must depend entirely upon the law of the Province of Quebec, as embodied in the Civil Code, and that the English law of trusts, and analogies derived from that law, are entirely inapplicable, and cannot be resorted to for the

(1) 5 App. Cas. 664.

purpose of determining the rights of the parties. Further, it is to be borne in mind that (excepting perhaps the law relating to substitutions) there is nothing in the legal system established by the Quebec Code in any way resembling the doctrine of a double ownership in the case of trusts which prevail in the English courts, by which property held in trust is regarded as the legal property of one owner,—the trustee,—and the beneficial property of another owner—the *cestui que trust.*

By the law of the Province of Quebec, as well as by the ancient and modern law of France on which it is founded, no distinction is made between the legal and the beneficial ownership, and the rights of a person who has ceded or caused to be ceded his property to a mandatary, by a transfer absolute in form, are in no sense rights *in rem*, but mere personal rights, entitling the party making the cession to a personal remedy against the mandatary for any breach by the latter of his obligations, and to nothing more. I am, of course, referring to a case in which the property is transferred to the mandatary, and not to the case of a deposit, when the property remains in the depositor and the possession only is parted with.

Having made this preliminary observation as to a general principle of law, which must be kept constantly in view in considering this case, and as to which I shall have to say more, and refer to some authorities hereafter, I now propose to inquire what were the legal rights of the appellant as against Rose; first, in respect of the money deposited with him by Messrs. Crawford & Lockhart, and next in respect of the shares now in question, in which, as Rose now alleges, he invested the money.

As regards the money remitted by Messrs. Crawford & Lockhart to Rose, the proof appears to be sufficient

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to establish that Rose was a depositary of it. The entry in the books of Morland, Watson & Co., the firm in which Rose was a partner, appears to me to constitute a commencement of proof, sufficient to let in oral proof according to art. 1233 C.C. (P.Q.), which seems to restrict the definition of a commencement of proof, according to the ancient law, in a less degree than art. 1347 of the French Code, which requires that a writing, to constitute a commencement of proof, should emanate from the party against whom it is sought to be used, or from one of his "auteurs," the latter a condition not required by the terms of art. 1233 of the Quebec Code, and, as it appears from the authorities, not required by the ancient law of France (1). This entry shows that the moneys remitted by Messrs. Crawford & Lockhart reached Rose's hands, and were by him deposited with the firm of Morland, Watson & Co., of which he was a member, and would have been sufficient according to Bonnier under the stricter French law. This entry is a writing emanating from the firm of Morland, Watson & Co., of which Rose was a member; there is nothing to show, and no reason can be suggested, why a writing emanating from others, jointly with the party sought to be charged with it, should not be a sufficient commencement of proof; then this writing does emanate from Rose in conjunction with his partners—at least it was an entry made by one who represented the firm, the clerk or book-keeper, in whose handwriting it is, and who was a person representing the several members of the firm, including Rose, which is sufficient. Bonnier (2) says:

D'abord aux termes de l'article No. 1347 l'auteur de l'écrit doit être le defendeur, ou celui qu'il répresente. Il est le même en sens inverse, de celui qui le répresente: ainsi, les ecrits du mandataire peuvent être opposés au mandant.

(1) Bonnier, Traité des Preuves, Vol. I. Nos. 165-166.

(2) Traité des Preuves, Vol. I. No. 167.

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I am, therefore, of opinion that this entry on the books is a sufficient commencement of proof to let in oral evidence of the deposit of this money with Rose as a depository for the appellant. Indeed, I should not have thought the matter called for even so much consideration, if it had not been so strenuously argued by the respondent that it was insufficient for that purpose.

This contract of deposit, however, only involved a personal obligation on the part of Rose to pay over the money when called upon, and there having been, up to the date of the purchase of the shares, no mandate to invest, this was nothing more than an ordinary debt, and did not involve any obligation to transfer the shares, the equitable doctrine of following moneys held upon deposit, as trust funds, into a wrongful investment, having no place, as far as I have been able to ascertain, in French law.

It is said, however, that there was a mandate to invest, and it therefore becomes a question whether any such agency is proved. I fail to find in the record any proof of such a mandate anterior to the purchase of the shares.

It is clear law that a mandate may be either express or tacit, but whether express or tacit, as in the case of every contract, the assent of both parties, of the principal as well as of the agent, must be established by legal proof.

As regards direct proof, mere verbal evidence is of course inadmissible, under the French law of evidence, to establish the mandate. A tacit mandate may however, be established by the acts and conduct of the parties, and from such acts and conduct the assent of the mandator as well as of the mandatary may be inferred. There is however nothing in the evidence warranting the inference that the appellant assented in any way to an investment of her money in these shares,

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prior to the date at which they were acquired, or the contrary, it appears they were bought by Rose without her knowledge or assent.

The question arises however, whether there was not such a tacit ratification by the appellant, of the purchase of the shares by Rose, as was equivalent, in law, to a prior authority. The general principle of law that the ratification of the acts of one who assumes to act as agent, is to be deemed equivalent to a prior authority, is expressly provided for by the Quebec Code, and the article 1720, (identical with 1998 of the French Code) in which this principle of law is embodied, also expressly delares that such ratification may be either express or tacit. Then the acceptance of the benefit of the act of the assumed agent, by the person for whose benefit he has ostensibly acted, with knowledge of all the circumstances, is considered as implying adoption, and amounts to tacit ratification (see Troplong Mandat Nos. 610 and 611.) This principle, by which subsequent adoption or ratification is considered equivalent to prior authority, is however, like all legal fictions, subject to the qualification that the rights of third parties, intervening before the ratification, are not to be affected *ex post facto.*

Turning then to the evidence I proceed to enquire if there is place for the application of this principle to the facts of the present case.

Was there then such an assent by the appellant, to Rose's investment of her money in Montreal Rolling Mills shares, as amounted to a tacit ratification sufficient, under article 1720, to make Rose her agent by relation in the acquisition of the shares? As before stated any acts of recognition or assent on the part of the appellant to have this effect must have been prior in point of time to the transfer by Rose to Mr. Buchanan.

The proof on this head consists entirely of statements

contained in the deposition of Rose. It is to be remembered that the two transfers to Mr. Buchanan were completed respectively on the 3rd June, 1876, and the 14th March, 1879. In order then to give the appellant a title in priority to the bank, it must be shown that there was an adoption by her of the investment, at a date anterior to the last transfer to the respondents. Any silent acquiescence by Miss Sweeney in what is stated in Rose's letter is therefore manifestly too late for this purpose, as that letter is of the 6th June, 1880, a date long subsequent to the last transfer to the respondents.

The statements material to this question contained in Rose's deposition are as follows :—

Q. Have you any doubts as to whom the stock referred to in the certificate, plaintiff's exhibit number 1, belongs?

(The defendant's counsel objects to this as involving a question of law. Objection reserved by the court.)

A. The certificate was handed to Miss Sweeney, the plaintiff in this case.

Q. And for whom did you buy it?

A. For her.

Q. Did you ever pay anything to her coming from this stock?

(The defendant's counsel again repeats his first objection above set forth, and the objection is again reserved by the court.)

A. Yes I paid her the dividends up to the time the bank stopped me from drawing them.

Q. When was that?

A. I paid her dividends up to or near the date of this letter, plaintiff's exhibit "A. 9," namely the sixth of January, 1880, and I expected the dividends to be paid again, shortly after that time, as usual. They were paid to me up to that time and I paid them to her. I expected to receive them as usual soon after, but they were stopped. It was the first time they were stopped. The dividends fell due on the first of February following the date of that letter, and I thought they would be paid then as they had been before. They were always paid to me previously and I had paid them over to Miss Sweeney as I got them.

Q. The dividends of the Montreal Rolling Mills Company are payable in August and in February of each year, are they not?

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A. Yes.

Q. And you received them up to what date?

A. Up to the date of that letter exhibit "A, 9."

Q. That is January, eighteen hundred and eighty (1880)?

A. The dividend previous to the date of that letter exhibit "A 9" was received and paid over to Miss Sweeney and the other ladies entitled to it.

Q. By whom was the dividend received?

A. It was received by me from the bank.

Q. You received it from the Bank of Montreal?

A. Yes.

By the judge—That is, you received the dividends on the whole of the stock?

A. Yes; on the whole of the stock.

From this it appears that at some unascertained time, whether before or after the dates of the transfers to the bank is left uncertain, the certificate for the shares was handed to Miss Sweeney, and that the proceeds of dividends accruing up to January, 1880, were received by Rose, and by him paid over to the appellant. This is the only evidence which tends to prove ratification to be found in the case. The onus of proving a mandate by ratification or otherwise was, of course, upon the plaintiff in the action, but can it be said that either of these facts, taken separately or together, establish that Miss Sweeney, with the knowledge that her money had been invested in Rolling Mills shares, accepted the certificate and took the profits of the shares prior to the transfers to the respondents. Time was material, and it was incumbent on the plaintiff to establish the date, but the handing over of the certificate, for all that appears, may have been after the last transfer to the respondents, for no date is assigned to it by Rose, and in a case like the present, when the anxiety of Rose to throw the loss occasioned by his fraud and misconduct on the bank rather than on the appellant is manifest, I think we ought jealously to scrutinize his evidence, and that we are not entitled to supply defects in the

proof by making presumptions and drawing inferences to establish material facts which the plaintiff ought to have proved directly. Again, the mere fact that Rose received the dividends and handed the proceeds to the appellant proves nothing towards making out a case of ratification, unless it is also shown that Miss Sweeney was informed by him, or in some way knew, that the money was in fact the proceeds of an investment in these shares, but of this most material fact there is not a word of proof to be found in Rose's deposition or elsewhere in the record. It is quite consistent with Rose's statements, that whilst he handed the money to Miss Sweeney, he also told her that the money was the produce of other investments, or that it was interest on money remaining in his hands or in those of his firm, or that it was the profit of some investment not specified, in any of which cases there would have been no ratification of his act in investing in these particular shares, for it was incumbent on the plaintiff to prove that she knew of the purchase of these particular shares and assented to it prior to the transfer to the respondents. In this I think the appellant has failed, and consequently it is not proved that Rose held the shares as her agent when the respondent acquired them.

I, therefore, come to the same conclusion as the Court of Queen's Bench, that the appellant failed to prove her case, of which the establishment of a mandate was the indispensable foundation, and that, therefore, she must fail in her action.

There are, however, in my opinion, other reasons for holding that this appeal cannot succeed, reasons which are consistent with the hypothesis that the evidence is sufficient to establish the agency, and that the conclusion before stated on that head is erroneous.

Then assuming, that either by reason of some prior

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authority, proof of which has been overlooked, or by reason of ratification prior to the transfer to the respondents, it matters not which, a mandate is sufficiently established, I proceed to inquire what would have been, in law, the consequence and effect of such proof as regards Rose's powers of disposition upon the shares in question.

Mourlon, who, though an institutional writer, is regarded as a sound authority on French law, states, with clearness and conciseness, the legal consequences of a purchase by an agent of tangible, corporeal property, property susceptible of being transferred by tradition. He says (1) if corporeal property, such as a house, is purchased by an agent in the name of his principal, the agent is a mere "porte-voix," and the property passes at once to the principal; but if the agent purchases in his own name, the law operating on the contract of sale transfers the property to the agent in the first instance, who becomes bound by a legal obligation to transfer it at once to his principal, which latter obligation the law also by force of art. C.N. 711 (C.C.P.Q. art. 583) implements by transferring the property to the principal, who thus acquires the property by force of these two mutations.

The law thus applicable to the case of a corporeal, movable or immovable, cannot be applicable to the property in these shares now in question, for the legislature has expressly enacted that the property in them shall be passed in one way, and in one way only, namely, by a transfer on the books of the company.

This brings the enquiry to the question: What are the legal powers of disposition of an agent or mandatary to whom property is either transferred by the mandator or principal, or who, with the knowledge and assent of the principal, obtains from a third party a

(1) Vol. III. pp. 477-478.

transfer of property such as this for the benefit and behoof of the principal.

In the French law such an agent is designated a *mandataire prête-nom* and according to the highest authorities he is entitled to exercise unlimited powers of disposition over the property so vested in him, and third persons acquiring rights in or title to the property from him, are not considered to be in bad faith, or in any way affected by knowledge or notice that the agent is dealing with the property in contravention of the agreement between him and his principal, the sole remedy of a principal in such a case being a personal action against the mandatary who is considered, as regards third persons, to have been invested with unlimited powers of disposition, as much so as if he was himself the veritable and absolute proprietor. As showing that such is a correct definition of the powers of the person known in French law as *mandataire prête-nom*, I refer to Laurent, (1), who says :—

> On appelle "prête-nom," en matière de mandat, celui qui, en apparence, a les droits du propriétaire sur une chose, tandis qu'en réalité il n'est que mandataire.

The author then gives, as an illustration, the case of a transfer of property transferred by the owner to one who, as agreed by a *contre lettre* or secret convention, is to hold it as a mandatary for the benefit of the party making the transfer. From this, however, it is not to be inferred that this particular species of agency is confined to the case of a transfer by the principal himself and does not include the case of a transfer by a third person to a mandatary for the beneficial use of the principal, for such a distinction would, of course, be purely arbitrary, and moreover is shown by the *arrêt* of the Court of Cessation, hereafter to be cited, to have no existence.

(1) Vol. 28 p. 82 No. 76.

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Laurent, in the passage referred to, next proceeds to consider what are the powers of disposition which such a *prête-nom mandataire* has over the property with which he is invested, and he shows that these rights are those of an absolute proprietor. Thus he says:—

Donc, a l'égard des tiers, le mandat est censé ne pas exister: partant, celui qui, en réalité, n'est qu'un mandataire aura les droits que lui donne son titre apparent. Si c'est une cession, il sera considéré comme propriétaire à l'egard des tiers, et il pourra valablement faire tous actes de disposition, quand même par ces actes il dépasserait les bornes du mandat qu'il a recu sous forme de cession.

Next he considers the case of the third party having notice that the person with whom he deals is only a mandataire, and, after citing a decision of the Court of Cassation, proceeds as follows:

Cela implique qui celui qui constitue un mandat sous forme de prête-nom a l'intention que les rapports entre le prête-nom et les tiers soient règlés par l'acte apparent, et qu'il n'y ait de mandat qu'entre lui et le prête-nom: de sorte que le mandat, même connu des tiers, soit censé ne pas exister à leur égard. Mais, comme le cessionnaire apparent est, en realité, mandataire, nait la question de savoir en quelle qualité les tiers entendent traiter avec lui, alors qu'ils savent que le prétendu cessionnaire n'est qu' un mandataire? Est-ce l'acte apparent qui prévaudra, quoique les tiers sachent que ce n'est qu'un acte apparent? On suppose que le cessionnaire a traité en cette qualité, et que les tiers ont accepté cette qualité apparente. Dans ce cas, il faut dire, avec la cour de cassation, que l'acte apparent régle les rapports du prête-nom avec les tiers, malgré la connaissance qu'ils ont de la réalité des choses.

Having thus shown that knowledge of the fact that the mandate does not affect the third party who may purchase from the "prête nom," Laurent next proceeds to consider a question, which is also the vital question in the present case, and his decision of which applies *a fortiori* here, namely, whether the knowledge of a third party acquiring title from the mandatary, not merely of the existence of the mandate, but also of its terms, and that the act of the mandatary in ceding his apparent

rights is in contravention of the convention existing between him and his principal binds the purchaser. He says on this head:

Il y a cependant un motif de douter: si le prête-nom fait ce qu'il n'avait pas le droit de faire comme mandataire, l'acte sera-t-il valable? Ne peut-on pas dire que les tiers sont de mauvaise foi? Dans la doctrine consacrée par la cour de cassation, on écarte la question de bonne foi. Il y a, en effet, une difference entre la contre lettre de l'article 1321 et le mandat donné sous forme de prête-nom. La contre-lettre a pour objet de tromper les tiers, elle éveille du moins l'idée et le soupçon de fraude: tandis que celui qui donne un mandat à un prête-nom ne veut pas tromper, il consent à ce que le mandataire agisse à l'égard des tiers, non comme mandataire, mais comme cessionnaire: c'est lui qui pourra être trompé si le mandataire dépasse les bornes de son mandat; il accepte d'avance cette conséquence de l'acte apparent qu'il passe, il renonce à se prévaloir contre les tiers du mandat que ceux-ci ignorent ou sont censés ignorer. Il suit de là qu'il n'y a pas, dans l'espèce, mauvaise foi de la part des tiers, ils font ce que le mandant les autorise à faire.

I have given this somewhat long extract from Laurent as it shows the law very clearly and is very apposite to the questions which are presented for our decision in this appeal.

The *arrêt* of the Court of Cassation, already referred to, and upon which Laurent founds his text, is reported in Dalloz, 1864, Vol. 1, p. 282 (the case of *Richaud C. Lécurieux*) and it fully bears out his conclusions. The court says in effect that the *mandat prête-nom* is a contract *sui generis* not governed by the general principles of the law applicable to the contract of mandate, and that the question of the good or bad faith of those dealing with the mandatary cannot arise. It is further of importance, as showing that the principle applies as well to the case of a cession made to the mandatary by a third party for the benefit of the principal, as to that when the cession is by the principal himself, directly to the *prête-nom* for in that case the fact was, the property and the rights in question had been ceded to the

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*prête-nom* by a third person.

In this *arrêt* the court says:—

Attendu, en droit, que le mandat proprement dit ne doit point être confondu avec le mandat *sui generis*, connu sous la dénomination de prête-nom: Attendu que lorsque le mandat a constitué son prête-nom maître absolu de la chose à l'égard des tiers, il importe peu que le tiers avec qui ce dernier a traité en son nom personnel ait eu connaissance de la qualité de prête-nom: que cette circonstance ne saurait exercer aucune influence sur les droits et obligations qui naissent du contrat: que cet acte s'étant accompli hors de la présence du mandant, qui a voulu y demeurer étranger, celui-ci ne peut pas plus s'en prévaloir qu'il ne pourrait être invoqué contre lui.

These authorities might be largely added to, but I will only refer further to Troplong, Mandat (1), which is in entire accord with the law before stated from Laurent and the Court of Cassation.

It cannot be objected that these authorities are not applicable in the Province of Quebec, for the law of agency as embodied in the Quebec Civil Code agrees in every respect material to the present question with that of the French Code. And it is to be observed that the doctrine of the Court of Cassation is not founded on any particular article or text of the Code, but on a presumption of law (*præsumptio juris et de jure*) as to the intention of a principal who transfers or authorizes a transfer of property to his agent or mandatary to be held by the latter ostensibly as absolute owner, but in reality for the beneficial use of the principal, and the reasons which have induced the French courts and jurists to make such a presumption are equally applicable in the Province of Quebec.

Then applying the before stated principles of law to the facts in proof in the present case and, assuming for the present purpose that the fact of agency by ratification is sufficiently established, we find that the relations between appellant and Rose were exactly such as according to the authorities cited constituted the latter

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a *mandataire prête-nom*, according to the definition before given.

The absolute property in these shares was vested in him, though for the benefit of his principal; for, if the appellant was entitled, even as between herself and Rose, to claim any interest in the shares, it could only be on the ground that she had recognized and adopted his acts in taking the transfer in his own name, and as such ratification was in all respects equivalent to a prior authority, we are by a sort of legal fiction to regard Rose as having acquired the shares originally as the mandatary of the appellant with her authority and assent, thus exactly fulfilling the conditions pointed out by Laurent and the Court of Cassation as requisite to constitute the peculiar species of the contract of mandate now in question.

Next arises the enquiry, were the powers of disposition incidental to an agency of this nature legally exercised?

It is to be observed that both the Court of Cassation and the text writers above mentioned lay it down that a degree of knowledge which, in an ordinary case, would constitute a purchaser in bad faith, would have no effect upon the validity of the acquisition by a person to whom a *prête-nom mandataire* might sell or pledge the property entrusted to him, and that even though such a purchaser or pledgee should have notice not merely of the fact, that the person from whom he was buying or taking security was an agent holding the property for the benefit of another, but also of the additional fact that the disposition of the property proposed to be made would actually contravene the convention between the agent and his principal, such notice would still not invalidate a transfer made to the third party having such knowledge. This goes far beyond anything which is requisite in the present case,

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for at the most the words "in trust," entered in the share register and added to Rose's name in the transfer to Mr. Buchanan (if indeed they had any signification at all), would only have signified that Rose, having the absolute property in the shares, held that absolute property as the mandatary for some undisclosed principal, in which case, as already shown, the law clearly justified Mr. Buchanan in assuming, as he did, that Rose had the power to do what he actually did, namely, to pledge the shares for advances to be made or already made to him by the bank.

That this is the very utmost effect which can be attributed to this appearance of these words "in trust" in the share register and transfer is apparent when we consider the general principle of the law that good faith is always to be presumed, and that it lies on those who allege bad faith to prove it. Whilst I say this, I by no means concede that it would in law have made any difference if Rose had disclosed to Mr. Buchanan facts, which there is no pretence for saying he did communicate, viz., the entire history of these shares and of the purchase of them by Rose with the funds of the appellant, just as fully in every respect as Rose states those alleged facts in his deposition, for it appears to me that the question of good or bad faith is entirely immaterial in dealing with an agent, such as Rose undoubtedly was. It is out of the question to say in face of the law, which says that bad faith must be proved and not presumed, that even if bad faith or notice of all the facts had been material, there was any obligation on Mr. Buchanan to make enquiry, as the declaration charges there was. To say there was such a duty cast upon the respondents would be to apply the doctrine of constructive notice, which prevails in English courts of equity, and which being entirely founded on presumption is expressly excluded in French law by the principle

already mentioned that no presumption of bad faith shall be made. Whilst I have made these observations on the evidence, as showing that nothing was done by the bank or the manager knowingly to prejudice the rights of Miss Sweeney, I must repeat that, in my judgment, it would have made no legal difference if Mr. Buchanan had received the fullest information as to Miss Sweeney's connection with the shares in question.

I have carefully refrained from making any observations on the English law applicable to the case, either for the purpose of drawing analogies or pointing out distinctions. I have endeavoured to consider the case on what I consider to be the principles of the French law prevailing in the Province of Quebec, by which alone it falls to be decided. I may, however, be permitted to add that I should doubt whether even upon the highly artificial principles as to constructive notice which prevails in courts administering English equity there would have been sufficient in the words "in trust," (for it is the appearance of these words in the share register and in the transfers, which alone can be referred to as establishing notice,) to have put Mr. Buchanan on enquiry. The argument doubtless would be that Mr. Buchanan was put upon enquiry by seeing these words added to Rose's name as indicating that he was acting in the quality of a trustee or agent. But in the first place I should doubt if the words "in trust" are not too general and vague for any such purpose, and in the next place it would have appeared to me to be out of the question to suppose that an enquiry from Rose, who was dealing with the shares as his own, would have led to any communication of the appellants rights, and an enquiry of the officers of the Rolling Mills Company would certainly have been fruitless as all they could have said would have been that they added the words "in trust" because Rose instruct-

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ed them to do so: and consequently there would have been no ground for applying the doctrine of constructive notice which proceeds on the inference that knowledge would have been obtained if enquiry had been made. I need not however speculate on what the result of the evidence would have been in an English Equity Court for it is sufficient to say that this case is to be decided by the law of Quebec, and that adjudged by that law the result is that, first; no presumption of any notice or knowledge not actually found to have been brought home by the respondent's manager can be imputed to them; and secondly, that even if Rose had stated to Mr. Buchanan every fact and circumstance contained in his deposition in this cause, Mr. Buchanan would have been in law fully justified in accepting the transfer and the notice would not have impaired or in any way affected the title of the bank to hold the shares as security for the advances for which they were pledged.

That the view of the law, before stated, is that acted on in practice in dealing with shares in the Province of Quebec, is proved on the part of the respondent and not contradicted. Mr. Buchanan, in his deposition, states that it is not unusual to find these words "in trust" added in the certificate, but that such addition is not considered as incapacitating the holder from disposing of the shares freely as his own property, and that it is not the usage to make any inquiries into the nature of the title in such cases.

That a trust may be created in the shares of this company, which it would be imperative on the courts of the Province of Quebec to enforce, according to the principles prevailing in English courts of equity, I do not for a moment question. In the case, which may be supposed, of shares being put into trust by a settlement made between parties domiciled in England,

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and which, according to the intention of the parties, is to be construed and executed according to the law of that country, there can be no doubt that on the ordinary principles of private international law the rights of the parties would be considered by the Quebec courts as governed by the rules relating to trusts which prevail in English law, provided, of course, that proper proof of that law was adduced. But in the present case all the parties to the contract being domiciled in Quebec, which was also the *locus* of the contract, and where it was to be carried into execution, I maintain that their rights under it must be ruled exclusively by the law of Quebec.

I am of opinion that the appeal must be dismissed with costs.

FOURNIER J.—La poursuite de l'appelante, Demanderesse en Cour Supérieure, a pour but le recouvrement de trois actions dans le fonds de la "Montreal Rolling Mills Company," originairement de mille dollars chacune, régulièrement convertie plus tard en actions de cent piastres chacune,—détenues pour elle en *fidéicommis*, (*in trust*) par James Rose l'un des défendeurs, qui les a illégalement transportées à la Banque de Montréal, intimée, comme sûreté collatérale d'une dette qui lui était personnelle.

L'Appelante allègue que lors de ce transport par le dit James Rose (*in trust*) *fidéicommis* il était à la connaissance des défendeurs et de chacun d'eux que les dites actions n'étaient point la propriété du dit James Rose, mais celle d'autres personnes et qu'il était en conséquence du devoir des défendeurs de s'enquérir de ce fait avant d'en consentir ou accepter un transport.

L'Intimée seule a plaidé à cette demande, alléguant que les dites actions lui ont été transportées conjointement avec au-delà de deux cents autres pour la garantie

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d'une créance qu'elle avait contre le dit James Rose pour un montant excédant trente mille dollars ; alléguant en outre qu'aucun *fidéicommis* ne lui a été dénoncé et que le dit James Rose disposait de ces actions comme de sa chose propre.

D'après la preuve écrite et testimoniale, il est établi que la famille Sweeny dont l'appelante est un des membres, fit le 18 mars 1871, remise à James Rose par l'intermédiaire de MM. Crawford et Lockhart de Belfast, en Irlande, d'une somme de £2040.11.1. On ne trouve dans la lettre d'envoi de cette somme aucune instruction particulière sur la manière de la placer ou employer,—mais elle contient les passages suivants faisant voir qu'une partie de ces fonds appartenait à l'appelante et qu'ils restaient sa propriété.

BELFAST,
18th March, 1871.

Dear Sir,

We have at length brought the sale of the Sweeny property to a close and now enclose balance sheet between the Sweeny family and ourselves, and have this day remitted to the Montreal Bank as *directed by your friends* to your credit £2040.11.1.—We also send you, as you wish, a statement shewing the portions of the purchase money to *which each party was entitled with their* contributions to the costs of the sale, and also to the sums which had to be repaid Mr. Esson for 17½ years accumulations of rent and interest.

It would be very desirable if the Certificates which will become necessary on Miss Sweeny attaining age to prove her heirship, were now procured while there are so many parties who could give information which it might be difficult to obtain in 15 or 16 years hence.

Cette somme fut reçue par Rose vers le 31 du même mois et par lui déposée entre les mains de la société Morland, Watson et Cie., dont il faisait partie. Ce fait est constaté par l'entrée suivante que l'on trouve dans les livres de cette société, "1871, March. James Rose ex Deposit Crawford & L., 20 March, £2040.11.1"—égale à $9,930.71. Il fut crédité pour cette somme dans les livres de la société. Plus tard la balance de ce qui revenait à la famille Sweeny fut également remise à

James Rose, par MM. Crawford et Lockhart, comme cela est prouvé par la production de leur correspondance.

Le 14 avril, même année Rose tira sur ce dépôt une somme de $4,000 qu'il employa le même jour à acheter quatre actions en *fidéicommis* (*in trust*) de la "Montreal Rolling Mills Company" de la valeur de $1,000, chacune. Ce fait est prouvé par les livres de cette compagnie.

Le 11 avril il se fit remettre par la dite compagnie un certificat No. 1008 sous le seing du président et secrétaire, constatant que lui le dit James Rose était le détenteur en *fidéicommis* (*in trust*) de trois actions dans le capital de la dite compagnie, dont le plein montant de mille dollars par part avait été acquitté. Ce certificat fut transmis par Rose à l'appelante à laquelle il a aussi fait parvenir les dividendes de ces actions jusqu'au 1er janvier 1884.

Le 3 janvier 1876, Rose toujours avec la qualité de *fidéicommissaire* transporta à l'un des défendeurs W. J. Buchanan agissant (*in trust*) comme *fidéicommissaire* pour l'intimée, deux cent cinquante actions, du montant de $100 chaque, payé, dans le fonds social de la comgagnie. Quoique l'appelante n'en ait pas fait un grief dans sa déclaration, ce transport paraît d'après la preuve avoir été fait comme sûreté collatérale d'escompte fait dans le même moment et à être fait par après, sur les billets de James Hawley, endossé par Rose. Ce fait forme un des considérants du jugement de la Cour Supérieure, énoncé comme suit :—

Considérant que le dit transport n'a été fait que pour garantir des avances a être faites au dit James Rose, et non pour garantir des dettes alors existantes.

Le 13 mars 1879, un autre transport d'actions dans la même compagnie fut fait de la même manière, ce qui faisait en tout 310 actions payées en plein, transportées à

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l'intimée par Rose.

Depuis l'établissement de la "Montreal Rolling Mills Company" James Rose a été l'un des actionnaires jusqu'à la date des transports ci-dessus mentionnés, et y a toujours eu ces actions inscrites en *fidéicommis* (*in trust*).

L'appelante, confiante dans le certificat qui lui avait été transmis, recevant régulièrement ses dividendes, croyait ses fonds en parfaite sûreté lorsqu'elle apprit au commencement de Janvier 1880, que ses actions avaient été transportées à l'intimée à laquelle elle en fit plus tard la demande par un protêt qui fut suivi de l'action en cette cause.

L'appelante a retracé la disposition de ces fonds d'une manière certaine depuis le moment de leur envoi jusqu'à celui de leur emploi en actions dont les certificats lui furent remis presqu'aussitôt et dont elle est toujours demeurée en possesion. Malgré cela la Cour Supérieure a renvoyé sa demande, se fondant principalement sur les considérants suivants :—

1o. Considérant que par le dépôt de la dite somme de trois mille piastres fait entre les mains du dit James Rose, ce dernier est devenu propriétaire de la dite somme en autant que ce *dépôt est irrégulier.*

2o. Considérant que la preuve du dépôt en matière civile ne peut se faire vis-à-vis de *tiers que par écrit.*

3o. Considérant que le fait, que le dit James Rose, a apposé son nom comme souscripteur des dites parts n'a pas eu l'effet vis-à-vis des tiers de rendre la demanderesse propriétaire des dites parts, que s'il en était autrement on ne saurait à qui attribuer la propriété de ces parts dans les cas où elles serait réclamées par plusieurs déposants ; que le dit James Rose ne pouvait pas vis-à-vis des tiers soustraire ses biens à l'action de ces créanciers par le seul fait d'ajouter à son nom le mot *in trust*, et tant que le *fidéicommis* (*trust*) n'est pas déclaré comme étant la propriété d'une personne nommée, les tiers ont droit d'agir avec la dépositaire dans telles circonstances comme si ces choses étaient siennes.

Ce jugement a été confirmé par la Cour du Banc de la Reine, et c'est ce dernier jugement confirmant le premier qui est actuellement soumis à la révision de

cette cour.

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Le premier considérant du jugement de la Cour Supérieure est fondé sur une proposition évidemment inadmissible, savoir, que Rose est devenu propriétaire de la somme de trois mille piastres en autant que le dépôt qui en a été fait est irrégulier. L'omission de quelques-unes des conditions légales d'un dépôt peut bien changer la nature des obligations du dépositaire, mais elle n'a certainnement pas l'effet de le rendre propriétaire de la chose déposée Le contrat peut alors suivant les circonstances se transformer en un mandat obligeant le dépositaire à remettre ou à rendre compte de la somme reçue. Ce considérant est en outre contraire à la preuve qui constate que du moment que Rose a touché cette somme, loin de s'en considérer le propriétaire il en a fait au contaire une entrée dans les livres de compte constatant que la somme qui lui avait été remis par MM. Crawford et Lockhart provenait de la succession Sweeny. La lettre d'envoi ne lui conférait ni droit de propriété ni de jouissance dans cette somme. L'entrée qu'il en a faite prouve bien qu'il l'a compris ainsi. De plus l'employant presqu'aussitôt à l'acquisition, comme il a déjà été dit, d'actions souscrites, il est vrai par lui-même, mais en *fidéicommis* (*in trust*), ne conservait-il pas encore à cette somme, le caractère d'un dépôt ou du moins d'une somme d'argent à raison de laquelle il reconnaissait n'avoir aucun droit de propriété, et dont il ne pouvait disposer qu'au bénéfice d'autres personnes.

Son mandat à cet égard n'est pas bien formel, mais la lettre d'envoi en contient assez pour faire comprendre que ces fonds ne lui étaient transmis que pour être placés au profit des héritiers. Il n'y a certainement pas d'autre conclusion à tirer de cette lettre, surtout par rapport à l'appelante. En effet, si ces deniers n'avaient pas été envoyés pour être placés, pourquoi MM.

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Crawford et Lockhart auraient-ils pris la précaution de recommander à Rose de se procurer de suite les preuves de l'état civil de Mlle Sweeny. Non seulement ces deniers étaient sa propriété, mais ils devaient être placés pour elle. Il est bien vrai comme le dit l'hon. Juge Rainville que le dépôt qui en a été fait est irrégulier parce que l'obligation de garder les deniers et de les restituer en nature n'a pas été imposée à Rose. Mais quelle peut être la conséquence de cette omission, serait-ce de rendre Rose propriétaire. Il est certain que non d'après ce qui a été dit plus haut. Et d'ailleurs le but que se proposait évidemment l'appelante n'était pas de confier la garde de ses deniers, mais bien de les faire placer ainsi que je l'ai déjà dit. Pour bien apprécier la convention des parties, il ne faut pas perdre de vue le but qu'elles avaient. En faisant application aux faits de cette cause de l'autorité suivante de Duranton on est forcé de conclure que ce n'est pas un dépôt qui a été fait, mais un mandat qui a été confié à Rose. Au vol. 18, n° 12, après avoir défini le dépôt, il dit :—

Et puisque le but principal du contrat de dépôt est la garde de la chose remise à ce titre, il n'y aurait pas de dépôt, mais quelque autre contrat, dans le cas où les parties se seraient principalement proposé, par leur convention et la remise d'un objet, quelque autre but que la simple garde quand bien même elle se trouverait secondairement comprise dans les obligations de celui à qui la chose serait confiée, ainsi que cela a lieu souvent dans le cas d'un mandat et dans d'autres cas encore ; ce serait un mandat avec une autre espèce de contrat, selon les circonstances du fait ; car dit le jurisconsulte Ulpien dans la loi (1), c'est toujours au but principal que se sont proposé les parties entraitantes, qu'il faut s'attacher : *unius cujusque contractus initium spectandum est ;* l'auteur continue en citant plusieurs cas de cette transformation d'un dépôt imparfait en un autre contrat qui n'attribue aucunement la propriété de la chose remise à celui qui l'a reçue.

Suivant cette autorité, il faut conclure que le dépôt irrégulier dans le cas actuel s'est transformé en un contrat de mandat, et ce qui serait encore plus conforme

(1) 8 pp. ff., *Mandati.*

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aux faits, c'est qu'il n'y a eu dès l'origine qu'un contrat de mandat et non pas un contrat de dépôt, et que Rose était un mandataire et non un dépositaire et que tout ce qu'il a fait pour l'appelante l'a été en la première qualité. Dans le cas même où Rose ne serait pas considéré comme ayant eu un mandat régulier, il est impossible de ne pas le considérer au moins comme le *negotiorum gestor* de l'appelante. S'il n'a pas eu dès l'origine instruction spéciale de faire des deniers qui lui ont été remis, l'emploi qu'il en a fait, il est du moins constant qu'il les a reçus, qu'ils appartiennent à l'appelante ; qu'il en a fait le placement pour elle, quoique pas nommément ; qu'aussitôt après l'achat des actions il en a transmis le certificat à l'appelante et qu'il lui a fait remise des dividendes. Son ingérence, en supposant qu'elle ne fut pas autorisée, le place dans la position au moins d'un *negotiorum gestor* responsable de ses actes envers l'appelante. Mais par la ratification de ses actes l'ingérence de Rose est devenue sujette à toutes les obligations d'un mandataire régulier envers son mandant. Cette ratification est prouvée bien positivement par l'acceptation par l'appelante du certificat que Rose lui avait transmis pour constater l'achat des actions et par la réception des dividendes pendant plusieurs années. Ces faits constituent certainement une ratification formelle de l'emploi des deniers qui a fait naître entre l'appelante et Rose les mêmes obligations que s'il y avait eu un contrat de mandat régulier dès l'origine. En conséquence de ce qui précède, je reconnais qu'il n'y a pas eu de dépôt régulier,—mais que la lettre de MM. Crawford et Lockhart est suffisante pour établir la preuve d'un mandat de gérer pour l'appelante, et que dans tous les cas l'ingérence de Rose, son emploi des deniers, la transmission du certificat des actions—la réception par l'appelante du certificat et des dividendes ont établi entre eux les obligations

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de mandant et de mandataire.

On a fait objection à la réception de la preuve testimoniale sur le principe que ni le contrat de dépôt ni le contrat de mandat ne peuvent être prouvé par témoins. Ce principe est certain, mais ne s'applique pas à la gestion d'affaires. La preuve testimoniale était donc admissible pour prouver tous les faits d'ingérence de Rose. En outre, lorsqu'il y a un commencement de preuve par écrit, la preuve testimoniale peut être reçue pour compléter la preuve du contrat du mandat Dans les deux cours cette preuve a été considérée comme illégale et c'est principalement pour ce considérant que la Cour du Banc de la Reine a confirmé le jugement de la Cour Supérieure. Je regrette d'avoir à dire que je ne puis accepter cette conclusion. Non seulement je crois qu'il y a un commencement de preuve par écrit suffisant, mais je trouve qu'il y a une preuve complète du fait que les actions en question n'appartiennent ni à Rose ni à l'intimée. Celle-ci en les acceptant et Rose en les remettant (*in trust*) en *fidéicommis* ont tous deux admis que ces actions n'appartenaient ni à l'un ni à l'autre. Cette déclaration formelle faite par écrit doit avoir son effet, et si elle n'indique pas l'appelante comme propriétaire, elle ne laisse plus au moins à établir que la question d'identité de la personne du propriétaire. Ce fait matériel de l'identité pouvait sans doute être prouvé par témoin, après l'admission des deux parties qu'elles n'étaient pas les propriétaires. Il ne restait donc qu'à faire disparaître l'incertitude créée à cet égard par l'insertion des mots *in trust*. Cette incertitude est-elle, comme l'a dit l'hon. Juge de la Cour Supérieure, une raison suffisante pour faire attribuer à Rose la propriété de ces actions? La réponse est dans l'écrit même, où Rose dit qu'il ne les détient pas pour lui. S'il s'agissait d'un meuble ordinaire réclamé par différentes parties, regarderait-on comme suffisante pour en priver le véri-

table propriétaire, et l'attribuer à ceux qui le répudieraient, la raison qu'on ne peut distinguer auquel des réclamants ils appartient. On essaierait sans doute avant cela d'en chercher par la preuve testimoniale, le véritable propriétaire. Cette déclaration *in trust* qui suit les actions depuis leur première origine jusqu'aux transports fait à l'intimée, constitue un commencement de preuve par écrit suffisant non seulement contre Rose, mais aussi contre l'intimée qui a fait la même déclaration par l'intermédiaire de son agent Buchanan ; ainsi il émane des deux parties, et il n'y a pas lieu de discuter la question de savoir si n'émanant que de Rose il pouvait aussi servir contre la banque. Les autorités citées dans le *factum* de l'appelante établissent clairement cette proposition développée dans le vol 5 p. 88, No. 7 de Lacombière, des Obligations.

Un écrit est censé émané de la personne à laquelle on l'oppose, lorsqu'il émane de son auteur ou de son mandataire.

Au surplus cette objection ne pouvait être opposée par l'intimé, même s'il n'y en avait contre elle, comme contre Rose, le même commencement de preuve par écrit, pour la raison que l'appelante n'était pas partie aux transactions entre Rose et l'intimée, et qu'il lui a été impossible de se procurer une preuve écrite d'un acte qui se faisait en fraude de ses droits. L'art. 1233, par. 5, C.C, est positif sur ce point. La preuve testimoniale pouvait donc être admise :—

1o Parce que les faits du *negotiorum gestor* qui par la ratification se transforment en mandat, peuvent être prouvés par témoins.

2o. Parce que l'appelante n'étant pas partie aux transactions faites à son détriment il ne lui était pas tenue de se procurer une preuve écrite.

3o. Parce qu'il y a dans l'insertion des mots *in trust* un commencement de preuve par écrit émanant de Rose et de l'intimée, suffisant pour faire admettre la

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Les actions dont il s'agit sont sans doute d'après l'art. 387, considérées comme meuble, mais elles ne sont pas dans tous les cas sujettes à l'effet de l'art. 2268, déclarant que la possession d'un meuble corporel, à titre de propriétaire fait présumer le juste titre. Quoique l'article ne semble viser que les meubles corporels, je ne contesterai pas la proposition avancée par l'intimée que les actions aux porteurs doivent, pour leur transmission, en certains cas, être assimilées, à la transmission des meubles corporels. Mais les auteurs, quelques-uns mêmes de ceux cités par le savant conseil de la Banque intimée, reconnaissent qu'il y a des exceptions auxquelles ce mode de transmission ne peut s'appliquer. Marcadé (1) en fait ainsi la distinction dans le n° 12.

C'est seulement aux meubles individuels que s'applique la prescription instantanée de notre art. 2289. Les universalitées ou quote-part d'universalités, aussi bien mobilières qu'immobilières, n'ont jamais été soumises qu'à la prescription trentenaire, et l'exposé des motifs déclare explicitement que cette règle est maintenue.

Mais notre disposition ne s'applique même pas à tous les meubles individuels ; elle s'applique seulement à ceux qui s'acquièrent par transmission purement manuelle et pour l'aliénation desquels un écrit n'est pas nécessaire.

Après avoir fait voir que l'art. 2279 s'aplique aux actions au porteur, et aux billets de banque, il conclut ainsi qu'il suit :

Il faut donc dire que l'article s'appliqne aux meubles matériels et à ceux qui sont représentés par un signe matériel au moyen duquel on obtient la valeur ; en un mot, à tous les biens meubles qui se transmettent de la main à la main.

Pour le transport des actions dont il s'agit il y avait des formalités à remplir. Ces actions ne sont pas au porteur ; elles ne peuvent être transportées que par un écrit fait dans les livres de la compagnie et signé par les parties. Elles ne sont donc pas susceptibles d'être transmises de la main à la main.

(1) 12 Vol. p. 363.

L'intimé ne peut en conséquence opposer l'art. 2268. Même d'après cet article l'appelante aurait droit de prouver sa propriété, et de prouver les vices de la possession et les vices du titre de la banque. C'est ce qu'elle a amplement fait en prouvant sa propriété des actions, et l'acceptation du transport par l'intimée en face de la déclaration qu'elle achetait ou prenait en gage la propriété d'autrui. Cette transaction si on la considère comme vente, est encore nulle d'après l'art. 1487, comme étant la vente de la chose d'autrui.

Le conseil de l'intimée a fait une très savante dissertation pour établir la légalité du transport de ces actions fait à la banque comme sûreté collatérale. C'est-à-dire que même si elles appartenaient à l'appelante, Rose pouvait valablement les mettre en gage. Cette proposition exigerait un examen sérieux et approfondi pour être combattue. Mais heureusement que ce travail est tout fait et que la question est réglée par la plus haute autorité judiciaire de l'empire, celle de la chambre des Lords siégeant comme cour d'appel. Ce haut tribunal n'est pas, il est vrai, notre cour de dernier ressort comme le Conseil Privé, mais dans la décision que j'invoque *City Bank* v. *Barrow* (1), il s'agissait de décider d'après le code civil, B.C. Ainsi la discussion si complète qu'on y trouve et la décision rendue dans cette cause de la doivent avoir sur ce point toute la force d'une autorité. Le cas était beaucoup plus favorable que le cas actuel, car celui qui avait mis les articles en gage avait le pouvoir de les vendre, tandis que Rose n'avait ni le pouvoir de vendre ni celui de mettre en gage. Comme il serait trop long de faire une analyse de ce rapport. Je ne donnerai qu'un extrait du préambule du rapport et un court extrait des motifs de lord Selborne :

When there is a power, by law, to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge * *

(1) 5 App. Cas. 664.

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Held, that under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow, entitled to pledge Barrow's goods, and that, consequently, the bankers could not set up any title to the goods, as derived from him, against the real owner.

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A la page 669, lord Selborne dit :

> If there are two things, in fact and in law, which it is easy to distinguish from each other, I should have said that those two things were, sale and pledge * * * *
> Not only in the nature of the case are there these differences, but there is no system of jurisprudence which does not recognize them. In this very Canadian Code there is a whole chapter on the subject of sale. It begins by thus defining a sale, "Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay." And there is another chapter on the subject of pledge which begins :— "Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him, with the owner's consent, in security for his debts." Each of those subjects is pursued in details, in a series of clauses carefully and throughout distinguished from each other. Not only is it so in this Canadian Code, but it is generally so in others, certainly in the French Code and in the text writers upon the French law, which deal with these two things very much in the way in which they are dealt with in Canada. Therefore, to say that when there is power given by law to sell, when a purchaser has by law a good title under circumstances particularly defined, that power extends by implication to a pledge, and the pledgee will have a good title also, is an assumption for which neither reason nor authority has been, nor I think can be, alleged."

Si, comme on le voit d'après cette autorité, celui qui a légalement le pouvoir de vendre n'a pas celui de mettre en gage, à plus forte raison celui qui, comme Rose n'avait aucun autre pouvoir que celui d'un mandataire, ne pouvait-il mettre en gage la chose de son mandant.

En résumé je suis d'avis que les actions en question sont la propriété de l'appelante et que l'intimée les ayant illégalement acquises, elle est tenue d'en consentir une rétrocession tel que demandé. En conséquence l'appel devrait être maintenu avec dépens.

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HENRY J.—I think it is clear from the evidence that Rose had in his possession, and it is unimportant in this case how he came by it, certain money belonging to the appellant, and that he invested it in the stock of the Montreal Rolling Mills Company in his own name, but "in trust," and that for two or three years he collected dividends and paid them over to the appellant Miss Sweeny. Whether he was instructed by her to invest the money is immaterial, because, after it was invested, she ratified the act, and became virtually the principal, and not only entitled to be considered as such, but liable to all the incidents attending that position; and if the company had failed, it is clear she would have become a contributory for unpaid stock, and obliged to contribute to the payment of what is due to creditors; under such circumstances Rose held that stock as her trustee.

The bank claims it was transferred to them absolutely by Rose, but in order to sustain that defence it would be necessary for them to prove that he was not only a trustee to hold, but also that he had authority to sell.

There is no pretence that he had authority from the plaintiff to convey or sell that stock. But even if he had the power of dealing with or selling it at all, that would not authorize him to transfer it to another party in payment of a debt which he owed. She, therefore, is entitled, to all intents and purposes, to claim the value.

But we are told it was held by him "in trust" and that the *cestui que trust* for whom he held was not named. That, I think, is immaterial, the stock was shown to have been held by him "in trust" for somebody, and the bank knew that fact and they, under such circumstances, must be held to have known that they were taking from him, in payment of his debt, what belonged

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to another. I consider it amounted to a fraudulent transaction for the bank to take the stock from Rose, knowing that he did not own it. I would consider such conduct discreditable on the part of any moneyed institution. Independently of that, they have shown no right to hold the stock by the transfer from him. If the principal can show that he was entitled to the property he can always take advantage of the illegal act of transfer of property by his agent, and if Rose took the stock improperly in his own name without any qualification, having used the money of the appellant to purchase it, she would be entitled to come into court and make him transfer it to her. I think the appeal should be allowed with costs and the appellant declared entitled to rank for the amount she claims.

TASCHEREAU J.—I am also of opinion that this appeal should be allowed. The remittance of the money by Sweeny's agent to Rose did not, as held by the Superior Court, create a contract of *depôt irrégulier* (1). If Rose's act in investing this money in these shares had not been ratified by Sweeny, he would have been, supposing there was no proof of a mandate, a *negotiorum gestor*, acting under a *quasi* contract. In that case, no commencement of proof in writing would have been necessary. Article 1233 C. C.

It is evident, however, that this money was sent to him to be invested for and in Sweeny's name. This seems to me an irresistible inference of fact in the case. Demolombe (2). For what else was this money sent? Then, there was subsequently a complete ratification by Sweeny of this investment, first, by her accepting the certificate of these shares in lieu of her money, and, secondly, by

(1) See Pont 1st des Petits contrats, 385 and seq.; Pothier, depôt 82; Troplong, depôt 23 a 33, 91, 114, 116, and mandat 71, 118 and seq.; 19 Laurent, 547 and seq.

(2) Obligations, 60 and seq.

her receiving, during over eight years, the dividends thereon. Rose was then a mandatary, and a commencement of proof in writing was, perhaps, necessary to prove the mandate, though both the mandator and the mandatary admit it. Did the plaintiff adduce such a commencement of proof? She has produced and holds the only certificate in writing issued for these shares: this certificate expressly says that these shares were held by Rose for a third person, as mandatary or agent, in *nomine procuratoris;* for the words "in trust" can mean nothing else. Can she not, then, prove by oral evidence that this third person, for whom Rose got these shares, is herself? There are, moreover, Crawford's letter to Rose, transmitting him these moneys for the plaintiff, the entries in the books of Rose's firm, and the words "in trust" added to Rose's name in the register of the Montreal Rolling Mills, which all prove that these shares did not belong to Rose personally; Rose's evidence was then perfectly legal. It was argued for the bank that Rose being Sweeny's mandatary his evidence was objectionable on that ground. But it must be remarked that when he gave his evidence he had long before ceased to be such mandatary.

The bank's contention, that a writing sufficient to create a commencement of proof in favor of the plaintiff should have emanated from them, and from them alone, is unfounded. It never was possible for the plaintiff to get a writing from the bank in the matter, and the law in such a case does not require one: Article 1233 C.C. Laurent (1); Bedarride, Dol and Fraude (2).

Then it is not necessary that such a writing should emanate from the adverse party. Pothier, it is true, was of a contrary opinion, but the courts in France, in cases before the Code Napoleon, were all against him on

(1) 19 Vol. No. 585. (2) 2 Vol. No. 728.

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this point. Bonnier (1); Table Gen. Dev. V. Preuve, commencement de (2); Marcadé under article 1347; Dalloz. Vo. Obligations (3); Bedarride (4); Sebire and Carteret, Ency. De Droit (5).

The fact that our Code leaves out the qualification of a commencement of proof given by the Code Napoleon demonstrates, it seems to me, that the codifiers must have been of opinion that the last one was new law, but that they deemed it better to adhere to the old law.

Moreover, even if we were to hold that the commencement of proof in writing required is the same for us as the one required by the Code Napoleon, the bank's contention on this point could not prevail because their very title to these shares and the only one on which they can rely to retain them is signed by Rose "in trust," that is to say, "for a third party." This constitutes, according to all the authorities, a writing emanating from them. Laurent (6); Dalloz V. Obligations (7).

As to the appellant's contention that the bank may be here taken as the *ayant cause* of Rose, and that a writing by Rose is, on that ground, a writing by the bank, I would have some doubts, though it is not unsupported by authority. Demolombe, (8); Marcadé, (9); Laurent, (10); Bedarride (11).

But there is another aspect of this part of the case. What were the real relations between the bank and Rose? No other, it seems to me, than that of a mandator and mandatary as regards the dividends, and pledgor and pledgee as regards the capital. Rose authorized the bank to receive the dividends on these

(1) 1 Vol. 165
(2) Nos. 2, 3 & 5.
(3) No. 4744 and seq. 4756.
(4) Dol and Fraude No. 731.
(5) Vo. Commencement de preuve.
(6) 19 Vol. Nos. 494, 495.
(7) No. 4794.
(8) 7 Vol. Des contrats, No. 133, Turin, 4 mars, 1806 *In re* Camosso, S. G. 6, 2, 909.
(9) Under Art 1357.
(10) 19 Vol. 517.
(11) Dol and Fraude, No. 759.

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shares for him and transferred to them the capital as a pledge or security. The bank consequently never became the owner of these shares. This appears by their own plea. Now, according to all the authorities under the Code Napoleon, in fact under the very terms of Art. 1347 thereof, the writing necessary to constitute a commencement of proof may emanate from the person represented by the party against whom the proof is brought. Here the bank is the mandatary and pledgee of Rose, and not only represents him, but they are, in law, as to this, one person. The admissions in writing by Rose that this money belonged to a third person are then sufficient commencement of proof against the bank and in fact are to be held admissions by the bank itself. Dalloz Vo. Obligations (1); Aubry et Rau, (2); Nimes 1st February, 1870, Dalloz Rec. Per. 1872, 1st part, (3); Rolland de Villargue (4). I repeat, however, that I do not think it was necessary in this case for the plaintiff to produce any writing by or from the bank.

The respondent has referred us to the authorities on *prête-noms*. But there was no *prête-nom* here. Sweeny never authorized Rose to sell these shares either in his name or in her name; and Rose did not buy these shares, or transfer them to the bank, in his own name, but only as agent. He did not disclose the name of his principal, but he informed the bank, by signing "in trust" that it was as agent or mandatary, and for a third party, that he was acting. They were put on their guard and were bound to ascertain who the third party was, and what was the extent of Rose's powers as such mandatary. Not having done so, they have only themselves to blame if they suffer

(1) Nos. 4794, 4796.
(2) P. 332.
(3) 8 Vol. 119.
(4) Vo. Commencement de preuve par écrit, No. 4.

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from having dealt with an unauthorized agent (1). Article 1703 C. C. specially enacts that for all acts of alienation and hypothecation the mandate must be express. There was no such mandate here from Sweeny to Rose. The original mandate was to invest her moneys. Having done so, his powers as to the capital had lapsed. He was *functus officio*, art 1755 C. C., and he had no right thereafter to dispose of or deal in any way with this investment without a new authorization or mandate.

The law as to factors and brokers, relied upon by the respondent, has no application to this case. Rose was not a factor or broker, neither was he a trader dealing in such securities. It is precisely because the rule is *nemo plus juris in alium transferre potest quam ipse habet* that the factor's Acts and article 1735 *et seq.* of our Code were necessary, in the interests of commerce, to legalize sales made by factors and brokers in certain cases. See Per Lord Blackburn, in *City Bank* v. *Barrow* (2); *Clarke* v. *Lomar* (3); *Johnston* v. *Lomar* (4). If Rose had taken these shares in his own name, or had transferred them to the bank as owner, even then the plaintiff's contention would probably prevail. The sale of a thing which does not belong to the seller is null, says Art. 1487 C.C. That such, as a general rule, is the law in regard to the pledge of a third person's property is unquestionable. Before the code, though the sale of another person's property was not null, it was not doubted that a pledge of anything of which the pledgor was not the owner conferred no right as against the owner to the pledgée. *Cassills* and *Crawford* (5). If a debtor, says Pothier Nantissement (6), gives as a pledge what does not belong to him, the owner may revendicate it, though the pledgee

(1) 1 Pont des Petits Contrats, 1066, 1080.
(2) 5 App. Cas. 664.
(3) 4 L. C. J. 30.
(4) 6 L. C. J. 77.
(5) 21 L. C. J. 1.
(6) No. 7.

is not paid. I refer also to Troplong du Nantissement (1) and Massé (2); *Moor* v. *Lambert* (3). The authorities of Troplong Nantissement (4) and other commentators who are of opinion that now, in France, in virtue of art. 2279 of the Code Napoleon, the sale or pledge of a thing belonging to a third party is valid when the vendee or pledgee could reasonably and without any doubt believe that the vendor or pledgor was really the owner, cannot apply here. In the first place our corresponding art. 2268, different in this from the French Code, applies expressly to corporeal movables only; secondly, it applies only to purchasers in good faith: Troplong, Prescription (5) and authorities cited in the Belgian edition. And thirdly, under our article, possession of a movable is not (*per se*) a title, but only a presumption of title. The owner of a moveable is, within three years from the loss of his possession, always admitted to reclaim it by proving the defects of the possession of any one who detains it. The article and the codifiers expressly say so. Supplementary Report (6).

Upon these last three grounds also must fall the contention raised by the bank, at the argument, that the appellant cannot recover the said shares without reimbursing the advances they made upon them. There are, however, two additional, and to my mind decisive, reasons which militate against the bank on this point. The first one is that there is no plea on the record raising the issue, the second is that the bank's plea is not that they made advances on these shares, but only, and as against them this is conclusive, that these shares were transferred to them as collateral security for advances previously made.

The case of the *City Bank* v. *Barrow* (7) is, it seems

(1) Nos. 68 and 69.
(2) 6 Vol. Droit. Comm. No. 444 and seq.
(3) 5 La. Ann. Rep. 66.
(4) No. 70 and seq.
(5) Nos. 926 and seq. 1065.
(6) Vol. 3, 367.
(7) 5 App. Cas. 664.

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to me, in point, even if the bank here could be considered as having acquired these shares in good faith. It was there held that the Art. 1498 C. C. and the words, "nor in commercial matters generally," in Art. 2268, cannot be interpreted as legalizing, in the general sense contended for by the respondents here, the pledge of a thing belonging to a third party, even in commercial matters. It was also there held that these articles do not apply to the contract of pledge. Upon this last point it must be remarked here that though by the Act 42-43 Vic. chap. 18 (Q.) the said articles now undoubtedly apply to the contract of pledge, yet the bank in the present case cannot take advantage of that statute, because they got these shares from Rose before its sanction.

The case of *Fawcett* and *Thompson* (1), cited by the respondent, has no application; there the purchase had been made in good faith in the usual course of trade.

*Appeal allowed with costs* (2).

Solicitors for appellants: *Keer, Carter & Goldstein.*

Solicitor for respondents: *Robertson, Ritchie & Fleet.*