JAS. B. MACKINNON (PETITIONER).....APPELLANT; 1887

AND *May 9, 10.

ALPHONSE KEROACK (PLAINTIFF).....RESPONDENT. *Dec. 14.

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

Capias—Petition to be discharged—Judgment on—Appealable under sec. 28 of ch. 135 R.S.C., Arts 819-821 C. C. P.—Fraudulent preference—Secreting—Art. 798 C. C. P.—Promissory note discounted—Arts 1036-1953 C. C. P. (P.Q.)

A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P. Q.) he petitioned to be discharged under art. 819 C. C. P. and issue having been joined on the pleadings under art. 820 C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (appeal side) and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction;

Held, that the judgment was a final judgment in a judicial proceeding within the meaning of sec. 28 ch. 135 R. S. of C. and therefore appealable—Taschereau J. dissenting. *Stanton* v. *Canada Atlantic Ry. Co.* reviewed (1).

On the merits it was:

Held, per Ritchie C.J., Fournier and Taschereau JJ. that a fraudulent preference to one or more creditors is a secretion within the meaning of art. 798 C.C.P.

Also, that an endorser of a note discounted by a bank has the right under art. 1953, C. C. to avail himself of the remedy provided by art. 793 C. C. P. if the maker fraudulently disposes of his property (Strong, Henry, Gwynne JJ. *contra.*)

The court being equally divided the appeal was dismissed without costs.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (2) sitting at Montreal, rendered on the 27th day of January, 1887,

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

(1) Cassels's Digest 249. (2) 15 Rev. Lég. 34.

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and confirming a judgment of the Superior Court, dismissing a petition of the appellant to quash a writ of *capias ad respondendum* issued against him by the respondent

This was an action brought by the respondent on the 26th November, 1888, against the appellant to recover the sum of $29,686.09, being the amount of 21 promissory notes signed by Sharpe & Mackinnon, the appellant firm, and was instituted by a writ of *capias* upon an affidavit of the respondent, alleging that the respondent had reason to believe and verily believes that the appellant was about immediately to leave the Province of Canada with intent to defraud his creditors in general, and the respondent in particular, and that the departure of the appellant would deprive the respondent of his recourse. In the affidavit were given the reasons for the belief of the said respondent, and also in the said affidavit the respondent swore that the said appellant had secreted and made away with, and was about immediately to secrete and make way with his property and effects and the effects of the firm of Sharpe and Mackinnon, with intent to defraud his creditors in general and the respondent in particular.

The appellant fyled a petition to be discharged from arrest under said *capias*, in which he denied the allegations of the affidavit, also alleging in the said petition that the notes mentioned in the affidavit, were the property of third parties to whom respondent had sold and transferred them, and that respondent had no interest in the present suit, but was merely lending his name to third parties.

To this petition a general answer was fyled and the parties went to proof.

At the trial it was proved that the promissory notes sued upon had been given for value but had been

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endorsed and discounted by respondent at different banks in the city of Montreal at the time he made the affidavit for capias. These notes were however subsequently filed in the record.

The facts relied on by the learned judge at the trial for his finding that the appellant had been fraudently dealing with his assets with a view of defrauding his creditors are as follows :—

That in May, 1886, Sharpe & Mackinnon gave to the Bank of Commerce, one of their creditors, a statement of their affairs up to the 31st December, 1885, representing that they had a surplus of $36,439.24 which statement was false and fraudulent.

That in July, 1886, they had to borrow money to pay their workmen and were on the eve of having to suspend.

In the months of August, September and October their affairs went on getting worse, until the 20th November, 1886, when they were obliged to assign.

That notwithstanding their insolvent condition being well known to them, they in the month of October 1886 sold goods to the amount of $43,393.74 on account of which they received a sum exceeding $20,000 which they applied to the payment of certain creditors by way of fraudulent preference and to the detriment of their other creditors including the respondent.

That Mackinnon had paid fraudulently and by preference to the respondent and to his other creditors, at a time when he knew he was insolvent, considerable sums of money to the firm of McIndoe & Vaughan, to Northey & Co. and other creditors.

That on the last day that the firm of Sharpe & Mackinnon ran their business, the bookkeeper Dennis and each of the partners took some goods and realized on them, and each one appropriated two hundred and twenty dollars a piece.

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Greenshields for respondent moved to dismiss appeal for want of jurisdiction, the appeal only relating to the writ of *capias* and not finally disposing of the suit. Citing arts. 1797-8 C. C. P. *Blanckensee* v. *Sharpley* (1); *Carter* v. *Molson*(2); *Stanton* v. *Canada Atlantic Ry. Co.*(3).

McMaster Q.C. and *Hutchinson* contra referred to Arts. 819, 820, 821 C. C. *Goldring* v. *Hochelaga Bank* (4); *Phillips* v. *Sutherland* (5); *Shaw* v. *St. Louis* (6).

The court decided to hear the appeal and reserve the objection.

McMaster, Q.C., and *Hutchinson* for the appellant. The writ of *capias* was asked for on two grounds: First, that McKinnon was about to leave the country: Secondly that he was secreting his property in order to defraud his creditors. See Arts. 796-7-8 C. C. P.

The writ of *capias* must contain a special prayer which, in this case, was for a money condemnation and that the debtor be imprisoned.

Arts. 819, 820, 821 C. C. P. provide for the discharge of a prisoner under a writ of *capias*.

Keroack does not swear that he was the holder of the notes, which had been discounted in three several banks. See Daniel on Negotiable Inst. (7); Byles on Bills (8).

As to the secretion see *Gault* v. *Donnelly* (9); *Reg.* v. *Wynn* (10); *Emmanuel* v. *Hagens* (11); *Quebec Bank* v. *Steers* (12); *Warren* v. *Morgan* (13).

Gault v. *Dussault* (14) relied on by the respondent, is not applicable. The facts in this case show a perfect swindle from beginning to end.

(1) 3 L. C. J. 292.
(2) 25 L. C. Jur. 65.
(3) Cassels's Digest 249.
(4) 5 App. Cas. 371.
(5) 19 L. C. J. 131.
(6) 8 Can. S. C. R. 391.
(7) P. 238 s. 1234.
(8) 14 Ed. p. 408.
(9) 1 L. C. L. J. 119; S. C. in appeal 3 L. C. L. J. 56.
(10) 13 Jur 1087.
(11) 6 Rev. Leg. 209.
(12) 15 L. C. J. 155.
(13) 9 L. C. R. 305.
(14) 4 L. N. 321.

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Greenshields for the respondent, cited Dalloz vo. Mandat (1), as to the right of a *prête-nom* to sue in his own name for the benefit of a third party. Also Pothier on Obligations (2), and relied on *Gault* v. *Dussault* (3) and *Molson's Bank* v. *Leslie* (4) as applicable to the facts of this case.

Sir W. J. RITCHIE C. J.—Assuming this is an appealable matter I cannot say the findings of the two courts on the question of fraudulent dealing by defendant with his goods with a view of defrauding his creditors is not fully sustained by the evidence; the question then simply resolves itself into this : Is such a fraudulent dealing and preference a secretion or making away with the goods as the code contemplates ? The only question therefore it appears to me we are called upon to decide is as to the correctness of the decision of the Court of Queen's Bench in holding that a fraudulent preference comes within the meaning of the terms "secreting or making away with," leaving the other questions raised to be be tried out in due course in the courts below.

In the Province of Quebec it appears to be well established, that, so soon as a debtor finds himself insolvent and unable to meet the demands of his creditors, the general body of his creditors become entitled to an equal and just distribution of his assets, and he ceases to have any legal right to deal with or distribute his property otherwise, than the law directs, either for his own benefit or for the benefit of any other party creditor or otherwise whereby such an equal distribution is hindered, and the intent and object of the code was, no doubt, to prevent any fraudulent making away by an insolvent with his property with an intent to render a just and equitable distribution of his property

(1) Vol. 30, p. 631.
(2) Vol. 2, sec. 75.
(3) 4 L. N. 321.
(4) 8 L. C. J. 8.

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rateably among all his creditors impossible. Article 1036 of the civil code, declares that every payment by an insolvent to a creditor knowing his insolvency is deemed to be made with intent to defraud. I cannot but think that a disposition by a creditor of his property in fraud of his general creditors, or the individual creditor in the proceedings, whereby such an equitable distribution becomes impossible, is such a making away with his property as it was the object of the code to prevent by this article. If then the intention and object of this provision of the law was to prevent an insolvent debtor from secreting or making way with his property with intent to defraud his creditors in general or the individual creditor, how could this making away be better accomplished than by transferring his property with the intent indicated, in other words, fraudulently making away with his property to one creditor in fraud of his other creditors? What could the object of the article of the code be if it was not to prevent debtors from so dealing with their property as to put it beyond the reach of their creditors? I do not think "secreting" and "making away with" can be considered or dealt with as equivalent terms, but I can readily conceive that there may be a fraudulent making away with without secretion.

I am at a loss to understand what other construction can be put on the words "*ou soustrait*" "or make away with," if it was not intended that they were to include and cover fraudulent dispositions by the debtor of his property, that the limited primary meaning of the words "*cacher*" or "secrete" might leave doubtful; or in other words, if the legislature had intended that the primary meaning of the words in the English version "has secreted or is "about immediately to secrete" or in the French version "a *caché ou soustrait ou est sur le point de cacher*"

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were to govern the construction of the sentence and be limited to hiding or concealing, why should in the English version "or make away with" or in the French version "*ou soustrait*" have been used, and having been used what right have we to eliminate these words?

I find in a French dictionary of high repute "*soustraire*, means *ôter quelque chose à quelqu'un, le priver de certaines choses par addresse ou par fraude, deduire, diminuer, retenir, retrancher, ôter, détourner, receler, enlever, écarter*," and in the Imperial dictionary we find "to make away" signifies "to alienate, to transfer as to make away property;" and "to make away with" signifies "to put out of the way to remove."

If a debtor, knowing himself insolvent, secretes or makes away with his property when he has no right to do so in fraud of his creditors, what possible difference can it make in the eye of the law whether he secretes or makes away with the property for the benefit of himself individually or any member of his family or a stranger, whether a creditor or not having a right to the property, with intent in law to defraud his creditors generally or the plaintiff in particular? What can be a greater secreting or making away with property under the code than, with intent to defraud his creditors in general or the plaintiff in particular, to illegally transfer or hand it over to a person not entitled to receive it to be by him appropriated and dealt with for his own use? If this is not illegally making away with property I am at a loss to conceive what is: for so soon as the debtor became aware of his insolvency all payments made to a creditor are deemed to be made with intent to defraud, and the debtor has no right to deal with his property, or put it in a position, where it would be inaccessible to all his creditors.

In *Gault et al.* v. *Dussault* (1) the head note is as follows:—

(1) 4 Legal News, 321.

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Fraudulent preference, by which assets which should be available to the creditors generally, are given to one or more, is equivalent to secreting.

Dorion C.J. is reported as follows:—

The Chief Justice commented on the facts as established by the evidence, (which appear in the judgment below) and held that it was a clear case of fraudulent preference, amounting to secreting. His honor could not understand the attempt to make a distinction between secreting and fraudulent preference. The French version used the words *cacher ou soustraire*. This was the same as *recéler*, which was *détourner, distraire, divertir*, the effects which should be available to the creditors generally, and there could be no doubt that the acts of the respondent were equivalent to a recel.

There has been, no doubt, some conflict of opinion in the courts of Quebec on this point, but I think the weight of authority and the reasoning is in favor of a conclusion at which I have arrived, and Ramsay J. in *Gault* v. *Dussault*, intimates that the Privy Council in *Molson* v. *Carter* (1) concurred in this view he says:

Ramsay J.—* * * but if a preference or any other disposal amounts to a fraud, it appears to me to be secreting within the meaning of the act. Secreting does not mean hiding alone, but as the article says, any "making away" with property which shall put it unlawfully out of the creditors' reach. Thus one may secrete or make away with property by putting legal impediments in the way of the creditor, by which he is prevented from getting possession of it in order to be paid. I expressed this opinion in the case of *Molson* v. *Carter*, and I understand the Privy Council concurred in it. Indeed, it is difficult to understand that the legislature could have intended it should be otherwise. I am at a loss to conceive why courts should use so much ingenuity to put a strained interpretation on the law to defeat its manifest object.

In *Gault et al* and *Donnelly*, Sep. 9th 1887 (2), although it was held, that an undue preference given by an insolvent to one of his creditors, by selling him goods in payment of his claim, is not a "secreting with intent to defraud," and does not justify the issue of a *capias ad respondendum*,

Duval, C.J., dissenting says:

In this case a *capias* issued against the defendant but was set aside in the court below on the ground that there was no proof of

(1) 3 Legal News 261. (2) 3 L. C. L. J. 56.

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fraudulent secretion by the defendant. The majority of the court think that this judgment should be confirmed, but I am of a different opinion. The whole case turns upon the interpretation to be put upon the word "secreting." The facts of the case are that the defendant being the plaintiff's debtor and being insolvent, made over a portion of his property to Mr. Walsh, another of his creditors.

It is contended that this was only an undue preference, and does not amount to a fraudulent secretion. But what meaning can be given to the term of secreting, if it be not a secreting to put property beyond the reach of the creditors, as was done in this case.

I am of opinion, whenever, by any improper means, a creditor is deprived by his debtor, of the means of getting his just claims, that such act is a secreting.

No remarks were made by Drummond, Mondelet and Johnson, JJ. who concurred in confirming the judgment.

And in *Molson* v. *Carter*, Sir A. A. Dorion C.J. says (1):

If a man, being indebted to his father, or to his wife, or to his family, knowing that he is insolvent, goes and pays them, so that the money cannot be reached by the creditors, he is guilty of secretion. Secretion, in the eye of the law, is putting property beyond the reach of the creditors.

Even if this case was open to doubt I think article 12 of the civil code might be invoked with effect viz: that where a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature and to obtain the object for which it was passed; which, in my opinion, can only be done by giving the article the construction placed on it by Chief Justices Duval and Dorion.

STRONG J.—1o. On the motion, I am of opinion that it should be refused, the case being appealable on the authority of *Chevalier* v. *Cuvillier* (2); and *Shields* v. *Peak* (3).

2o On the merits I am for allowing the appeal adopting the reasons of Cross J. that fraudulent preference is not concealing or making away with property. The weight of jurisprudence is in this sense.

(1) 3 Legal News, p. 261. (2) 4 Can. S. C. R. 605.
(3) 8 Can. S. C. R. 579.

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30. Further it is shewn not only that the notes were not due at the time of the arrest, but it is also proved that they were all outstanding in the hands of three banks who were holders for value. Granting that the non-maturity of the notes by itself would have been no objection to the arrest in case of notorious insolvency, yet we have here the additional circumstance that they were outstanding in the hands of *bonâ fide* holders for value. Keroack was therefore not a creditor in respect of the notes which he did not hold, and he was not a creditor in respect of the original debt for which the notes were taken, for the English law that where notes are taken for a debt and the creditor endorses the note over, the right to sue on the original debt is suspended, is the general commercial law.

FOURNIER J.—L'action de l'intimé, accompagnée d'un bref de *capias ad respondendum*, était pour $29,68,09. L'appelant a demandé par requête l'annulation du bref de *capias*. L'affidavit donné pour l'obtenir alléguait 1° que l'appelant était immédiatement sur le point de laisser la province du Canada avec l'intention de frauder ses créanciers en général et l'intimé en particulier, 2° que l'appelant :—

Has secreted and made away with and was about immediately to secrete and make away with his property and effects of his firm of Sharpe & MacKinnon, with intent to defraud his creditors in general and the respondent in particular.

L'action est basée sur vingt-et-un billets promissoires décrits dans la déclaration.

Par sa requête l'appelant nie les allégations de l'affidavit et allègue que les billets y mentionnés sont la propriété de tierces parties auxquelles l'intimé les a cédés et transportés, qu'il n'a aucun intérêt dans l'action et n'est qu'un prête-nom.

La contestation liée, un grand nombre de témoins ont été entendus.

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Le premier moyen—l'intention de laisser la province du Canada a été rejeté par la Cour Supérieure, faute de preuve—et formellement abandonné lors de l'argument devant cette cour. Il ne reste que le second qui a été admis par la Cour Supérieure dont le jugement a été confirmé par celle du Banc de la Reine en appel.

Lors des plaidoiries orales devant cette cour, il a été prétendu que le jugement dont il s'agit n'était pas appelable. C'est sans doute en ne considérant que comme interlocutoire le jugement rendu sur cette requête que l'on se fonde pour soutenir que l'appel ne pouvait avoir lieu que sur le jugement au mérite. Ce jugement ne peut être assimilé à celui rendu par cette cour dans la cause de *Stanton* v. *The Canada Atlantic Ry. Co.* Là, il ne s'agissait que d'un ordre rendu sur une demande d'injonction ne devant avoir d'effet que jusqu'à ce qu'il en eût été ordonné autrement par la cour ou un juge. Cet ordre était évidemment d'un caractère interlocutoire et n'avait aucune finalité. Le refus du Conseil privé d'entretenir l'appel dans des causes où il s'agissait de jugements interlocutoires ne peut être invoqué ici contre l'appel à cette cour. Ces jugements n'ont pas d'application dans la présente cause, le code de procédure civile ayant établi des dispositions spéciales pour la décision des contestations sur *capias*. L'article 821 déclare que si la contestation n'a lieu que sur la suffisance des allégations de l'affidavit, la cour ou le juge pourra en disposer sur audition ; mais si la contestation est fondée sur la fausseté des allégations de l'affidavit, la contestation doit être liée sur la requête du défendeur, suivant le cours ordinaire et indépendamment de la contestation sur la demande principale, à moins que l'exigibilité de la dette ne dépande de la vérité des allégations de l'affidavit, dans lequel cas le bref peut être contesté en même temps que le mérite de la cause.

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Comme on le voit, cet article fait de la contestation du *capias*, lorsqu'elle repose sur la vérité des faits de l'affidavit, une contestation séparée et indépendante de l'action principale et qui doit suivre le cours ordinaire de la procédure.

Dans le cas seulement où l'exigibilité de la dette est contestée, il est loisible aux parties de contester en même temps le bref et le mérite de la cause. La première partie du 2e paragraphe de cet article rend obligatoire une contestation séparée lorsqu'il s'agit de la vérité des faits de l'affidavit—la 2e ne donne que la faculté, au cas où la dette est contestée, de joindre le mérite à la contestation du bref.

Les parties n'ont pas voulu se prévaloir de cette dernière faculté, elles n'ont pas jugé à propos de joindre les deux contestations. La cour n'est pas intervenue pour les y contraindre. Elles ont procédé, comme cet l'article leur en donne le droit, de même que dans une contestation indépendante du mérite. Le jugement qui s'en suit n'est donc pas interlocutoire. On ne peut donner une meilleure preuve qu'il doit être considéré comme final, que le fait que l'art. 822 C. de P. C. donne au défendeur dont la demande a été rejetée le droit d'en appeler, sans se conformer aux dispositions du code de P. C., concernant l'appel des jugements interlocutoires. Je suis d'avis que le jugement dont il s'agit est appelable à cette cour en vertu des dispositions de l'acte de la Cour Supreme et de ses amendements qui règlent le droit d'appel à cette cour.

Quant au mérite j'ai déjà dit que le premier moyen donné pour obtenir le *capias* avait été abandonné. Il ne reste que la question du *secreting*.

Je ne crois pas devoir répéter l'histoire des transactions de la société dont l'appelant faisait partie et qui ont été alléguées et prouvées pour établir la vérité du

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fait qu'il soustrayait ses biens dans la vue de frauder ses créanciers. Après examen de la preuve, je suis venu à la conclusion que le fait de cacher ou soustraire, suivant l'intention de l'art. 797, ses effets ou plutôt ceux de la société, a été amplement prouvé.

Pour enlever à ces faits prouvés et rapportés dans le jugement de la Cour Supérieure, leurs conséquences juridiques comme établissant le fait d'avoir caché ou soustrait ses effets, on a prétendu qu'ils ne constituaient qu'une préférence frauduleuse qui ne pouvait être un motif suffisant pour obtenir un *capias*. En effet il a été soutenu déjà qu'une préférence frauduleuse n'était pas suffisante. C'est la proposition développée par l'honorable juge Cross dans son dissentement en cette cause, fondée sur les mêmes raisons qu'il avait déjà données dans la cause de *Molson* v. *Carter* (1). Avec tout le respect que j'ai pour l'opinion du savant juge, je ne puis croire que des faits que l'on qualifie de préférence frauduleuse, ne puissent être tout à la fois une préférence frauduleuse pour le créancier qui en profite, et en même temps une soustraction frauduleuse à l'égard de la victime, à l'insu de laquelle ces préférences sont pratiquées. Pour la victime c'est évidemment une soustraction frauduleuse. Je citerai à cet égard les opinions de Sir A. A. Dorion, juge en chef, dans la cause de *Gault et al* v. *Dussault* (1), et de feu l'honorable juge Ramsay dans la même cause.

Chief Justice Dorion said :—

It had been decided over and over again by the Court as now constituted, that the remedy by *capias* subsisted concurrently with the Insolvent Act. He was not therefore prepared to hear the question raised in this case. The Chief Justice commented on the fact as established by the evidence which appear in the judgment of the Court below, and held that it was a clear case of fraudulent preference, amounting to secreting. His Honor could not understand the attempt to make a distinction between secreting and fraudulent

(1) 4 Legal News p. 321.

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preference. The French version used the words *cacher ou soustraire.* This was the same as *receler* which was *détourner, détruire,* diverting the effects which should be available to the creditors generally and there could be no doubt that the acts of the Respondent were equivalent to a *recel:*

Ramsay J. :—

I concur so fully in which has fallen from the learned Chief Justice, in delivering the judgment of the Court, that I should have thought it unnecessary to add any remarks of my own were it not that I consider it important that there should be no doubt as to individual opinions of the Judge in this important matter. The question is simply as to the meaning of art. 721 of the Code of Procedure. As the Chief Justice has said over and over again we have decided that proceeding in insolvency did not deprive the creditor of the right to take out a *capias.* Again there is no doubt as to the proceeding being fraudulent. We are all agreed there was fraud. The effect of the transaction complained of appears to have been to reduce the available assets from 75 cents in the dollar to about 12 cents. The argument which has been pointedly stated by one of the learned judges who dissents, is that there may be a fraudulent disposal, which does not amount to secreting, and that an instance of this is a fraudulent preference. I believe there is some authority for this view, but I confess I am unable to understand. I can conceive a payment being so trifling that it could not be considered fraudulent, but if a preference or other disposal amounts to a fraud, it appears to me to be secreting within the meaning of the Act. Secreting does not mean hiding alone, but as the article says, any making away with property which shall put it unlawfully out of the way of the creditor's reach. This one may secrete or make away with property by putting legal impediments in the way of the creditor, by which he is prevented from getting possession of it in order to be paid. I expressed this opinion in the case of *Molson* v. *Carter,* and I understand the Privy Council concurred in it. Indeed it is difficult to understand that the legislature could have intended it to be otherwise. I am at a loss to conceive why courts should use so much ingenuity to put a strained interpretation on the law to defeat its manifest object. If it be said that it is figurative to call it secreting to pass a fraudulent deed to shield property from seizure, I admit it, but I am not aware that in the interpretation of statutes it is necessary always to adopt the first meaning of the terms used. Dorion, Ramsey and Baby—Dis. Monk and Cross.

Dans la cause de *Molson* v. *Carter* (1) Sir Aimé Dorion dit :—

(1) 25 L. C. J. 65.

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It is secreting, in the eyes of the law, when a debtor, unable to meet his liabilities, fraudulently puts his property, or any appreciable portion of it, beyond the reach of his creditors.

L'opinion de ces honorables juges fut soutenue par la majorité de la cour.

La jurisprudence sur cette question semble avoir été fixée par ces deux décisions. Je la crois conforme à une saine interprétation de notre loi et à une juste appréciation des faits. Je ne puis m'empêcher de regretter que cette jurisprudence soit mise de côté, parce que les résultats ne pourront manquer de favoriser les transactions frauduleuses déjà trop nombreuses dans les affaires commerciales.

L'appelant a aussi prétendu que les billets promissoires ayant été escomptés par diverses banques, l'intimé n'avait pas droit d'action contre lui. Cela serait vrai si la faillite de l'appelant n'avait pas mis fin aux délais accordés par ces billets. Ils sont devenus exigibles de ce moment et l'intimé (art. 1953 C. C.), même avant d'avoir payé, avait droit d'agir contre l'appelant pour s'en faire indemniser. Ce droit de se faire indemniser constitue en sa faveur une action personnelle qu'il a droit de faire valoir par tous les moyens légaux. Il a tous les recours ordinaires et le droit d'employer les moyens conservatoires pour assurer sa créance. Il ne lui en est interdit aucun. Le recours au *capias* lui était ouvert comme les autres.

L'objection fondée sur le fait que les billets n'étaient pas en possession de l'appelant au moment où il a donné son affidavit n'est pas sérieuse. Son droit d'action existait du moment de la faillite et le fait qu'il ne les avait pas alors ne pouvait l'empêcher d'agir comme caution, parce que son action est fondée sur la faillite et l'obligation légale qui en résulte, dans ce cas, d'indemniser la caution.

D'ailleurs les billets promissoires ont été produits et sont au pouvoir de l'intimé qui est prêt à les remettre

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à l'appelant si celui-ci veut les payer. Même si l'intimé n'était qu'un prête-nom il aurait encore le droit d'action en les produisant comme preuve de son autorisation de poursuivre.

Pour ces raisons je suis d'opinion que le jugement de la Cour du Banc de la Reine devrait être confirmé et l'appel renvoyé avec dépens.

HENRY J.—Two questions for decision are open in this case. The first is raised by a motion on the part of the respondent to dismiss the appeal on the ground that it was not an appealable case. I have considered the matter, and have arrived at the conclusion that the appeal was regular, and having had the privilege of reading a judgment prepared herein by my brother Gwynne, refer to it for the reasons that have influenced my conclusion. The other question is as to the claim of the appellant to have a writ of *capias* under which he was arrested set aside and his bailbond given up to be cancelled. The affidavit of the respondent upon which the *capias* in question was issued and attested to on the 20th day of November, 1886, sets out that the appellant is indebted to the respondent in the sum of $29,686.09, and that he " has reason to believe and verily believes that the defendant James B. Mackinnon is about to leave immediately the Province of Canada, to wit, the now Provinces of Quebec and Ontario with intent to defraud his creditors in general and the plaintiff in particular and that such departure will deprive the plaintiff of his recourse against the defendant."

"That my reasons for so swearing that the defendant is about immediately to leave the Province of Canada, are that I was informed yesterday by one Galibert of the city of Montreal, that the said James B. Mackinnon had told him, said Galibert, that he

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was about immediately to leave the Dominion of Canada and go to the United States of America to reside there permanently."

The affidavit goes on to allege that the said indebtedness was as and for the amount of certain promissory notes to wit the following notes. The notes are then dercribed as made payable to the order of respondent and alleged to have been made by the firm of Sharpe and Mackinnon the appellant, and amounting to the number of twenty-one in all. It is shown that of that number but four had matured.

The affidavit then alleges the insolvency of the appellant and that of his firm, and "That the defendant "has secreted and made away with and is about im- "mediately to secrete and make away with his property "and effects and the property and effects of the said "firm of Sharpe & Mackinnon with intent to defraud "his creditors in general, and the plaintiff in particu- "lar," and "that without the benefit of a writ of *capias* "*ad respondendum* against the body of the said defendant "the plaintiff, myself, will lose his debt and sustain "damages."

Upon the above allegations and statements, if true the respondent was justified in having recourse to the writ of *capias*.

It was necessary, however, that the allegation of indebtedness to the respondent should be true at the time he made the affidavit in question and the writ issued. If the appellant was not legally indebted in any sum whatever to the respondent the foundation of his right to make the affidavit and to have the *capias* issued was wholly wanting.

It was shown by his own evidence that at the time of the making of the affidavit and the issue of the *capias* the respondent was not the holder of any one of the notes in question—that he had endorsed them all

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and that when he made affidavit the Bank of Commerce and other banks were the holders for value of the said notes. The indebtedness was then to the banks and not to the respondent. He was then not the creditor but the guarantor only of the appellant. I will deal with that subject further on. The appellant in his petition denies all the allegations in the respondent's affidavit as therein contained. The respondent by his answer to the petition after alleging that the statements in his affidavit were true and that the statements in the petition were false alleges as follows :—

"That the said petitioner at the date of the issuing "of the said *capias* was about immediately to abscond "from the Province of Canada, present Provinces of "Quebec and Ontario and had secreted and was immediately about to secrete his property and effects with "the intent as set forth in the said affidavit."

By the petition and the answer then, two and only two issues are raised, that is to say :

1st. Was the appellant about to abscond, and

2nd. Was he guilty of the charge of secreting his property and effects with the intent before stated.

As to the first it is only necessary to say that the charge was not only unsustained but disproved, and it was so so found by the court below.

The second requires to be fully considered in the light of the evidence adduced ; and it is necessary to see what the real issue is and how it is provided to be disposed of. Article 819 of the code of civil procedure provides for the presentation of the petition. Article "821 provides "But if the contestation is founded on "the falsity of the allegations, issue must be joined on "the petition of the defendant in the ordinary course, "&c."

It is shown above that such issue has been joined and by it we have but to determine if the respondent

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has shown that the appellant was guilty of the concealment or that he was about immediately to be so guilty. That being the only issue raised we can consider no other. The statement in the affidavit is that he had secreted and made away with, &c. The latter three words are not in the answer of the respondent and are therefore no part of the issue, but if they were I do not think the fact would vary it so far, at all events, as this case is concerned.

Article 2277 C. C. provides that the arrest of a debtor by a writ of *capias ad respondendum* shall be according to the provisions of chap. 87 of the consolidated statutes of Lower Canada and in the manner and form specified in the code of civil procedure.

The 1st. section of that act in the English version provides for such arrest on an affidavit setting out, among other things, " that the defendant hath secreted " or is about to secret his property, &c."

The corresponding section in the French version is " Ou que le defendeur a caché ou est sur le point de cacher ses biens et effets, &c."

We look in vain in the one for the word " soustrait " and in the other for the words " make away with, &c."

Article 797 of the civil code of procedure in the English version provides for the issuing of a *capias* against a defendant " if the latter is about to leave " immediately the Province of Canada, or if he secretes " his property with intent to defraud his creditors." The latter provision in the French version is " si ce " dernier est sur le point de quitter immediatement la " Province du Canada ou s'il soustrait ou cache ses " biens, dans la vue de frauder ses creanciers." The statute and the code of procedure are provided by the civil code as our guides to determine as to the right to issue the *capias*. Both versions of the statute limit it to the fact of secreting and the English version of the

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code of procedure does the same. What then is the reasonable conclusion? It is that the use of the word "soustrait" in the French version of the latter was not intended to provide another and different cause for an arrest; but was merely intended to express the views of the legislature by the use of two words instead of one. Besides, what is the legitimate meaning of "soustrait." The verb soustraire means, "to take," "to take away," "to preserve," "to save," "to secure," "to shelter," "to screen" "to subtract." The term, therefore, as embodied in the code of procedure must refer to something alleged to have been done with his property, and selecting the words "to shelter" or "screen" as being the most appropriate I would construe the provision simply to mean a sheltering, screening or secreting of his property.

I therefore think that in constructing the French version referred to we must limit the provision to "secreting." I have read the evidence bearing on this issue and cannot find anything approaching to the establishment of the allegation of secreting. The respondent admits in his evidence that he had no personal knowledge of any such thing, and no one of his witnesses proved anything more. Instead of any such secreting the negative was most fully proved by a number of witnesses. Much stress has been laid on the fact that in the month of May previous, the appellant's firm exhibited a statement (not to the respondent but to other parties with whom they were dealing) showing a balance of about $30,000 of assets over liabilities, and as in November following they were deficient to meet their liabilities they must have secreted. To say the least this under any circumstances could only be received as very weak evidence, and of but an inferential character. The matter was, however, very fully, and to my mind, satisfactorily explained by the appellant's

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book-keeper who, says that the statement was wholly made up by him and that he did it in good faith and without any suggestions from his principals or either of them, but that he had not reliable data from one of the manufacturing establishments, and had to estimate largely as to it; and that he made a large error in the statement. He, however, and those having charge of different branches of the business, establish by their testimony that no secreting or improper handling of any of the assets took place, and give evidence that shows that none could have taken place.

I will now deal with the objection that the respondent was not the creditor of the appellant when the *capias* was issued.

Mr. Justice Tessier in his judgment for the majority of the court lays down the legal proposition that the respondent as endorser, but not the holder of the notes, can by action recover the amount of them. He says:

La première objection de l'appellant est que l'Intimé n'est pas le véritable créancier et ne peut poursuivre en son nom "qu'il n'a aucun intérêt dans cette poursuite "et qu'il ne fait que prêter son nom à d'autres parties."

Il faut observer que la demande est fondée sur des billets promissoires sur lesquels Mackinnon est prometteur avec Sharpe son cidevant associé, donnés à Keroack qui les a endossées et fait escompter, dans certaines Banques.

Il s'en suit que quoique les Banques soient créancières des billets contre les prometteurs il a intérêt que ces billets soient payés par les prometteurs.

En poursuivant en son nom il suffit qu'il soit capable de remettre les billets aux prometteurs sur paiement par eux; c'est le seul intérêt que le prometteur Mackinnon peut invoquer.

Or il est en preuve que Keroack a produit les billets dans la cause, et que Mackinnon peut les obtenir de suite sur paiement. Keroack est créancier de ces billets, a pris arrangement avec les Banques, il en est le porteur et tout au plus il serait *procurator in rem suam* ce qui est un intérêt suffisant pour lui donner droit de poursuite en son nom.

The learned judge after stating that the claim of the respondent rested upon promissory notes of McKinnon

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& Sharpe, made to the respondent and by him indorsed and discounted in certain banks, says that the banks were creditors thereby of the makers and indorser, and that the indorser is also creditor of the makers and has an interest that the notes should be paid by the makers. He adds, in suing in his own name it is sufficient that he should be able to give up the notes to the makers upon payment by them, and cites Daniel on Negotiable Instruments as authority for the proposition that "The production of the instrument in its possession is sufficient *primâ facie* evidence to sustain its suit."

I do not think it necessary to accept the law as so laid down, and it the respondent had possession of the notes as a holder when he made the affidavit for the *capias*, the mere production of them would have been good *primâ facie* evidence that he was such holder, and in that case he would be the creditor of the respondent. It is in evidence, however, by his own witnesses that he only got the mere possession of them on the morning of the day when the issues herein were tried; and the evidence further shows that he did not obtain such possession as a holder of them—that at that time they were proved to be the property of the several banks, and it is not shown how he obtained such possession or upon what terms, or that he had any authority to deal with the appellant concerning them. I, however, do not consider that such a consideration is material. A man cannot be permitted to arrest another for a debt not due to him but to a third party, and when the legality of the arrest is questioned to purchase the debt from the other party and get an assignment of it. We can only look at the position of the case when the affidavits for the arrest were made. It was either right or wrong, regular or irregular, then; and if not right or regular then nothing done afterwards can be

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admitted to make the wrong right or the irregular regular. At the time of the making of the affidavits the creditors of the appellant thought the notes in question were the banks, and it cannot be contended he at the same time owed the same debt also to the respondent. Payment to the respondent when the affidavit was made would have been no bar to the claims of the banks as holders and they, disregarding the proceedings of the respondent against the appellant, might, if otherwise justified, have each issued a *capias* against the appellant.

The right to issue a *capias ad respondendum* is wholly founded on the statute and the two codes before referred to; and no one has the right to cause an arrest unless under the conditions therein specified.

Sec. 1 of the statute requires that the affidavit must be made by the plaintiff or his book-keeper, "clerk or legal attorney that the defendant is personally indebted to the plaintiff, &c."

The legal interpretation of the term "indebted" is well known and appreciated. That the appellant at the time in question was indebted to the banks cannot be contested. That he was indebted to the respondent I cannot admit, and if not so indebted he had no right to swear he was and have the *capias* issued and executed by causing his arrest. Article 2314 C. C. prescribes the act of an indorser to entitle him to recover against either an acceptor or drawer of a bill as follows:— "Payment by an indorser entitles him to recover from "the acceptor and drawer and all the indorsers prior "to himself." The respondent is not shown to have paid any of the bills when he made the affidavit, and therefore he had no right of action against the appellant. Besides seventeen of the bills had not matured; and therefore at the time no cause of action existed in either the banks, the holders, or in the respondent.

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Here is an action brought on bills of which the banks are the holders and to whom the amount of them is due. If the respondent is allowed to proceed to judgment he would recover upon notes, seventeen of which were not due and the remaining four held by and due to the banks. On the latter four the banks could proceed to judgment immediately, and on maturity of the others could do the same as they each fell due. In the meantime if the respondent obtained judgment he could levy for the amount of it and take the appellant's property from the control of the banks. I am free to admit that had he taken the proceedings in question as the duly authorized agent or *prête-nom* of the banks each could no doubt have taken measures to realize what was due to each separately out of the judgment, if the means of doing so were available, but there is no evidence of such agency or of his authority as such *prête-nom*. His proceeding was not adopted by the banks when the *capias* was issued nor was it even at the trial. It was proved by the managers of the banks that the notes were at the time of the trial the property of the banks, and no evidence was given that the respondent had any authority to take the proceedings he did. All then that the banks could do was to look to the respondent as the indorser of the notes. The result too of the respondent's obtaining judgment would be to enable him to recover and enforce the payment of the seventeen notes not yet due, months before the respondent promised to pay them, and thus obtain a position which the holders could not obtain. This view is of course independent of the provision that when bankruptcy takes place notes and bills running become due but they would become due only to the legal holders.

The remaining point to be disposed of is as to the allegation of secretion. There is no evidence

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whatever that the appellant or his firm directly secreted any of his property, but it is claimed that their dealing with their property after the month of May before his arrest was fraudulent, and that being so, it amounted to a secreting within the meaning of the statute and the codes referred to. I have read and considered the evidence very carefully and have failed to see in it anything to sustain the charge.

The evidence shows that after the statement was made up in May the appellant's firm, continuing their large manufacturing business with means and with aid derived from several parties, made payments to them in the ordinary way of business, and to some in larger proportions than to others. During the period in question they purchased largely from the respondent, giving the notes of the firm to the amount stated in his affidavit,—but four only of which were due when it was made and they only for a few days—and the amount of them was about $4000. The payments made to the other creditors of which the respondent complains were made before the four notes fell due, and as far as I can see were made for debts previously due and for advances in cash. The payments so made cannot be called fraudulent and were made before the respondent's notes had matured. I am not now dealing with the question of unjust preference, as that question does not arise under the issue, but if it did, I should be slow to say that even within the provisions of the bankrupt act there was evidence to sustain such a charge. I am therefore of opinion that in this case the charge of fraudulently dealing with their property is not sustained by evidence.

If, however, such had been established, I am of opinion it would not have authorized the arrest of the appellant. There was no secreting of the property shown, and without evidence of it I cannot add to the

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provisions of the statute and codes, but feel it my duty to decide that all that was proved instead of sustaining the charge of secrecy most fully rebuts it. By the law in Quebec a man finding himself unable to meet the demands of his creditors is authorized to make an assignment of his estate in trust for the benefit of all his creditors without preference. This the appellant and his firm did on the day the affidavit of the respondent was made and the latter was by it made the trustee. No creditor could complain of such an assignment and none would be hardy enough to say that the execution of such an assignment should be called a "secreting." I have read the cases in Quebec bearing on this question but they run in both directions. Some of them go so far as to say that a man making preferential payments to some of his creditors becomes amenable to arrest. I cannot sustain such a doctrine. I maintain that it becomes "secreting" when a party disposes of his property so far as to secrete it from his creditors for his own benefit or at all events hides or conceals it in such a way that his creditors may not be able to find it. Such and such only is, in my judgment, the case intended to be provided for, and the arrest is provided for to enable creditors, as far as possible, to recover possession of or control over the property secreted. To say that making preferential payments to one or more of a man's creditors means a secreting of his property is to my mind a perversion of language. Statutes abridging the liberty of a man or limiting his common law rights are properly held to be construed strictly. If so what right has any court to say in such a case as the present that the legislature meant more than it has said? I make no apology if I express views on this question different from those of the learned judges in Quebec as given in some of the later cases The learned judges of those courts may feel

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bound to adopt decisions previously made but it is the privilege as well as the duty of this court to declare the law. If, indeed, the legislature recognized the validity of such decisions the case would be very different. To sustain the judgment in this case would be, in my opinion, usurping by this court the power of the legislature.

I am of opinion, for reasons given, and for those contained in the judgment of Mr. Justice Cross, that the appeal should be allowed with costs and the bond in question ordered to be cancelled.

TASCHEREAU.—I am of opinion that this appeal should be quashed for want of jurisdiction. But as the majority hold the cause appealable, I am of opinion that the appeal should be dismissed.

GWYNNE J.—In my opinion this case is appealable and is not governed by *Stanton* v. *The Canada Atlantic Railway Company* (1), the circumstances of which case were quite dissimilar to those of the present case. In that case Mr. Justice Torrance had ordered the issue of a writ of injunction enjoining the respondents and certain other persons named therein from issuing or dealing with certain bonds until otherwise ordered by the court or a judge thereof. Upon a motion subsequently made before Mr. Justice Mathieu that learned judge suspended the writ until the final adjudication of the action on the merits. This decision of Mr. Justice Mathieu had the same effect, in subtsance, as if the temporary injunction which had been granted by Mr. Justice Torrance had never been granted. Now it is to be observed, first, that the application for the injunction was made to the discretion of the judge, it was not a matter of right. The object the plaintiff had in applying for it, was to deal temporarily with what

(1) Cassels's Digest 249.

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was the very gist of the action upon the merits, and its effect would have been to secure to the plaintiff until the hearing of the cause upon the merits, or until the court or a judge should make further order to the contrary, the benefit which the plaintiff sought to obtain permanently at the final hearing upon the merits. A decision granting or refusing the injunction was therefore purely of an interlocutory character not having any finality in it.

But in the case of an arrest the law authorises, before the trial of the action, a contestation with the same formality as that attending the trial of the action upon the falsity of the allegations in the affidavit upon which the writ of *capias* is founded. These allegations are that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding forty dollars upon a certain cause or certain causes of action set out in the affidavit, and, that the deponent has reason to believe and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant: or, besides the existence of the debt as above mentioned, that the defendant has secreted or made away with, or is about to secrete or make away with, his property and effects with such intent.

One of these last mentioned acts committed or intended to be committed with intent to defraud must co-exist with the debt to the plaintiff to justify the arrest of the defendant.

Now by the 821st article of the C. C. P. it is provided that if a contestation is founded upon the falsity of the allegations in the affidavit, issue must be joined upon the petition of the defendant in the ordinary

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course and independently of the contestation upon the principal demand, unless the exigibility of the debt depends upon the truth of the allegations of the affidavit in which case the writ may be contested together with the merits of the case.

If the existence of the debt alone, without more, was what the defendant had put in contestation by his petition, it might be very proper that the contestation as to the legality of the arrest should take place together with the contestation upon the merits of the action. But when the existence of the debt and the truth of the other allegations, necessary to be established to justify the arrest, are all contested, as these latter allegations are not matters issuable in the action the defendant seems to have a right under this article to have the whole matter tried at once upon petition in advance of, and wholly independently of, the trial of the action upon its merits. That was what in point of fact did take place in the present case.

The affidavit upon which the writ of capias was founded was made by the plaintiff and it alleged that the defendant was personally indebted to the plaintiff upon 21 promissory notes set out in the affidavit, four of which were overdue, and the residue not yet due and payable according to their tenor, but it alleged that the defendant had become insolvent; it also alleged that the plaintiff had reason to believe for a cause therein stated that the defendant was about to leave Canada with intent to defraud his creditors, and that the defendant has secreted and made away with and is about to secrete and make away with, his property and effects and the property and effects of a firm of Sharpe & McKinnon of which the defendant was a member, with intent to defraud his creditors generally and the plaintiff in particular.

The defendant by his petition contested every one of these allegations, and the court, being of opinion

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that the allegation of the intent to leave Canada with intent to defraud had not been established, but that the existence of the debt and the secreting of his property and effects by the defendant with intent to defraud had been, delivered judgment maintaining the validity and legality of the arrest.

Now, although the existence of the debt is a matter inquireable in the action when tried upon its merits, still the allegation of fraudulently secreting his property by the defendant is not; that is a matter wholly collateral to, and independent of, the matters which are issuable in the action, and the co-existence of this fraud with the debt is absolutely necessary to sustain the judgment of the court; the point adjudicated by the judgment is a point wholly independent of the matters which are issuable in the action, and for the trial of which the law has provided an independent procedure; the judgment of the court is conclusive upon the only matter which is adjudicated by it, namely, the validity of the *capias* and the arrest, and is therefore a final judgment upon a matter or judicial proceeding within the clause of the statutes regulating appeals to this court; and being appealable the whole of the matters contested by the issues joined upon the defendant's petition are now open before this court.

Upon the merits of the appeal I am of opinion that the evidence clearly shows that at the time the plaintiff made the affidavit upon which the writ of *capias* issued under which the defendant was arrested he was not the holder of any of the promissory notes in his affidavit mentioned, as constituting the debt then alleged to have been due from the defendant to him, but on the contrary these notes were, some of them the property of the Molson's Bank, some the property of the National Bank, and the residue the property of the Merchants' Bank, who were the holders thereof respectively and

entitled to receive payment thereof. Four of them only were over due; the remaining 17 had not yet became due according to their tenor; but it was contended that in virtue of article 1092 C. C. the respondent having become insolvent he could not set up that the time of payment mentioned in the notes had not yet arrived. This article, in my opinion, enured to the benefit of the respective banks, who were then the holders of the notes and to whom they were payable, and had not the effect of altering in any respect the relation which the plaintiff then bore to the defendant, which was that of surety only as indorser to the several banks who were the holders of the notes, and, as such, the creditors to whom the defendant owed the sums secured by the respective notes. The evidence also established that on the 20th November the defendant, on the application and demand of a creditor, made an abandonment of all his property and effects, and that he and his brother made an abandonment of all the property and effects of the firm for the benefit of their creditors as required by the civil code of the Province of Quebec, and the plaintiff was made provisional guardian of the insolvent estate, and that such abandonment had been lodged in the prothonotary's office before the defendant was arrested under the writ of *capias*.

In the judgment of the Superior Court, which has been maintained by the Court of Queen's Bench in appeal, the right of the plaintiff to have arrested the defendant as he did is rested upon three grounds:

1. That the plaintiff, as endorser upon the notes of which the banks were the holders, and as surety to the banks for the payment of the notes by the defendant, had the right under article 1953 C. C. to proceed against the defendant to be indemnified before paying or becoming the holder of the notes which had been transferred by him to the banks, and that having such

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right he had the right also to arrest the defendant as his, the plaintiff's, debtor, to the amounts of the notes before the plaintiff should pay them or become the holder of them;

2. That certified copies of the notes having been produced in conformity with article 101 C. C. P. at the return of the suit and the originals themselves having been placed in the record by the plaintiff upon the 6th December, 1886, it results as a consequence from these two facts that the plaintiff had been authorized by the holders of the notes to use them for his own benefit and advantage, and that the defendant as debtor upon the notes could not contest the right of his creditor, the plaintiff, to demand payment of them in his own name; and

3. That the appropriation by an insolvent debtor of any portion of his property or effects by way of payment to one or more creditor or creditors in preference to another or others is a secreting of his property with intent to defraud his creditors within the meaning of the statute authorising imprisonment for debt.

Now with respect to the first of the above grounds, the article 1953 C. C. only authorises the surety to take proceedings against his principal to obtain indemnity against his suffering loss at suit of the creditor of the person for whose debt he is surety. The article does not alter the condition of the surety, or the relation which he bears to his principal. It does not convert the surety into the creditor of his principal or make the latter his debtor for the amount personally due to a third person; the payment of which amount the surety has guaranteed. The position of a creditor entitled to arrest his debtor is very different from the position of a surety entitled to call upon his principal for indemnity against loss by reason of default of the principal to pay the debt due to his creditor. The rights and remedies of the two are wholly different, a

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surety to a third person for the payment of a sum of money due to such third person by another is not competent in my opinion to arrest such other on his committing default in payment of his debt due to such third person, or upon his becoming insolvent: he cannot make the affidavit necessary to be made to support the issuing of a writ of *capias* at his suit.

As to the second of the above grounds, it proceeds upon a legal inference which is drawn by the court from two facts stated, one of which, as appears in the considérant, occurred on the 6th December, sixteen days after the arrest which is complained of was made. The inference which is drawn from the facts stated is one which cannot be deduced from the facts which are relied upon as justifying it, and further the inference drawn is directly at variance with the evidence. The evidence shows that the arrangement upon which the plaintiff became possessed of the notes from the banks, who were the holders thereof and entitled thereto, was not made until after the arrest of the defendant, nor until the examination of witnesses upon the defendant's petition to quash the writ of *capias* was in progress, so that whatever authority from the holders of the notes which, if any, the plaintiff may have acquired, in virtue of that arrangement of proceeding to judgment in an action commenced by him as holder of the notes at a time when he was not the holder of any of them, the arrangement cannot be invoked to support a *capias* and arrest made thereunder at a time when the plaintiff had no such authority from the holders of the notes and had not possession of them. Even if the plaintiff had paid notes in full to the holders thereof and had thus become legal holder of them after he had arrested the defendant, he could not sustain an arrest made by him in an action which he had commenced as holders of the notes when in point of fact he was

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not the holder of them—*a fortiori* he could not sustain the writ of *capias* issued in the present case, and the arrest made thereunder by force of any authority derived from the holders of the notes subsequently to the arrest. The validity of the *capias* must depend upon the right of the plaintiff to issue it at the time when it was issued.

As to the 3rd ground upon which the courts below proceeded, I am of opinion that a payment to one or more creditors of a debtor although he be in insolvent circumstances in preference to another or others is not a secreting of the debtor's property with intent to defraud within the meaning of the act authorising imprisonment for debt. Upon this point I need only say that I entirely concur with the dissentient judgment of Mr. Justice Cross in the Court of Queen's Bench in appeal.

I am of opinion therefore that this appeal should be allowed with costs, and that the arrest should be set aside and the writ of *capias* quashed with costs.

Appeal dismissed without costs.

Solicitors for appellants: *MacMaster, Hutchison, Weir & MacLennan.*

Solicitors for respondent: *Greenshields, Guerin & Greenshields.*