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*Mar. 18.

*Nov. 19, 20.

STEPHEN HAMILTON THOMPSON, (PLAINTIFF)..... ..... } APPELLANT.

AND

THE MOLSONS BANK, (DEFENDANTS)..RESPONDENTS.

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

*The Banking Act—R. S. C. ch.* 120 *secs.* 53 *et seq.—Warehouse receipts —Parol agreement as to surplus—Arts.* 1031, 1981. *C. C.*

The Molsons Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. & Co. H. & Co. having become insolvent T., as one of the creditors, brought an action against the bank, claiming that the surplus must be distributed ratably among the general body of creditors H. & Co. were not made parties to the suit.

*Held*,—affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, R. S. C. ch. 120, and that after the goods were lawfully sold the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. (Ritchie C. J. doubting and Fournier J. dissenting).

Per Taschereau J.—That H. & Co. ought to have been made parties to the suit.

APPEAL from a judgment of the Queen's Bench for Lower Canada (Appeal Side) confirming a judgment of the Superior Court in favor of respondents, the defendants in that court.

Appellant sued as creditor of H. Haswell & Co., of

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

which firm Haldane Haswell is sole surviving partner, and alleged substantially:

That that firm owed him over $13,000 for goods sold and money lent in 1884, and on June 10th, 1884, made a voluntary assignment to A. W. Stevenson, with the acquiescence and express consent of appellant and respondents, and that by this insolvency all the property of the said firm became the common gage and pledge of the creditors, who were entitled to share ratably in the proceeds.

That respondents made advances to the firm on various dates, for which notes were taken and warehouse receipts given as collateral security.

That the firm becoming insolvent the respondents disposed of the collateral, and realized a surplus alleged to amount to $2708.27.

That demands had been made on the respondents to account and to pay over the balance to Stevenson, the assignee, the appellant, or such other person as might be entitled thereto, to the end that it might be divided ratably amongst the creditors, but that respondents in order to obtain an illegal preference had refused to account or to pay over the balance.

The respondents pleaded:

That they had for a long time previous, been dealing with H. Haswell & Co., and in the ordinary course of their banking business made not only the advances mentioned in appellant's declaration, but others upon collateral security of warehouse receipts; but they specially denied that such advances were made upon any understanding that such collateral was only to be held as against each particular advance, but that on the contrary it was agreed before and at the time of making the advances, and at all times during which the firm and the bank were doing business, that should the advances not be repaid the bank should have the

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right to sell the collateral securities and apply the surplus to any other debt the firm might owe, or hold the same as security for their current advances.

That the firm failed to repay the advances, and the bank realized on the sale of the collateral securities mentioned, more than the direct advances, but not sufficient to cover other advances upon collateral security not mentioned in the appellant's declaration. In these cases also the collateral had to be sold, leaving a deficit.

That in addition the bank made other advances to the firm, to the amount of $3981.62, which was obtained on a distinct understanding that any surplus, arising from the sale of security held by the bank, should be applied towards payment of these advances; that the advances were made in consideration and on the faith of this agreement, and respondents applied the surplus accordingly as they had a right to do.

By their second plea the respondents said:

That the $2780.27 referred to in plaintiff's declaration had been compensated and extinguished by the balance due on the secured loans, and the $3981.62 mentioned above.

The respondents also demurred to the action on the following grounds:

1. No privity of contract between them, and, if any one entitled to an account, it would be H. Haswell & Co., and it did not appear that appellant was their legal representative or stood in their right.

2. The alleged insolvency and voluntary assignment did not affect the right of the firm to sue for an account or give appellant any greater rights in that connection than he had before.

3. It did not appear by the declaration that the transactions between the respondents and H. Ha well

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& Co., were fraudulent, or that the creditors were entitled to have the same set aside, and the action was in fact a direct action by a creditor for an account of dealings between his debtor and a third party.

It was proved at the trial that the bank had for a long time been discounting the business paper of Haswell & Co. on collateral, and that in March, 1883, long before the insolvency, on being asked to discount accommodation paper, Mr. Thomas, general manager, refused, except on condition that the surplus of all collateral security held or to be held should be applicable on any and all indebtedness to the bank.

The following is the form of the collateral security held by the bank:

"Montreal, 11th February, 1884.

"Manager of

"THE MOLSON BANK.

"In consideration of the Molsons Bank having discounted for us the undermentioned promissory note, viz:

"Note dated 11th February, 1884, falling due 14th June, 1884 for $1900, amounting in all to nineteen hundred dollars, we herewith deposit with you as manager, as collateral security for the due payment of the said note at maturity.

D. Campbell & Sons' warehouse receipt No. 1207.

| | |
|---|---|
| 45 bls. Raw Linseed Oil, average 49¾ galls., 2339¾ @ 54 | $1225.86 |
| 50 bls. Raw Linseed Oil, average 40 galls., 2000 @ 54 | 1080.00 |
| | $2305.86 |

in favor of ourselves, and endorsed with insurance of the Phœnix of Brooklyn Insurance Company for $3000, to 29th May, 1884.

"Should the above named note not be duly paid at

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maturity, the said the Molsons Bank is hereby authorized to dispose of the goods specified in the said warehouse receipts, in such a manner as it may deem advisable and to appropriate the proceeds so far as may be necessary towards the payment of said note. The whole without prejudice to the ordinary legal remedies upon the said note."

"H. HASWELL & Co.,

"*per pro.* C. J. Binmore."

*Robertson* Q.C., and *Falconer* for appellants.

The firm of Haswell & Co., our debtors, being notoriously insolvent under art. 1981 C.C. appellant has a right of action in his own name. The case of *Boisseau* v. *Thibaudeau* (1) supports this view.

The firm of Haswell & Co. have not been put *en cause*, but no exception has been taken to this in the pleadings, and in addition no injury can be done to defendants, inasmuch as Haswell & Co. are admittedly insolvent and therefore have no claim on their own estate. In addition, Mr. Haswell has signed a declaration declaring he puts himself before the court to abide the judgment to be rendered. Such a declaration has been held sufficient by the Court of Queen's Bench in an unreported case:—*Johnson* v. *The Consolidated Bank*, judgment rendered the 25th September, 1885.

The judgment of the Court of Queen's Bench in effect turns on a technicality, a mere question of procedure. It cannot be denied that in the absence of any special privilege appellant and respondents are entitled to share alike in all the assets of their common debtor. It is evident also that if the respondents are allowed to retain the moneys in question they will obtain more than their share. There must, therefore, be some remedy. An action by Haswell & Co. would be defeated, as against them the respondents have a

(1) 7 L. N. p. 274.

good defence, viz., compensation. The assignee cannot succeed, for he, holding under a voluntary assignment, is a transferee of the debtor only, and is in no way vested with the rights of the creditors; and, moreover, plaintiff has not abandoned his rights to the assignee. The right to an equitable distribution of the assets is a right belonging to the creditors only and to each of them, and they, therefore, are the proper parties to bring suit. The rights of creditors are not limited by Art. 1031 of the Civil Code referred to in the judgment of the Court of Queen's Bench, nor is that article applicable to the present case. It provides a means for creditors to increase their debtor's estate by bringing into it assets which the debtor neglects to secure, and has nothing to do with the distribution of the assets actually belonging to him, as in the present action which is brought not to deprive respondents of their rights in Haswell & Co.'s estate, but to secure an equitable distribution.

As to the conditions of the advances and respondents' rights to hold the surplus, the written contract between the parties shows clearly that the intention was that each advance should have its own security to apply to it alone. Any attempt to vary the terms of a valid written contract and to extend its stipulations is illegal—Art. 1234 C.C.—and contrary to section 46 of 34 Vic., ch. 5, of the Banking Act. See also Grant on Banking (1); *Adams* v *Claxton* (2); *Vandersee* v *Willis* (3); and especially *Talbot* v *Frere* (4); Taylor on Evidence (5).

In reply to respondents' third plea of compensation, appellant submits that an examination of respondents' claims, and a careful comparison of dates clearly shows

(1) 4th ed., p. 183.
(2) 6 Vesey 229.
(3) 3 Brown C.C. 22.
(4) 9 Ch. D. 568.
(5) 8 ed., secs. 1144–1158.

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that the plea of compensation cannot be maintained, inasmuch as the requisites for compensation as set forth in Art. 1188 C.C. (and in connection therewith Art. 1196), are wanting because—

1st. The debts were not equally liquidated and demandable.

2nd The right of compensation must have existed previous to the debtors' insolvency to avail against his other creditors, and the evidence shows that up to, and at the time of, such insolvency the debts did not have each for object a sum of money of a certain quantity of indeterminate things of the same kind and quality. *Perkins* v. *Ross* (1).

*Geoffrion* Q. C. and *H. Abbott* Q. C. for respondents. The appellant's action is apparently taken as representing his debtors, H. Haswell & Co., and such action is only justified by articles 1031 and 1032 C. C. A comparison of the former article with the corresponding articles of the Code Napoleon (2092, 2093), will show that our codifiers have adopted the view of those commentators on the Code Napoleon, who hold that the neglect or refusal of the debtor is an essential condition precedent to the exercise of his rights by the creditor (2).

The case of *Boisseau* v. *Thibaudeau* (3) is clearly distinguishable from this. There the payments were made directly by the insolvent to one of the creditors and to a creditor who had access to their books before the insolvency. The guilty knowledge of the creditor was proved and the case came clearly under art. 1036. The question of putting the insolvent debtor in default to exercise the action was not raised. Nor does it appear that there was any vesting by consent of the rights of the insolvent in the assignee, which would have estop-

(1) 6 Q. L. R. 65.
(2) 25 Demolombe, Nos. 48, 1026 and 186.
(3) 7 L. N. 275.

ped the plaintiffs, and, moreover, the assignment in this case is a mere voluntary assignment.

The agreement as alleged is proved, and apart from the points raised by the demurrer three questions remain:—

1. Is the agreement proved?

2. Was this agreement legal, and has the bank a right to retain the money?

3. If illegal, has the bank, having the money actually in hand, a right to set it off against the balance due?

As to the proof, we submit that the evidence is sufficient, and that verbal proof is admissible in all commercial matters unless expressly prohibited by law. Between individuals it would undoubtedly be perfectly legal.

The Bank Act, R.S.C. chap. 120, sec. 53 s.s. 4, provides in effect that the bank shall not acquire or hold a warehouse receipt as collateral for a debt, unless the debt is negotiated or contracted at the time, or upon promise that a warehouse receipt would be transferred.

The bank by law, to carry out the objects of its existence, has a right to engage in such trade as generally appertains to the business of banking (s. 45).

And by the law, the bank has a general lien on all securities for an unpaid balance of account.

The general lien of bankers is part of the law merchant to be judicially noticed, etc.

Unless there be an express contract, or circumstances showing an implied contract inconsistent with the principle of lien, the bankers have a general lien on all securities deposited with them as bankers by their customers. Grant on law relating to bankers, &c. (1). *Bank of Hamilton* v. *Noye Manufacturing Co.* (2).

The case of *Perkins* v. *Ross* (3) is also distinguishable.

(1) 4 edit. p. 244.

(2) 9 Ont. Rep. 631.

(3) 6 Q. L. R. 65.

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There the agreement gave no privilege on the goods pledged (1).

The creditor therefore only had a right under the agreement to set off the balance of the proceeds against an unsecured claim. The money never came into his hands until after the abandonment, when by the Insolvent Act it vested in the assignee, and the creditors had to deal with him. The assignee was a party to the suit, exercising his own rights and claiming the money.

Apart from these considerations the money actually came into the hands of the bank, no demand for it by the assignee has ever been made and the balance was still due the bank, and under these circumstances compensation took place.

*Robertson* Q.C. in reply referred to Larombière (2).

Sir W. J. RITCHIE C.J.—In this case I have had very considerable doubt, but as the majority of the court are of the opinion that the appeal should be dismissed, and as my judgment would not alter the result, I do not think it advisable to delay the judgment.

STRONG J. concurred in dismissing the appeal.

FOURNIER J.—L'appelant, créancier pour une forte somme de la société insolvable de M. Haswell & Co, maintenant représentée par M. Haswell seul, a poursuivi l'intimée, la banque Molson, en se fondant sur l'article 1981 du Code civil, déclarant les biens du débiteur le gage commun de ses créanciers, dont le prix doit se distribuer par contribution entre eux. Il allègue que l'insolvabilité de Haswell & Co., qui remonte à la date du 10 juin 1884, était à la connaissance de l'in-

(1) See Dorion, C.J. S.C. p. 78. (2) 3 vol. No. 27, p. 666.

timée qui savait aussi qu'ils avaient fait cession à A. W. Stevenson pour le bénéfice de leurs créanciers. La banque leur avait fait les avances suivantes :

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|---|---|
| Février 11 1884 | $1900 |
| Avril 1er 1884 | 2600 |
| Mai 21 1884 | 3000 |
| " " " | 3000 |
| Mai 23 1884 | 2200 |

Elle avait lors de chacune de ces avances, en particulier et à leurs dates respectives, exigé des sûretés collatérales de ses débiteurs, qui lui avaient transporté des reçus de marchandises en entrepôt leur appartenant, avec la condition spéciale que chaque sûreté délivrée ne serait une garantie que du remboursement du prêt particulier auquel elle était affectée ; que dans le cas de défaut de paiement des dites avances, les sûretés données pour chacune d'elles, seraient réalisées, et après remboursement des dites avances, la balance en serait remise à la dite société. Cette dernière ayant fait défaut, les sûretés données ont été réalisées et ont rapporté un surplus sur le montant de chacune des avances, produisant en totalité la somme de $2,708.27. Ce surplus, vu l'insolvabilité des dits Haswell & Co., devrait être partagé au marc la livre entre leurs créanciers, mais l'intimée retient illégalement cette somme dans le but de s'assurer au détriment des autres créanciers une préférence pour le paiement d'une balance de compte courant qu'elle réclame des dits Haswell & Co. L'action est à l'effet d'amener cette somme à distribution entre tous les créanciers.

L'intimée a plaidé par défense au droit que l'appelant n'était pas partie à la transaction entre elle et la société, Haswell & Co., et ne représentant pas légalement cette dernière, il n'avait aucun droit d'action, que l'insolvabilité de la dite société ne lui conférait pas plus de droit qu'il n'en avait auparavant, et qu'il

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n'avait pas allégué fraude. Cette défense en droit a été renvoyée.

Par un autre plaidoyer elle allègue qu'en vertu d'une convention spéciale avec Haswell & Co., le surplus qui pouvait résulter de la vente des sûretés devait être employé au paiement de la balance de leur compte courant, que ce surplus se trouve compensé par la balance du dit compte courant et d'autres avances non remboursées.

Le jugement de la cour Supérieure a considéré cette convention spéciale relativement à l'emploi du surplus comme prouvée, et renvoyé l'action en conséquence. La majorité de la cour d'Appel ne s'est pas prononcée sur ce point, mais elle a confirmé ce jugement sur le principe que l'appelant n'avait pas droit d'action à moins d'avoir préalablement mis son débiteur en demeure. C'est de ce jugement qu'il y a appel en cette cour.

Les deux seules questions qui s'élèvent sont, 1° l'appelant a-t-il droit d'action d'après les faits allégués dans sa déclaration; 2° la convention verbale que le surplus du produit des sûretés serait affecté au paiement de la balance du compte courant, est-elle légale et a-t-elle été légalement prouvée.

Quand au premier point sur le droit d'action, quoiqu'il y ait eu divergence d'opinion à cet égard, il me semble que cette question ne peut souffrir difficulté. L'appelant se fonde principalement sur l'article 1981, C. C., déclarant que:

> Les biens du débiteur sont le gage commun de ses créanciers, et, dans le cas de concours, le prix s'en distribue par contribution, à moins qu'il n'y ait entre eux des causes légitimes de préférence.

L'intimée, en retenant le surplus en question, agit en contravention à cet article et viole le droit de l'appelant d'être admis à la distribution de cette somme par contribution. De cette violation du droit conféré

à tout créancier par cet article, naît le droit d'action de l'appelant. C'est moins le droit de ses débiteurs, Haswell & Co., qu'il exerce en vertu de l'article 1031, C. C., que celui que l'article 1981, assure à tout créancier sur les biens de son débiteur.

La faillite de Haswell & Co. a eu aussi l'effet légal de mettre au même rang tous leurs créanciers qui n'avaient ni privilège, ni hypothèque et de faire acquérir à ceux-ci le droit d'être appelés à la distribution des biens de leurs débiteurs au *pro rata* de leurs créances respectives. Cet état de faillite, malgré la révocation des lois à ce sujet, n'en est pas moins reconnu dans la province de Québec en vertu de l'article 17 C. C., paragraphe 23, qui le définit ainsi: "La faillite est l'état d'un commerçant qui a cessé ses paiements." Il est encore admis par l'article 1036, C. C., qui déclare nul le paiement fait par un débiteur à un créancier qui connaît son insolvabilité, et par l'article 2090, déclarant nuls les enrégistrements faits dans les trente jours qui précèdent la faillite. Cet état de faillite rend le débiteur incapable de disposer de ses biens au détriment de ses créanciers qui ont acquis de ce moment le droit d'être payés par contribution. Le droit que veut exercer l'appelant existe non seulement en vertu de l'article 1981, mais il est aussi la conséquence légale de la faillite. A cette époque, le 10 juin 1884, date de la faillite, l'appelant avait donc un droit acquis d'être admis à la distribution des biens de Haswell & Co., par contribution, et en particulier sur la somme de $2708.00 montant du surplus.

L'intimée prétend que du moment qu'elle est devenue débitrice de ce surplus envers Haswell & Co., il s'est alors opéré de plein droit compensation de cette somme jusqu'à concurrence d'autant avec la balance du compte courant qui lui était due par Haswell & Co. Mais elle n'a pu devenir débitrice de cette somme que par la

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réalisation qui seule a constitué Haswell & Co., ses créanciers d'une somme ainsi devenue claire et liquide et partant compensable, tandis que jusque là les dits Haswell & Co., n'avaient qu'un droit de se faire rendre compte des valeurs données comme sûreté collatérale, droit qui n'était pas susceptible de compensation. Ce n'est qu'après la faillite que la réalisation a eu lieu Ce fait important est prouvé par le témoignage de James Elliott. Avant cette réalisation l'appelant avait déjà acquis le droit à la contribution, et la réalisation subséquente en établissant une créance claire et liquide en faveur de Haswell & Co., n'a pu donner à l'intimée le droit d'invoquer la compensation au détriment du droit déjà acquis de l'appelant. Le Code civil, article 1196, contient une disposition à cet effet.

La compensation n'a pas lieu au préjudice du droit acquis à un tiers.

Dans ces circonstances l'intimée n'a pas le droit, sous prétexte de compensation, de retenir le montant entier du surplus; elle n'a, comme les autres créanciers, que le droit d'être admise à la distribution de cette somme entre eux au *pro rata* de leurs créances respectives. Autrement l'intimée obtiendrait une injuste préférence contre les autres créanciers.

Puisque la loi reconnaît à l'appelant ce droit à la distribution, elle doit certainement lui offrir un moyen de le faire valoir. Bien que le jugement de la cour du Banc de la Reine ait renvoyé l'action, la cour n'a cependant pas nié le droit d'action. C'est sur une omission de formalité qu'elle a fondé son jugement qui est motivé comme suit:

That the appellant failed to comply with the necessary requirements according to article 1031 of the Civil Code, to entitle him to exercise the action of his debtor who was not put in default before the institution of this action by a demand on him or his representatives.

Ce motif est-il fondé? Pour répondre à cette question je ne crois pouvoir mieux faire que de citer la réponse

donnée par Sir A. A. Dorion dans ses notes sur cette cause :

As to the contention that the appellant had no right to bring this action unless he had previously summoned Haswell & Co., his debtors, to do so, it has no foundation whatsoever. The law does not require it, for article 1031 of the Civil Code, which authorises such an action, provides that : "creditors may exercise the rights and actions of their debtors, when to their prejudice he refuses or neglects to do so." The mere neglect is sufficient to authorise the bringing of the action, and it is neither necessary to allege nor to prove such neglect. If a prior summons were required, it would be necessary to establish a refusal in every case and no action could lie for mere neglect on the part of the debtor to sue although the article of the code expressly authorises it in such case.

The jurisprudence is well established in France on that point as is shown by Larombière (1). This writer, at No. 21, says :—"Hors de "là, aucune autre condition n'est exigée pour qu'ils (les créanciers) "puissent exercer les droits et actions de leurs débiteurs.—Il suffit "qu'ils soient créanciers et que celui-ci néglige de les exercer, sans "qu'ils aient préalablement à le mettre en demeure d'agir.

This jurisprudence has always been followed here, and the fact that a debtor has a right which he does not enforce has been considered as a neglect to perform a duty towards his creditors which authorises them to sue in his stead.

Le droit d'action exercé en cette cause a été reconnu par la cour du Banc de la Reine dans la cause de *Boisseau* v. *Thibaudeau et al.* (1).

Dans cette cause il s'agissait de faire prononcer la nullité du paiement fait en contravention de l'article 1036 C. C., par un débiteur à l'un de ses créanciers qui reconnaissait son insolvabilité. La cour a reconnu à un autre créancier lésé par ce paiement le droit de poursuivre en son nom le créancier illégalement préféré, et de demander que la somme ainsi reçue fut déposé en cour pour le bénéfice commun des créanciers suivant leurs droits respectifs. Alors comme à présent les lois de faillite avaient cessé d'être en force. Le principe admis par ce jugement doit recevoir son ap-

(1) Vol. 1, p. 699, Nos. 21, 22 and following. (2) 7 Leg. N. 274.

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plication dans cette cause, car les faits sont parfaitement analogues. Comme l'a fait observer l'honorable juge Ramsay, dans ses notes sur cette cause, il y a dans notre système de droit basé sur l'équité aucune règle expresse enlevant le droit d'exercer une semblable action.

L'objection fondée sur le défaut d'allégation de fraude ne peut avoir aucune force dans une action où il s'agit de faire rapporter à la masse des biens du failli, une somme que l'intimée veut s'approprier illégalement au détriment des autres créanciers; la préférence que l'intimée veut s'attribuer est évidemment en fraude de la loi qui règle la distribution des biens du débiteur, et cela suffit pour donner lieu a l'action du créancier lésé.

Quant à la deuxième question au sujet de la prétendue convention verbale, indiquée par l'intimée comme lui donnant droit de s'approprier le surplus, cette convention, si elle a eu lieu est illégale, et n'est pas prouvée.

La convention entre l'intimée et Haswell & Co., réglant les conditions des avances a été faite par écrit. Pour chaque avance faite pour garantir le paiement des divers billets, il existe une convention écrite contenant la condition suivante :

Should the above-named note not be paid at muturity the said Molson's Bank is hereby authorized to dispose of the goods specified in the said warehouse receipt, in such manner as it may deem advisable, and to appropriate the proceeds so far as may be necessary towards the payment of said note, and the goods are described as "collateral security for the due payment of the said note at maturity."

Ce contrat fait voir clairement que pour chaque avance il y avait une sûreté qui ne s'appliquait qu'à cette avance même, et que le surplus, après réalisation, demeurait la propriété de Haswell & Co., sans aucune appropriation particulière. Le surplus, arrivant la faillite, devenait le gage commun de tous les créanciers

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et l'intimée n'y pouvait prétendre plus de droit que les autres créanciers. Aussi, pour soutenir sa prétention, l'intimée est-elle obligée d'invoquer une prétendue convention verbale qui aurait été faite avant l'écrit, comme lui donnant droit à ce surplus. M. Thomas, le gérant de la banque, est produit comme témoin pour prouver une telle convention ; mais il ne dit pas que cette convention a été faite après le contrat écrit. Haswell reconnaît dans son témoignage qu'une convention semblable à celle plaidée a été faite en 1883 au sujet d'une avance particulière de $5,000, fait en mars 1883, mais il en limite l'effet à cette avance particulière. M. Thomas a évidemment fait une erreur en parlant de cette convention, dont il ne donne pas la date, comme si elle avait eu lieu en même temps ou après la convention écrite. Son témoignage seul contre l'écrit qui prouve le contraire, ne peut suffire pour prouver cette convention. D'ailleurs cette preuve est illégale et contraire à l'article 1234 C. C. Si elle était admise, elle aurait l'effet de modifier un contrat par écrit qui dit que les sûretés devront être appliquées au paiement de chaque billet (*said note*) en particulier, tandis que la convention verbale en ferait l'application à d'autres créances que celles pour lesquelles les billets ont été donnés. Les conversations qui ont pu avoir lieu à ce sujet avant les écrits doivent être considérées comme non avenues, puisque les parties ont mis leur convention par écrit.

Bien plus, cette convention, même si elle était prouvée, serait illégale, comme contraire à l'acte des Banques, 34 Vic., ch. 5, sec. 46, tel qu'amendé par la 43e Vict., ch. 22, sec. 7, déclarant:

That the bank shall not hold any warehouse receipt to secure the payment of any note or debt, unless such note or debt be negotiated or contracted at the time of the acquisition thereof by the bank.

La preuve fait clairement voir que les sûretés ont été

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données pour une autre dette que celle de la balance du compte courant, pour laquelle il n'en a été donné aucune. L'intimée ne s'étant pas conformée aux dispositions de l'acte des banques, elle n'a pu acquérir aucun privilège sur le surplus, et elle le retient évidemment en violation de l'acte des Banques.

Par tous ces motifs, je suis d'avis d'allouer l'appel.

TASCHEREAU, J.—It seems to me that Haswell and Company should be a party in this case. The writing fyled in the record signed by Haswell, is irregular and cannot be looked at; and moreover Haswell does not legally represent the firm. I have no difficulty however in satisfying myself that the judgment of the Superior Court is perfectly right, and that the defendants have fully established the agreement with Haswell & Co. by which they were entitled to keep these monies in payment of their claim. I do not see in this agreement anything against the provisions of the Banking Act.

PATTERSON, J.—The judgment from which this appeal is brought is that of three of the learned judges of the Queen's Bench, from whose opinion the Chief Justice and Mr. Justice Tessier dissented. I think the decision of the majority should be affirmed, but at the same time I agree with some views expressed by the dissenting judges.

The objections taken to the *locus standi* of the plaintiff and given effect to in the judgment of the court do not seem to me to be well founded. The construction put upon article 1031 of the Civil Code by the dissenting judges commends itself to my judgment as more reasonable than that which requires some formal demand by the creditor, or some express refusal by the debtor, before the debtor can be said, within the

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meaning of the article, to refuse or neglect, to the prejudice of his creditor, to exercise his rights and actions. So far I go with the minority of the court below. I am further prepared to adopt the opinion which I understand to have been held by the minority, that the plaintiff's right of action exists independently of article 1031. But I agree with the conclusion that the plaintiff has failed to sustain his action for the reasons on which the judgment of the Superior Court, as given by Mr. Justice Taschereau, proceeded.

We have no complicated or disputed facts to deal with.

The bank having taken from Haswell several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claims to hold that surplus in payment of other debts due by Haswell, while Haswell having become insolvent the plaintiff insists that the surplus must be distributed ratably among the creditors generally.

With each warehouse receipt the bank took from Haswell a memorandum of the deposit of the receipt as collectual security for the particular note, each memorandum containing these words:

> Should the above named note not be duly paid at maturity, the said The Molsons Bank is hereby authorized to dispose of the goods specified in the said warehouse receipt, in such manner as it may deem advisable and to appropriate the proceeds so far as may be necessary towards the payment of the said note. The whole without prejudice to the ordinary legal remedies upon the said note.

The documents say nothing of the surplus that might remain after a sale of any of the goods, nor was it necessary that they should do so. The surplus must, of course, be accounted for to Haswell or to some one entitled through him, and, being outside of the

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written memoranda, could be made the subject of any other agreement or be disposed of by Haswell as he pleased. The argument to the effect that an oral agreement respecting these surplus moneys, such as the agreement proved to have been verbally made between Haswell and the general manager of the bank that the bank might retain the surplus, if a surplus there should be, towards the payment of other debts of Haswell, was in violation of the rule against varying a written instrument by parol, is founded on a misconception. That agreement in no way varied the agreements evidenced by the writings, but was perfectly consistent with them.

It was urged that these surplus moneys having come to the hands of the bank through the medium of warehouse receipts, and the agreement respecting them being made while the bank held the receipts and before the sales under them, and the power of the bank in relation to warehouse receipts being defined and limited by the Banking Act, the agreement was illegal and beyond the power of the bank.

I have not the advantage of knowing the views of any of the learned judges in the courts below upon this contention, except the learned Chief Justice and the learned judges who dissented with him from the judgment of the court. It is with some diffidence that I feel myself unable to assent, as they appear to have done, to the contention, but, with great respect, I venture the opinion that the views adopted are founded on a misconception of the effect of the statute.

The provisions are now found in the Bank Act, R S.C., chap. 120, sec. 53, the material parts of which I shall read—

"The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business——"

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Pausing here for a moment let us see in what respect the common law is changed. The warehouse receipt is a receipt by a warehouseman for goods in his warehouse. The goods themselves could always have been pledged as security for debts. Whatever was the mode of effecting the transfer of property or possession by which the pledge was made, whether by actual delivery of the goods, or under the English system by deed, the goods could by some mode of conveyance be effectually pledged. But the process was cumbrous and slow, and the statute aims at providing a simpler and speedier way of doing the same thing in connection with the business of banking. We are of course aware that, though this Dominion statute deals only with banks, which are within the exclusive legislative jurisdiction of the Dominion, the principle is made of more general application by provincial legislation. The principle is indicated by the passage which I have read, but the practical enactment follows. The clause proceeds:

> And the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisitiou thereof, all the rlght and title of the previous holder or owner thereof, or of the person from whom such goods, wares or merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank instead of to the previous holder or owner of such goods, wares or merchandise.

In other words, the warehouse receipt acquired by the bank operates as a conveyance of the goods to the bank. What is done is not so much to create a new right as to provide a new mode of conveyance. I say nothing of bills of lading which need not enter into the present discussion, and which hold a position different from warehouse receipts under the law merchant.

I shall read only one other passage, which is quoted by one of the learned judges in the court below:

> The bank shall not acquire or hold any warehouse receipt or bill of

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lading to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank,—or, &c.

I do not doubt that if Haswell had paid up his notes the effect of what I have just read would have been to annul the title of the bank to the goods held under the warehouse receipts, and to disable the bank from insisting on holding the goods or the receipts as security for the current account. The bank would not have handled or received actual possession of the goods, and the title under the receipts would have become effete. This was probably the history of the earlier transactions of the kind between Haswell and the bank. But, under events as they have happened, the title to the goods was vested in the bank; the goods were lawfully sold; and the money that remained after applying the proceeds of each sale to its proper note was simply money held to the use of Haswell. It was not held under the warehouse receipts, and it had to be accounted for like the excess over the mortgage moneys in the case of *Talbot* v. *Frere* (1) which the appellant cites in his factum.

The plaintiff insists that it must go for ratable distribution among the creditors. The defendants maintain that they have a right to apply it on account of what Haswell owes them, by reason of his agreement that it should be so applied.

The testimony of Mr. Haswell and Mr. Thomas establishes an agreement that the surplus moneys from securities, such as the warehouse receipts which we have been discussing, should be security for any debts Haswell owed or should owe the bank. The agreement went further than that, for it embraced the advances made on the security of the warehouse receipts, which would not have been made if the disposition of

(1) 9 Ch. D. 568.

the surplus which might have come into the hands of the bank had not been agreed to. The making of those advances was part of the consideration for the agreement as to the surplus. The accounts given by Haldane Haswell and by Mr. Thomas are substantially alike. I shall read that given by Mr. Thomas.

Question—Have you had any conversation with him (Mr. Haswell) with reference to the application of surpluses which might arise from the realization of collateral security held by the bank towards the payment of other advances that were made by the bank to him, and if so, will you state what such conversations were, and when they occurred?

Answer—Yes, I had one, and I imagine it was about the time Mr. Haldane mentioned, in March, eighteen hundred and eighty-three, and I objected to making the advance. Mr. Haldane was in very great need of receiving a certain sum of money, and he asked me to make him an advance on collaterals. I demurred to making the advance as our advances on collaterals were pretty large then at the time, and we had other advances unsecured, the unsecured advances being certain notes, the amount of which I do not remember now, certain notes signed by the firm, and indorsed by the two brothers individually. I wanted, in fact, to get the whole of those notes entirely covered, but he said he was unable to give collaterals and did not feel inclined also to give collaterals enough to cover them, and then I asked him if I made him the advance if he would agree that any surplus arising from that advance or any other collateral existing, or that we might take in the same way, should be applied to the payment of these notes of the firm, indorsed by the partners individually, or any other paper, and in fact to apply to any advance as the bank liked, and he agreed to it, and unless he had agreed to it I would not allow the advances to be made. That was one occasion, but there were several occasions. Mr. Haldane forgets, I believe, two or three occasions in which a somewhat similar conversation occurred. I did it believing at the time, that is in March, 1883, that I could have enforced payment by suit.

It was only to help him that I agreed to take transfer, it was a verbal one, a transfer of any surplus.

Question—And by those said notes you mean the notes signed, similar to the ones, Exhibits 4 and 7?

Answer—Yes, those notes indorsed by Haldane Haswell and his brother Charles. I think there were more than these running. I think the amount originally was about six thousand dollars.

Question—But they were notes of which Exhibits 4 and 7 are renewals?

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Answer—Yes.

Question—Has the bank account of Haswell & Co. been carried on under that understanding ever since?

Answer—Yes.

These exhibits 4 and 7 are promissory notes dated the 6th of February and the 5th of March, 1884, for the amounts respectively of $1,375 and $1,500, portions of Haswell's debt to the bank.

The date given for the first conversation out of which the verbal agreement arose, March 1883, is a year earlier than any of the warehouse receipts now in question, which run from the 11th of February to the 24th of May, 1884, but the agreement, as stated, was a continuing agreement applying to any surplus which should come into the hands of the bank. The insolvency of Haswell appears to have occurred, or at all events to have first become notorious, in June 1884.

I see no good reason to differ from the decision of Mr. Justice Taschereau in the court of first instance concerning the agreement respecting these surplus moneys. That judgment was affirmed in appeal on the same grounds, although in the appellate court greater weight seems to have been accorded to the view taken by the majority of the incapacity of the plaintiff to maintain the action; and the judges who would have reversed the decision treated this particular point only with reference to the Bank Act.

I think we should dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for appellant: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Abbotts & Campbell.*