JAMES M. MITCHELL (DEFENDANT).....APPELLANT ; 1889

AND *May 16.
*June 14.

CHARLES HOLLAND, *ès-qual.* (PLAINTIFF)..... .....RESPONDENT.

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

Estoppel—Art. 19 *C.C.P.—Right of suit by trustees—Promissory notes given as collateral for price of sale—Prescription.*

C.H. (the respondent) as trustee for certain creditors of the firm of R. M. and sons, sued J.M.M. (the appellant), a member of the firm, for $4,720, alleging : 1. A registered notarial transfer from one J.R.M. to him, as trustee, of a similar sum with all rights, mortgages, &c., thereunto appertaining, due by the said appellant to J.R.M. for the price of certain real estate in Montreal ; 2. A transfer of certain promissory notes signed by the appellant for the same amount and representing the price of sale of said property, but which were to be in payment thereof only if paid at maturity. The appellant was a party and intervened to the deed of transfer and declared himself satisfied and subject to its conditions.

The appellant pleaded that the respondent had no action as trustee under article 19, C.C.P. and that the price had been paid by the two promissory notes which were now prescribed.

Held, 1, affirming the judgment of the court below, that article 19 C.C.P. was not applicable. The appellant having become a party to the registered transfer, which gave the respondent as trustee all mortgagee's rights, was estopped from denying the efficacy of such deed or of the right of the plaintiff to sue thereunder in his quality of trustee. *Burland* v. *Moffatt* 11 Can. S.C.R. 76 and *Browne* v. *Pinsoneault* 3 Can. S.C.R. 103 distinguished.

2. That the notes in question having been given as collateral for the price of sale of the property, and the property not having been paid for, the plea of prescription as to the notes could not avail against an action for the price.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the

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

1889

MITCHELL v. HOLLAND.

judgment of the Superior Court, which dismissed the action of the respondent.

The suit in this case arose out of a deed of settlement made between the defendant and the plaintiff as trustee for the defendant's creditors, and bearing date 31st October, 1877.

On the 1st December, 1877, J. R. Mitchell transferred for value received to the plaintiff in his said quality of trustee a sum of $4,720.20, with all hypothecary rights, due to him the said J. R. Mitchell by the defendant as the price of certain real estate in Montreal and to secure which sum the defendant had hypothecated the property purchased (*bailleur de fonds*) as stated in a deed of sale dated 5th January, 1877.

By the deed of transfer of the 1st December, 1877, J. R. Mitchell also delivered up to the plaintiff two promissory notes amounting to $4,720.20 which had been given by the defendant in payment of the purchase price of the property, provided they were paid at maturity, and produced to be attached to the deed, but not otherwise, as appears by the following clause in the deed:

"Provided always, however, and it is hereby expressly declared, agreed and understood by and between the said parties hereto, that the consideration sum of $4,720.20, or any part thereof, shall not be held to be paid or discharged unless both said promissory notes are fully paid at maturity, and the said two promissory notes being so paid shall be produced by the said purchaser, his heirs, or assignees, and cancelled and annexed to these presents: when, if required by the purchaser, a discharge therefor in notarial form will be granted."

It was agreed also in this deed of transfer that if a certain sum of $6,000, of which the said sum of $4,720.20 formed part should be paid as set forth in a

1889

MITCHELL v. HOLLAND.

deed of settlement; recited in the deed of transfer, the plaintiff should re-transfer the amount transferred to J. R. Mitchell, together with the hypothec.

And to this deed of transfer intervened the defendant, who declared that he had taken communication of the deed and understood it, and was content and satisfied and accepted signification.

On the 8th of January, 1879, when the two promissory notes became due and payable, they were duly presented to the bank, and payment was demanded but was refused.

On the 25th September, 1885, the plaintiff in his said quality of trustee, sued the defendant, alleging in substance the above facts. He concluded by praying *acte* of his declaration, that he was ready to restore the notes, and asked for judgment for the said sum of $4,720.20, with interest and costs.

The defendant pleaded *inter alia*:— 1, that the plaintiff had no right to sue in his quality of trustee, having no right or standing to appear as such before the court, being merely the mandatary or attorney of the creditors; 2, that the promissory notes which had been given in payment of the purchase price were prescribed.

McCord for appellant: The plaintiff had no right to sue in the quality of trustee, having no right or standing to appear as such before the court, being merely the mandatary or attorney of the creditors named, Arts. 13 and 19 C. C. P.; *Browne* v. *Pinsoneault* (1); *Burland* v. *Moffatt* (2).

And although it might appear, at first sight, that these decisions as bearing on this case have been questioned in a manner by the Privy Council in the case of *Porteous* v. *Reynar*, (3) I contend that this case of *Porteous* v. *Reynar* (3) is totally dissimilar to the present one, and

(1) 3 Can. S. C. R. 102. (2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.

1889

MITCHELL v. HOLLAND.

that plaintiff's action was rightly dismissed by the Superior Court. He is not an assignee appointed by any court, or with any status which a court can recognize. The agreement *sous seing privé*, is the only basis on which he could presume to sue. There was no assignment by the insolvent firm to him. There was no necessity for a private assignment, for the Insolvent Act of 1875 was in force. The creditors of the firm of Robert Mitchell & Sons are individually parties to the deed; they accepted a composition, accepted notes in payment thereof, on which each individual could sue, and they appointed the plaintiff as their agent to hold the collateral security received from Dame Eliza Lane Mitchell. In the case of *Porteous* v. *Reynar*, the plaintiffs, as trustees, derived their title from the official assignee; in this case plaintiff had no authority, except as agent for the creditors, who could have urged their own rights, and cannot plead *avec nom d'autrui*. See also *Huot. Dubeau* (1); *Nesbitt* v. *Turgeon* (2); *May* v. *Fournier* (3).

I also contend that the plaintiff's action must fail also for the $6,000, the amount of the composition agreed to, and the notes given, must be taken as paid or prescribed. It was clearly the duty of the creditors, if they had wished so to do, to have themselves sued on the composition notes. They did not do so—and may never have had the intention of doing so. They allowed the notes to be prescribed. The notes were never even produced in this case, and it is to be borne in mind they were never even placed in plaintiff's hands. His whole function was the passive holding of the collateral notes received by him from Mrs. Mitchell under the deed *sous seing privé*. Once the composition notes were

(1) 10 Q. L. R. 92.
(2) 2 Rev. de Lég. 43.
(3) M. L. R. 1 S. C. 389.

prescribed or paid, viz., on the 8th January, 1884, his functions ceased and he was bound at that date to hand back to Mrs. Mitchell the collateral received by him from her and return the *bailleur de fonds* or mortgage to James M. Mitchell. It cannot be held for a moment that the composition notes are not merchantable; no class of security could be more so.

The collateral received for the security of these mercantile notes was likewise mercantile, and is governed by the prescription of five years.

As to the accessory character of the collateral security and of rights of hypothec, the learned counsel referred to Laurent (1) and Pothier (2).

H. Abbott Q.C., and *Lonergan* with him for respondent.

The defendant is estopped by his own acts and deeds.

He was a party to the deed by which the plaintiff acquired these hypothecary rights upon which this action is based. The plaintiff in his capacity is fully described there, and it is stipulated that:

> The said Charles Holland is hereby authorized to prosecute the recovery of the hereby assigned sums of money, in capital and interest, either in his name or in the name of said John Ross Mitchell, who, &c.

To this deed the defendant intervened and declared:

> That he has had and taken communication of these presents, and that he understood the same, and is content and satisfied therewith, and he did, and doth hereby accept signification thereof, subject to all the conditions and stipulations thereof.

He was also a party to the deed *sous seing privé*, produced by himself.

Can he be heard to deny his deed or oppose its provisions without showing that such an agreement was contrary to public order or the policy of the law?

In France, clearly, the plaintiff's action would be maintainable, apart from any question of estoppel on

(1) Vol. 31 Nos. 357 *et seq*, 369. (2) Vol. 1 p. 578.

1889

MITCHELL v. HOLLAND.

a variety of grounds, and it is difficult to see in what way our law can differ, unless by gradual growth of judicial decision, as there is no legislation which can account for such a difference. *Starke* v. *Henderson* (1); S. V. (2); *Carpenter* v. *Buller* (3); Best on Evidence (4); Taylor on Evidence (5).

In France under the *Ordonnance de Commerce* and prior to it, a similar number of creditors might have formed a *Union de Créanciers* and appointed a Syndic, or representative, as was done in this case, and this, it is submitted, is still the common law of this country.

In France, too, associations of persons not incorporated may appoint a person to exercise rights of action belonging to them all. See S. V. (6).

It has also been held that a *prête-nom* may sue especially persons who have contracted with him knowing him to be a *prête-nom*: that *quoad* such persons he is owner and mandatory only as regards mandator. See S.V. (7); Laurent (8); Aubry et Rau (9).

The decisions of the courts in this country are found in the following cases: *Allsopp* v. *Huot* (10); *Nesbitt* v. *Turgeon* (11); *Crémazie* v. *Cauchon* (12); *Robillard* v. *The Société de Construction* (13); *Valières* v. *Drapeau* (14); *Browne* v. *Pinsoneault* (15); *Moffatt* v. *Burland* (16).

In *Browne* v. *Pinsoneault* (15) the decision was practically the same as in *Alsopp* v. *Huot* (10) above cited, viz., that because an agent, or attorney, concluded a contract, as agent, it did not follow that he could sue upon it as agent. Judge Taschereau's remarks (17) make this perfectly clear.

(1) 9 L.C.J. 238.
(2) 52, 2, 303 : S. 80. 1. 56 & 89.
(3) 8 M. & W. 212.
(4) Par. 542 & 544.
(5) Par. 97.
(6) 66,1,358; 76,1,166; 80, 1,56.
(7) 54, 5, 14; 64, 1, 105.
(8) Vol. 28, No. 76, p. 82.
(9) Vol. 4, p. 635.
(10) 2 Rev. de Lég. 79.
(11) 2 Rev. de Lég. 43.
(12) 16 L.C.R. 482.
(13) 2 L.N. 181.
(14) 6 L.N. 154.
(15) 3 Can. S.C.R. 102.
(16) 11 Can. S.C.R. 76.
(17) 3 Can. S.C.R. 114.

The next point raised by the pleadings is the question of prescription.

Has a five year's prescription destroyed the original claims of the creditors, or are the notes given in connection with the sale presumed to be paid.

On the first question the plaintiff submits that the law is clear ; that where a debt exists, and the debtor gives the creditor, or any one on his behalf, a pledge or security the debt can never be prescribed so long as the pledge or security is not redeemed. The reason is simple. Prescription is founded on a legal presumption of payment. Hence, a presumption cannot exist in the case given, because if payment had been made the debtor would, without doubt, have redeemed the pledge or security, and his allowing it to continue in the creditor's possession is considered a perpetual and recurrent acknowledgement of the indebtedness.

The justice of the rule is apparent. The creditors cannot acquire the pledge by prescription without inversion of title, nor should the debtor be allowed to lull the creditor into a feeling of security by the possession of the pledge and then take advantage of his own conduct to claim a discharge by prescription. Duranton (1) ; Troplong, Nantissement (2) ; Troplong, Prescription (3) ; Pont, Petits Contrats (4).

SIR W. J. RITCHIE C. J.—This was an action for the price of land in which two notes were taken as security. The defence was that the notes were prescribed. Mr. Justice Taschereau has permitted me to read his reasons for judgment, in which he has gone fully into the matter, and I can only say that I think the notes were taken merely as collateral, and that this action was for the purchase money to which the defence cannot be maintained.

(1) 18 vol. s. 553 ; vol. 21, s. 253.
(2) Sec. 474, 478, 551, 552.
(3) Sec. 534, 618.
(4) 2 vol., 1166.

1889

MITCHELL v. HOLLAND.

FOURNIER, GWYNNE and PATTERSON JJ. concurred with TASCHEREAU J.

TASCHEREAU J.—I would dismiss the appeal.

The action, it appears, was instituted by the respondent, Holland, in his capacity of trustee for certain named creditors of the insolvent firm, Robert Mitchell & Sons.

The declaration is rather diffusedly drawn, but, however, alleges sufficiently that the respondent claims from the appellant a sum of $4,720, being the price of a sale of certain real estate by one John Ross Mitchell to the appellant, by deed dated the 5th January, with mortgage in the usual form, which sum, still due by the appellant, has, by deed of 1st December, 1877, been transferred and assigned to the respondent. The defendant bases his defence to the action, partly on the ground that the plaintiff has no action as trustee under article 19, C. C. P. 2nd. On the ground that he has paid the said price of sale, by two promissory notes, which said promissory notes are now prescribed, and, in law, now presumed to have been duly paid.

As to this last ground, which I shall dispose of first, a simple reference to the deed of sale proves it to be utterly unfounded. It is expressly stipulated in the said deed, that the said two notes shall be in discharge of the price of sale only *when paid*, and, in another clause of this deed, it is further agreed that:

> Provided, always, however, and it is hereby expressly declared, agreed and understood by, and between the said parties, hereto, that the consideration sum of $4720.20, or any part thereof, shall not be held to be paid or discharged unless both said promissory notes are fully paid at maturity, and the said two promissory notes being so paid shall be produced by the said purchaser, his heirs or assignees and cancelled and annexed to these presents: when, if required by the purchaser, a discharge therefor in notarial form will be granted.

Now, not only were these notes not paid at maturity, but they have never been paid at all. The price of

sale consequently remains unsatisfied and the mortgage on that property is in full force and effect. The transfer of that mortgage to Eliza Lane Mitchell relied upon for this defence by endorsement on these promissory notes is invalid and ineffectual. It has not, and could not be registered, whilst the transfer to the plaintiff was registered on the 29th April, 1878. The deed *sous seing privé* of the 31st October, 1878, was also never registered. Then these promissory notes are produced in court by the plaintiff, with a declaration of his willingness to hand them over to the defendant upon payment of the price of sale. Upon these facts, I cannot see how the defendant can ask the dismissal of the action. They certainly have never paid for this property. The mortgage given in the deed of January 5th, 1877, has certainly never been discharged. It stands in the Registry Office in the plaintiff's name. and can be radiated only by him, or a *quittance* from him.

Now, as to the defendant's contention, that the plaintiff as trustee has no action against him. On this plea, also, I think that the defence fails. The plaintiff was appointed trustee by the *sous seing privé* deed of 31st October, 1877. To this deed the defendant was a party. Moreover, he, the defendant, was a party to the deed of transfer by which the respondent acquired these hypothecary rights upon which this action is based. The respondent in his capacity as trustee is fully described there, and it is stipulated that "the said Charles Hol-"land as trustee is hereby authorized to prosecute the "recovery of the hereby assigned sums of money, in "capital and interest, either in his name or in the name "of said John Ross Mitchell."

To this deed the defendant intervened and declared, "That he has had and taken communication of these presents, and that he understood the same and is content and satisfied therewith, and he did, and doth

1889

MITCHELL v. HOLLAND.

Taschereau J.

hereby accept signification thereof, subject to all the conditions and stipulations thereof."

The respondent replied to this plea "that defendant has no right or interest to deny his capacity to bring the action, and further that defendant having intervened in the deed of transfer, as set forth above, is estopped from denying the efficacy of the same and the plaintiff's quality as set forth therein."

The respondent's replication, it seems to me, is unanswerable. If the appellant was satisfied and contented with a deed which gave the respondent the right to sue him, and intervened to that deed expressly to say so, he must remain contented and satisfied when he is sued accordingly. Moreover, as I have already noticed, this deed of transfer has been registered, and of course registered in favor of the respondent as trustee and that registration is specially alleged in the declaration. He, as trustee, has the mortgagee's rights and hypothec.

The appellant relied, in support of this plea, on the cases of *Browne* v. *Pinsoneault* (1) and *Burland* v. *Moffatt* (2). But as reference to these cases will show that they have just as much application to this case, as they had to *Porteous* v. *Reynar*, in the Privy Council (3) where their Lordships say, after mentioning the fact, that the Court of Queen's Bench had based their judgment, in that case, on the cases of *Browne* v. *Pinsoneault* (1) and *Burland* v. *Moffatt* (2):

> Their attention does not appear to have been directed to the totally different circumstances of the present case.

And, later on,

> The case before their Lordships is so different, that even if the two preceding decisions were untouched, they would not necessarily affect the decision of their Lordships on the present appeal.

The appellant here has also failed to see the distinc-

(1) 3 Can. S. C. R. 102. (2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.

tion between this case and those cases. In the present case, he was a party to the assignment by John Ross Mitchell to the respondent as trustee, and expressly ratified the agreement contained therein, that the respondent would, in default of payment, have a right to sue the appellant. There was nothing of that kind in *Browne* v. *Pinsoneault* (1), still less, in *Burland* v. *Moffatt* (2), where the gist of the decision of this Court is that the assignee (not under an Insolvency Act) has no more rights than the assignor had. Art. 19 of the C. C. P. *Nul ne peut plaider par procureur*, was perhaps unnecessarily referred to in that case.

That an assignee, or a *cessionaire*, has the rights and actions of the assignor, as held by the Privy Council in *Porteous* v. *Reynar* (3), this court had expressly recognized in the case of *Burland* v. *Moffatt* (2). Referring to the case of *Starke* v. *Henderson* (4) where the action taken by the assignee was purely and simply the assignor's action, in *Burland* v. *Moffatt* (2), far from questioning the right of the assignee to sue under these circumstances I remarked (5):

> Of course, in exercising the assignor's action, and claiming the assignor's rights and debts, the assignee does it in the interest of the creditors as well as of the assignor, but that is quite different. It is then, as any *cessionnaire* may do, the actions pertaining to the assignor, the actions that before the assignment or without it, the assignor would himself have had which he (the assignee) then brings, whilst here the assignee claims rights pertaining to the creditors alone, and to which his assignor could never have had any claim.

Then the case of *Prevost* v. *Drolet* (6) is referred to by me and distinguished (7).

> As the plaintiff there also claimed purely and solely as *locum tenens* of the assignor a debt due to the assignor.

This, it seems to me, is all that *Porteous* v. *Reynar* (3) in the Privy Council determines. There, clearly, the plaintiffs exercised nothing but an action that clearly

(1) 3 Can. S. C. R. 102.
(2) 11 Can. S. C. R. 76.
(3) 13 App. Cas. 120.
(4) 9 L.C. Jur. 238.
(5) 11 Can. S.C.R. at p. 85.
(6) 18 L.C. Jur. 300.
(7) 11 Can. S.C.R. at p. 86.

1889

MITCHELL v. HOLLAND.

Taschereau J.

belonged, before the assignment, to their assignor, Walker, an official assignee under the Insolvent Act. And the privity of contract that, in that case, so clearly existed between the assignees and the defendant, rendered the case still less doubtful.

Appeal dismissed with costs.

Solicitor for appellant: *David R. McCord.*

Solicitors for respondent: *Abbotts, Campbell & Meredith.*