MOISE BROSSARD *et al.* (DEFENDANTS)..APPELLANTS; 1890

AND *Nov. 24,25.

CALIXTE DUPRAS *et al.* (PLAINTIFFS)..RESPONDENTS. 1891

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *Nov. 16.

Composition—Loan to effect payment—Failure to pay—Secret agreement—Mortgage—Avoidance of—Arts. 1082, 1039 *and* 1040 *C. C.*

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $14,000. B. *et al.*, the appellants, were at that time accommodation endorsers for $7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for its claim B. *et al.* on the 8th January, 1884, advanced $3,000 to L. and took his promissory notes and a new mortgage registered on the 13th January for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, the respondents, who on the 14th January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the courts below, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The Chief Justice and Taschereau J. dissenting.

Per Fournier J.—The mortgage having been registered on the 13th January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date; art. 1040 C.C.

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

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

The facts and pleadings are fully stated in the head-note and in the judgments hereinafter given.

Geoffrion Q.C. and *Beausoleil* for the appellants contended:

1st. That the respondents were not Lamoureux's creditors at the time of the granting of such mortgage, and that they had no right as subsequent creditors to put in issue the validity of said mortgage.

2nd. That the said respondents were aware of the existence of the said deed of the 8th January, 1884, which was duly registered at the Registry Office of Coaticooke on the 13th January, 1884, and that the said respondents had knowledge of such mortgage for over a year at the time of the issue of the writ which is dated the 16th of June, 1885; that by article 1040 of the Civil Code their pretended right of action was lost.

3rd. That the transaction was made in good faith; that it did not create any undue preference in favour of the appellants, and that it ought to be declared valid on its own merits.

Ouimet Q.C. for respondents contended that respondents when they paid the Exchange Bank, and became the bearers of Lamoureux's notes, then and there and *de facto* became subrogated to the bank in the latter's action against Lamoureux, and cited arts. 1039 and 1032 C.C; Larombière on Obligations (1). Upon the evidence the learned counsel contended that when the respondents consented to advance $3,000, on the belief that they would stand for being repaid on the same footing as all the other creditors who had consented to take 65c. in the

(1) 2 Vol. p. 497.

dollar, Brossard & Chaput the appellants were behind their back getting a new note of $2,934.86, saddling Lamoureux's estate with that new indebtedness, and such a transaction was void at law. *Rickaby* v. *Bell* (1); Arts. 1032, *Ivers* v. *Lemieux* (2); Arts. 1092, 2090 C. C., *McGauvran* v. *Stewart* (3); and *Dwyer & Fabre* v. *McCarron* (4).

Geoffrion Q.C. in reply cited *Beausoleil* v. *Normand* (5).

Sir W. J. RITCHIE C.J.—I think this appeal should be dismissed and the judgment rendered by the learned judge *en première instance*, unanimously affirmed by the Court of Queen's Bench, should be affirmed.

STRONG J.—For the reasons given by Mr. Justice Fournier I am of opinion that this appeal should be allowed.

FOURNIER J.—L'action des intimés a pour but de faire annuler certains actes et billets promissoires comme faits en fraude de leurs droits et aussi pour faire obliger les appelants Brossard et Chaput à faire rapport de $2,000 à eux payées par Lamoureux qui avait failli. Le 20 décembre 1883, Lamoureux avait obtenu la signature de ses créanciers à un acte de composition, à raison de 65 centins dans la piastre, payable par ses billets promissoires à 4, 8 et 12 mois.

Cette composition (1) est signée par les appelants et par tous les autres créanciers de Lamoureux, à l'exception de la Banque d'Échange qui, ayant refusé de se joindre a la composition, fit avec Lamoureux un arrangement particulier. Les intimés aussi ne sont point

(1) 2 Can. S. C. R. 560.
(2) 5 Q. L. R. 128.
(3) 3 Legal News 323.
(4) 24 L. C. Jur. 174.
(5) 9 Can. S. C. R. 711.

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parties à cette composition parce que alors ils n'étaient pas créanciers de Lamoureux, ne l'étant devenus qu'après la composition.

Lamoureux devait à la Banque d'Échange $14,000, pour au delà de $5,000 de ce montant, il était responsable comme endosseur du papier de ses pratiques. La balance, $8,389 34, se composait de ses propres billets endossés par les appelants.

Une des principales difficultés de cette cause est au sujet de l'arrangement particulier avec la banque. Il est certain que Lamoureux avait fait un compromis avec ses créanciers à raison de 65 pour cent, on en possède la preuve écrite; mais en a-t-il fait autant avec la Banque d'Échange, et quelle est la nature de l'arrangement fait avec elle?

Brossard, entendu comme témoin des intimés, dit que la banque a transigé avec Lamoureux en acceptant et recevant la somme de $8,000, en paiement de sa dette de $14,000.

Lamoureux s'est procuré la somme de $8,000, nécesssaire pour payer sa composition particulière avec la Banque d'Echange de la manière suivante, savoir: $2,000 de sa femme; $3,000 prêtées par Dupras et Emard, et $3,000 aussi prêtées par Brossard et Chaput. Pour ce dernier montant, Lamoureux donna son billet aux appelants pour $2,934.86, avec une hypothèque de $3,000, pour en assurer le paiement. Ces avances furent faites à Lamoureux isolément par ces diverses parties, sans aucun concert ou convention entre elles, chacune agissant pour son propre compte avec Lamoureux, seul ou avec son procureur. Telle est la transaction que l'action des intimés a pour but de faire annuler comme faite en fraude des créanciers, parties à la composition. Brossard explique que le billet ne fut pas fait pour $3,000, pour la raison que Lamoureux avait payé certaines charges à la Banque d'Ontario dont il

lui fut tenu compte, et le billet pris pour la balance, $2,934 86 ; mais il affirme que tout le montant de $3,000 a été remis à M. Emard qui, comme procureur de Lamoureux, conduisait les négociations avec la Banque d'Echange.

D'après ce témoignage il est évident que cet arrangement avec la banque est tout à fait distinct et séparé de la composition de Lamoureux avec ses créanciers. Il n'y est question d'aucun *pro rata* sur la totalité de la dette. L'arrangement n'est qu'une composition pure et simple de $8,000 en paiement complet et parfait de la somme de $14,000. Ces $8,000 furent payées avec les deniers obtenus comme susdit.

Cet arrangement est d'autant plus probable que la banque étant elle-même en liquidation voulait être payée comptant. Pour cette raison elle a accepté 57 pour cent au lieu de 65, à quatre, huit et douze mois de délai. Lamoureux prétend au contraire que ses deux dettes de $5,000 ou environ, et de $8,934.86 ont été réglées séparément avec la banque, que les $2,000 avancées par madame Lamoureux étaient en paiement de la dette de $5,000, et que les $3,000 empruntées des intimés étant acceptées en paiement des 65 pour cent de la somme de $8,389.34, laissent aux appelants Brossard et Chaput à payer, comme endosseurs, les autres 35 pour cent, ce qu'ils firent en prenant le billet de Lamoureux pour le montant exact de 35 pour cent, savoir $2,934.86.

L'arrangement partiel fait avec la banque n'avait évidemment aucun rapport à la composition de 65 pour cent offerte aux autres créanciers. D'après cette version la banque avait accepté environ 40 pour cent pour la réclamation de $5,000, et limité sa réclamation contre les endosseurs de billets au montant de $8,389.94 à 35 pour cent de ce montant, et accepté un autre 35 pour

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cent des insolvables au lieu de 65 pour cent. Il n'est donné aucune raison pour en avoir agi ainsi

Il est certain d'après la preuve que la banque n'a point fait un pareil arrangement, mais qu'elle a composé par une seule transaction, à 57 pour cent, comptant, pour sa réclamation, se montant à près de $14,000 au lieu de 65 pour cent avec délai, c'est-à-dire qu'elle a accepté $8,000 pour les $14,000 qui lui étaient dues

Il n'est pas douteux qu'un projet semblable à celui de Lamoureux a été discuté entre les parties ; probablement aussi avec quelques-uns des employés de la banque. Dans la preuve il est quelquefois question de l'arrangement avec la banque comme si c'était le même que celui dont il avait été parlé entre les parties, mais cet arrangement n'a pas été exécuté.

Un des liquidateurs de la banque a été entendu comme témoin des intimés. Il dit qu'il a été fait ou qu'il a pu être fait une proposition de régler séparément la réclamation de $5,000, avant qu'on ait décidé de faire un règlement, mais que la banque a insisté pour un règlement de toute la dette. Le résultat de son témoignage est qu'en ce qui concerne la banque, il y a eu une composition de la somme de $8,000 acceptée en paiement de celle de $14,000

Le témoignage de M. Emard à tout prendre confirme cet arrangement Il dit qu'une offre a été faite à la banque de payer $1,500 pour les billets se montant à $5,115.84. Cette offre fut faite par une lettre de M. Emard, du 17 décembre 1884. Elle ne fut pas acceptée. M. Emard dit qu'ensuite il a fait verbalement une offre de $2,000, que la banque semblait disposée à accepter, mais qu'avant de l'accepter définitivement et de se déclarer prête à régler pour ce montant, la banque exprima le désir que son autre réclamation contre Lamoureux qui était garantie par les endossements de Brossard et

Chaput, se montant ainsi qu'il le dit à $8,385.32, fut aussi réglée.

En cela M. Emard se trouve d'accord avec M. Campbell, le liquidateur. Il parle ensuite de ce qui a été fait au sujet de la plus forte réclamation. Il dit que Lamoureux, n'étant capable de payer que $2,000, lui demanda d'offrir de racheter les billets. C'est alors qu'il s'assura pour la première fois qu'il pouvait se procurer $3,000 par M. Dupras et qu'il fit alors la proposition à la banque. Les termes de cette proposition furent écrits sur un blanc du télégraphe qui fut produit en preuve, mais a depuis disparu du dossier. Il eut été d'autant plus important de se procurer ce document, que d'autres qui n'ont pas été imprimés, mais qui sont restés dans le dossier et nous ont été transmis, ne confirment pas la version du règlement donnée par M. Emard. Il ne se souvient pas d'avoir payé à la banque $8,000, mais seulement $7,934.56. Cette somme se composant de $2,000, de Mme Lamoureux, $3,000 avancées par Dupras et Emard, et $2,934.56 de Brossard et Chaput. Mais les chèques au moyen desquels cet argent a été payé sont produits et sont pour le plein montant de $8,000. Il y en a quatre, savoir: $1,000, $2,000, $3,000 et $2,000. Ces montants n'ont pas été divisés d'après les sources de leur provenance, mais seulement pour la facilité de retirer les billets qui se trouvaient dans différentes banques.

Il ressort évidemment de cette preuve qu'il n'y a eu de la part de la banque qu'une composition pour $8,000, et que la banque n'a transigé qu'avec Lamoureux, ou avec Emard comme le représentant de Lamoureux, et non pas avec les appelants Brossard et Chaput. Ces derniers ont fourni une partie du montant de la composition. Brossard dit que c'était $3,000, le montant pour lequel Lamoureux a donné une hypothèque; c'est aussi le montant qui, d'après la preuve écrite faite par

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les chèques d'Emard, est celui que Brossard a payé à la banque. Quel que soit le montant qu'il a fourni ; que ce soit $3,000, ou seulement $2,934.86 comme dit Emard, il ne l'a sans doute ainsi avancé que parce qu'il était exposé à payer comme endosseur des $8,000. Le montant pour lequel il a pris le billet de Lamoureux était précisément 35 pour cent du montant entier des billets. Ce calcul fut sans doute basé sur la notion que Lamoureux pourrait fournir la différence. Mais le règlement final ayant eu lieu pour une somme comptant qui permettait d'accorder un escompte libéral, d'environ 57 pour cent, au lieu de 65 pour cent, ce qui faisait une diminution de $1,000 environ, ou 12 pour cent du montant qu'aurait donné la composition à 65 pour cent, on ne voit pas que les motifs de Brossard pour avancer de l'argent soient d'une aussi grande importance, ou que son avance de $3,000 soit d'une nature différente par rapport aux créances en général, des $3,000 avancées par Dupras et Emard. Cette dernière somme paraît avoir été avancée avec l'entente entre Dupras, Emard et Lamoureux, que la différence entre $3,000 et $5,453.67 (ou 65 pour cent des $8,389.34), savoir $2,453.67, serait partagée entre eux trois, ce qui donnait $817 69 pour chacun des trois. Il y a une légère différence due à leur manière d'arriver à ces chiffres, parce qu'il ont déduit $819.48, pour la part de Lamoureux des $5,453.67, laissant $4,633.67 pour laquelle Lamoureux donna à Dupras et Emard cinq billets promissoires à des échéances variant de deux à douze mois à compter du 11 janvier 1884.

Cet arrangement assez étrange est bâsé sur l'idée que les $8,389.34 de billets avaient été achetés de la Banque d'Echange pour $3,000 avancées par Dupras et Emard, donnant aux acquéreurs droit à 65 pour cent en vertu de la composition, mais en laissant complètement de côté Brossard et Chaput qui, s'ils avaient payé en

qualité d'endosseurs, (*accommodation indorsers*) avaient le même droit qu'eux aux dits billets.

Le document suivant qui est en preuve contredit la théorie que les billets ont été achetés pour $3,000, de même qu'il constate que le paiement fait à la banque était le plein montant des $8,000, comme il est prouvé par les quatre chèques auxquels il a déjà été fait allusion. Ce document est un ordre adressé par les endosseurs à la banque, comme ayant légitimement le contrôle des billets. Il est ainsi conçu :—

MONTREAL, 9th January, 1884.

To the Liquidators of the Exchange Bank of Canada.

Please remit to our attorney Mr. J. U. Emard all the notes endorsed by us and held by the Exchange Bank, upon payment of five thousand nine hundred and thirty-four dollars and eighty-six cents, $5,934.86.

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Dans son examen au sujet de cet ordre, monsieur Brossard persiste à dire, comme il l'a fait d'ailleurs dans tout son témoignage, que le règlement avec la banque n'a été qu'un seul et même règlement pour $8,000, dont lui et sa société ont avancé $3,000. Il faut, comme il a déjà été remarqué, faire la distinction entre les arrangements pour se procurer les fonds, et la transaction avec la banque. Une chose qui paraît assez claire est que les $5,000 de billets, quoique compris dans la composition avec la banque, sont considérés par les autres parties comme appartenant à Mme Lamoureux, comme si elle les avaient rachetés avec ses $2,000. L'ordre que l'on vient de lire n'avait rapport qu'aux autres billets endossés par Brossard et Chaput et, nullement aux $5,000 de billets. Cet ordre n'a pas d'autre importance maintenant que comme une reconnaissance des droits des endosseurs des billets que l'autre version de l'arrangement considère comme appartenant à Dupras et à Emard.

De la part de Dupras et Emard, la transaction n'a été

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qu'un prêt pour laquelle ils ont stipulé pour leur profit un intérêt exorbitant, et de la part de Brossard et Chaput un autre prêt de $3,000 dont ils devaient être remboursés par le billet de Lamoureux dont le paiement était garanti par une hypothèque qui n'était pas donnée seulement en considération de ce prêt, mais aussi en considération de l'existence d'une hypothèque antérieure qu'ils avaient quittancée.

Cette analyse des faits de la cause, établit que de la part de Dupras et Emard, les intimés, la transaction n'a été qu'un prêt pour lequel ils ont stipulé un intérêt exorbitant, et de la part de Brossard et Chaput un autre prêt de $3,000 dont ils devaient être remboursés par le billet de Lamoureux, de $2,934.86, garanti par l'hypothèque donnée par lui, le 8 janvier 1884, et aussi en considération de la décharge de l'hypothèque de $7,415, du 5 septembre 1881. Le résultat de ces deux transactions fut de réduire la première hypothèque des appelants de $7,415 au montant de celle donnée comme garantie du billet de $2,934.86, c'est-à-dire $3,000. Au lieu de donner une main levée partielle de la première hypothèque ils préférèrent l'acquitter et en constituer une nouvelle.

Lorsque le billet de $2,934.86 de Lamoureux fut consenti aux appelants, afin de lui faire obtenir l'escompte pour les $3,000 que devaient lui faire avoir Brossard et Chaput, le 5 janvier 1884, les intimés Dupras et Emard, n'étaient pas alors créanciers de Lamoureux ; ils ne l'etaient pas non plus, le 8 janvier 1884, lorsque Lamoureux garantit le paiement de son billet par l'hypothèque donnée le 8 du même mois. Ils ne sont devenus les créanciers de Lamoureux que le onze de janvier 1884 et n'ont partant aucuns droits comme créanciers subséquents d'attaquer les transactions faites entre Lamoureux et les appelants pour se procurer les fonds nécessaires pour acquitter sa composition. La

composition qu'il venait de faire avec ses créanciers lui avait rendu la libre disposition de ses biens, et il n'en fait qu'un usage légitime en donnant cette hypothèque de $3,000 sur ses biens pour l'aider à sortir de l'état d'insolvabilité. Ce principe a été maintenu par cette cour dans la cause de *Beausoleil* v. *Normand* (1).

Il serait plus qu'étrange de considérer cette transaction comme faite en fraude des créanciers de Lamoureux lorsqu'elle n'a évidemment pas d'autre but que de l'aider dans ses arrangements avec ses créanciers,—et il le serait encore davantage de la considérer comme une injuste préférence accordée aux appelants lorsqu'ils n'ont fait que renoncer à une hypothèque de $7,415 pour en accepter une seulement de 2,934.86 comme garantie du billet du montant qu'ils avançaient à Lamoureux pour payer sa composition. En outre si les intimés avaient un droit d'action pour attaquer ces transactions ils devaient, en vertu de l'acticle 1040 du code civil, l'exercer dans l'année. Ils ont eu connaissance de l'acte du 8 janvier enregistré, le 13, et leur action n'a été prise que dans le mois de juin 1885, plus d'un an après les transactions dont il s'agit, et à une époque où leur droit d'action avait cessé d'exister.

L'appel devrait être alloué.

TASCHEREAU J.—This was an action by Dupras *et al.* under article 1032 of the Civil Code to annul certain acts and notes as fraudulent, and to oblige the defendants, Brossard & Chaput, to return the amount of $2,000 to them paid by the defendant Lamoureux in virtue of the aforesaid acts and notes, with conclusions against the other defendant Lamoureux for $3,612.95.

The plaintiffs allege:—

"That towards the month of December, 1883, the defendant Lamoureux, then an insolvent, offered to

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pay his creditors the sum of 65cts. in the dollar, on the amount due to each creditor respectively, payable at 4, 8 and 12 months.

"That offer was accepted by all his creditors with the exception of the Exchange Bank. It reads in the following terms: —

"We, the undersigned, creditors of MM. Charles Lamoureux & Co., merchants and manufacturers of Coaticooke, agree by these presents to accept sixty-five cents on the dollar on the amount of our respective claims, payable by note to their order at four, eight and twelve months from date."

"On the remittance of the notes, as heretofore mentioned, we agree to give them a full discharge, and we promise to sign an agreement before a notary, if such be required, and we have signed on condition that the creditors for $100 sign the present composition."

"Montreal, 28th November, 1883."

"That the defendants, Brossard & Chaput, were parties to this contract and signed it the first, and in fact it was signed and accepted by all the creditors of Lamoureux with the only exception of the Exchange Bank of Canada."

"That a part of the claim which Brossard & Chaput then held against Lamoureux consisted of certain notes to the amount of $8,385.32, signed by Lamoureux to the order of Brossard & Chaput, and transferred by the latter to the Exchange Bank of Canada."

"That the said bank refused to join in the agreement, but declared their willingness to accept $3,000 in lieu of 65cts. payable by Lamoureux, on condition that the 35cts. remaining would be paid by Brossard & Chaput, the whole to be paid in cash."

"That at the request of the defendants the plaintiffs consented to pay those $3,000 to the Exchange Bank,

on remission to them by the latter of the notes for $8,385.52, and then to accept from Lamoureux in exchange for these his own notes to the amount of $4,633.62."

"That the defendants would not have consented to pay the said sum of $3,000 save on the faith of the compromise made by Lamoureux with his creditors, especially Brossard & Chaput who owned the heaviest claim against Lamoureux."

"That while Brossard & Chaput openly signed and accepted the aforementioned agreement by which they consented to give Lamoureux a full discharge of his indebtedness in consideration of his notes to the amount of 65 cents on the dollar, they secretly and fraudulently exacted from him a further note for $2,934.86, that is to say, for the amount of the 35cts. that they had consented to pay to the Exchange Bank, in discharge of their own liability and indebtedness to the bank, beyond the 65cts. for which they had compromised with Lamoureux. These $2,934.86 represent to a cent the proportion of thirty-five per cent in the above sum of $8,385.52, the amount of the Lamoureux's notes held by the Exchange Bank, bearing the endorsation of Brossard & Chaput."

"That to secure the advantage thus fraudulently obtained over all the other creditors of Lamoureux Brossard & Chaput induced Lamoureux to give them a mortgage on his immovable property, which was done by an act passed the 8th January, 1884, before Pepin, notary, said mortgage, to the amount of $3,000, being especially to secure the payment of the above note of $2,934.86."

"That said note and mortgage were made and given without a lawful consideration, and in fraud of all the other creditors of Lamoureux and especially of the plaintiffs, and for the purpose of giving an illegal and

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fraudulent advantage and preference to Brossard & Chaput.

"That by an act bearing date the 12th January, 1884, Brossard & Chaput, transferred the above mentioned hypothec to La Banque du Peuple, as security for the payment of the same note which they consented to discount for them the same day."

"That by another act, passed the 10th December, 1884, between Lamoureux and Brossard & Chaput, Lamoureux agreed that said hypothec would exist as long as anything was due by him to said Brossard & Chaput, whether on account of the note for $2,934.86, or any other note."

"That all rights or claims falling to Brossard & Chaput in consequence of the last act were transferred to La Banque du Peuple the 19th of the same month, (December, 1884)."

"That all the aforementioned deeds (or acts) were duly registered."

"That at the time of the passing of those deeds Lamoureux was, to the knowledge of Brossard & Chaput, and to that of La Banque du Peuple, notoriously insolvent and has been so ever since and is still insolvent."

"That Brossard & Chaput received on account of the above note of $2,934.86 the sum of, at least, $2,000, as a fraudulent privilege over the other creditors of Lamoureux."

"That at the time of the transfers of the 12th January and 19th December, 1884, the notes that such transfers were destined to guarantee were not yet matured, and that these transfers were made to La Banque du Peuple in violation of the law and of its charter."

"That the plaintiffs have had no knowledge of those deeds and the aforementioned fraudulent pay-

ments until three months previous to the institution of their present action."

"That Lamoureux still owes to the plaintiffs, in virtue of the notes for $4,633.62, a sum of $3,612.95."

"Wherefore the plaintiffs pray that Lamoureux be condemned to pay them the said sum of $3,612.95 with interest and costs; that the deeds (acts) of the 8th and 11th January, and of the 13th and 19th December, 1884, and the note of the 5th January of the same year and all other notes given in renewal of these, be declared fraudulent, null and of no effect, and be annulled, and that Brossard & Chaput be condemned to deposit in the prothonotary's office of this court the sum of $2,000, or all other sums that can be proven to have been received by them from Lamoureux on account of the note of $2,934.86, with interest, in order that the same be divided between the creditors of the latter according to law, and that in default of so doing, within 15 days of the service of notice, they be purely and simply condemned to pay that amount to the plaintiffs, with interests and costs, the said amounts to be, by the latter parties, deposited and distributed in the above mentioned manner."

The *mise en cause*, La Banque du Peuple, filed a declaration in the case that they were willing to abide by the judgment to be rendered by the court (*s'en rapportant à justice*).

The defendants Brossard & Chaput and the defendant Lamoureux filed separate pleas, but substantially offered the same *moyens de défense*, as follows: "that the plaintiffs only became creditors of Lamoureux after the contract between him and the defendants Brossard & Chaput; that the plaintiffs were not subrogated in the rights of the Exchange Bank; that they knew of the transactions complained of and made between the defendants at the time they took place, and their

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action was therefore prescribed, more than one year having elapsed before it was instituted; that the defendants Brossard & Chaput had only accepted the compounding (*composition*) of the defendant Lamoureux for the amount of $11,384.98, besides $100 lent to the defendant Lamoureux, not including the $8,385.52, amount of the latter's notes transferred by them to the Exchange Bank; that the Exchange Bank was creditor of Lamoureux to the total amount of $14,752.14, and that it did not consent to accept a *composition*, but offered to return the notes forming the basis of its claim against Lamoureux, in consideration of the cash payment of the sum of $8,000; that Lamoureux then asked from the defendants Brossard & Chaput a loan of $3,000 to clear himself of the Exchange Bank to which the latter agreed on condition that Lamoureux would give them an hypothecary guarantee, and that it was in execution of these agreements that Lamoureux gave them the note of the 5th January, 1884, payable four months from the date thereof, for $2,934.86, and gave them the hypothecary guarantee of the 8th of the same month; that Brossard & Chaput paid Lamoureux the said sum of $3,000, to the knowledge of the plaintiff Emard; that after said arrangements Lamoureux borrowed from the plaintiffs a further sum of $3,000, and at that period Lamoureux was solvent; that the note for $2,934.86 does not represent the amount for which Lamoureux was previously discharged by his *acte de composition*."

"That, moreover, in December, 1883, the defendants Brossard & Chaput held on Lamoureux's immovables hypothecary guarantees to the amount of $7,415; that without being obliged, but to help Lamoureux, they gave him acquittance (*main levée*) of their hypothec, by a deed passed the 8th January, 1884; that the plaintiffs, knowing Lamoureux to be insolvent, wish-

ed to make a speculation and instead of taking guarantees upon his property for what they advanced, they exacted usurious interest; that in fine, the immovables belonging to Lamoureux and hypothecated to the defendants Brossard & Chaput were sold to J. S. Bousquet, who undertook to pay off all the hypothecary debts attached to them, and agreed, in case certain hypothecs should be annulled, to place the amount in rightful hands to be distributed amongst the creditors." Then the defendants declared themselves ready to consent that after the payment of the loan of $3,000 with interest at 8 per cent per year, all existing balances on the said hypothec should be placed in the hands of those legally authorized to receive them to be distributed amongst the creditors, and they demanded the dismissal of the plaintiff's action.

The plaintiffs replied that Lamoureux's notes endorsed by Brossard & Chaput to the amount of $8,385.52 were withdrawn from the Exchange Bank with $3,000 furnished by the plaintiffs to pay the composition of 65 cents on the dollar payable by Lamoureux, and by means of $2,934.86 paid by Brossard & Chaput to clear off the 35 cents on the dollar that were not covered by the composition ; as to the surplus of the debt held by the Exchange Bank against Lamoureux, Brossard & Chaput had nothing to do with it and it was settled by the amount of $2,000 paid by Lamoureux himself, that is by his wife ; that it appears by the agreement that Brossard & Chaput were the first to sign the agreement (*concordat*) without reserve.

The Superior Court granted the plaintiff's conclusions for $3,612.75 against Lamoureux, and declared null and void the notes by him given to the other two defendants of the 5th January, 1884, and the deeds of 8th and 11th January, and of the 16th and 19th December, 1884. The Court of Appeal unanimously confirmed

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that judgment. Brossard & Chaput now appeal. Lamoureux does not.

I am of opinion that this appeal should be dismissed. It results clearly from the evidence that when respondents consented to advance $3,000, on the belief that they would stand for being repaid on the same footing as all the other creditors who had consented to take 65c. in the dollar, Brossard & Chaput were behind their back getting that new note of $2,934.86, saddling Lamoureux's estate with that new indebtedness, and what was still worse, were getting ahead of all the other creditors by means of a mortgage affecting as security for the payment of that new and secret debt, the best and clearest part of Lamoureux's estate, its immovables, and of the fraudulent character of such a transaction there can be no doubt.

The appellants contend, however, that even assuming this point against them, yet the respondents under art. 1039 C.C. have no action to get these dealings set aside because they were not then creditors of Lamoureux, having become so only a few days subsequently.

This point has been disposed of by the learned judge in the Superior Court by saying that all the divers deeds, notes and agreements formed, with the *concordat*, but one and a continuous transaction, which was affected and vitiated by the work of deception and concealment conducted by the appellants with the apparent intent on their part to gain an undue advantage on the respondents and all the other creditors of Lamoureux.

As a matter of fact this is undoubtedly so, and on this ground alone the appellants' contention based on art. 1039 C.C. fails, without it being necessary to consider respondents' contention that they had become by operation of law subrogated to the Exchange Bank.

PATTERSON J.—Lamoureux, who was insolvent, effected a composition with his creditors, the terms of which are set out in an instrument which bears date the 28th of November, 1883, but which, according to the evidence, was not completed until the 20th of the following December. The instrument, which is very short, is in these words:—

Nous, soussignés, créanciers de MM. Charles Lamoureux & Cie, marchands et manufacturiers de Coaticook, nous nous engageons par les présentes à accepter une composition de soixante et cinq (65) centins dans le dollar sur le montant de nos créances respectives, payable par billets à leur ordre, à quatre, huit et douze mois de cette date.

Sur remise des billets comme ci-dessus nous leur donnerons leur décharge et promettons signer un acte par devant Notaire si nous en sommes requis, et avons signé à condition que les créanciers au-dessus de $100 signent cette composition.

Montréal, 28 novembre 1883.

Then followed the signatures of Brossard, Chaput & Cie who are the present appellants, and of all the other creditors of Lamoureux with the exception of the Exchange Bank. The respondents Dupras and Emard are not among the signers. They became creditors after the date of the instrument.

The Exchange Bank was a large creditor of Lamoureux, but being in liquidation preferred to compound for a payment in cash to joining in the composition for 65 per cent on time.

Lamoureux's liabilities to the bank may be called in round numbers $14,000. For upwards of $5,000 of that amount he was liable as endorser of customers' notes. The remainder, being $8,389.34, was represented by his own notes on which the appellants Brossard & Chaput were accommodation endorsers.

There is a discrepancy in the accounts given of the arrangement with the bank.

The appellant Brossard, who was examined as a witness on behalf of his opponents the respondents, says

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that the bank received $8,000 in satisfaction of the $14,000. He says that $3,000 of that amount was a loan from him and his partner to Lamoureux. He took from Lamoureux a promissory note for $2,934.86, and to secure payment of that sum Lamoureux gave him a mortgage for $3,000. That is the transaction which this action is brought to set aside as fraudulent against the other creditors. Brossard gives an explanation of the note not being for the even sum of $3,000 by reference to some items of charges which he says Lamoureux paid to the Ontario Bank; and he says that the whole amount of $3,000 was handed to Mr. Emard, who, as attorney for Lamoureux, conducted the negotiations with the Exchange Bank. According to Brossard the arrangement with the bank was a direct and simple composition of $8,000 for $14,000, the $8,000 being made up of $2,000 advanced by Lamoureux's wife, $3,000 obtained from the respondents Dupras and Emard, and $3,000 from Brossard.

This, on the face of it, contains nothing improbable, the payment being about 57 per cent cash in place of a promise to pay 65 per cent at four, eight and twelve months.

The other account is given by Lamoureux, and is supported by Emard if we look only at some of his direct statements. Whether his evidence as a whole, including the documentary part of it, really does support it or is not rather confirmatory of the account given by Brossard is a matter to be considered.

The account given by Lamoureux is that the two debts of $5,000 or thereabouts and of $8,389.34, were settled separately with the bank, the $2,000 contributed by Madame Lamoureux being accepted in satisfaction of the $5,000 debt, and the $3,000 borrowed from the respondents being accepted in satisfaction of 65 per cent of the $8,389.34, leaving the appellants

Brossard & Chaput to pay, as endorsers, the other 35 per cent, which they did, taking from Lamoureux his note for the exact amount of the 35 per cent, viz., $2,934.86.

If this piecemeal arrangement was made with the bank it is evident that it had very little reference to the 65 per cent composition that was offered to the creditors generally. According to the statement the bank accepted about 40 per cent for the $5,000 claim; confined its claim on the endorsers of the $8,389.34 of notes to 35 per cent of that amount, though why it should have done so is not explained; and accepted another 35 per cent from the insolvents in place of 65 per cent.

I am satisfied from careful consideration of the evidence that the bank did not enter into that arrangement, but compounded, as one transaction, for 57 per cent in cash of its whole claim of nearly $14,000 in lieu of 65 per cent on time.

I do not doubt that a scheme such as that deposed to by Lamoureux was discussed among the parties with some of the bank people as well as amongst the others, and I think that, in giving evidence in the action, the actual arrangement with the bank has been sometimes spoken of as if it was the same as that which had been talked of among the other parties but not carried out with the bank. There seems to be some confusion in this respect. One of the liquidators of the bank was a witness for the respondents. He shows that there was or may have been a proposition to settle the $5,000 claim by itself but that before a settlement of that claim had been decided on it was insisted that one settlement should be made of the whole debt. The effect of his testimony is that, as far as the bank was concerned, there was one composition of $8,000 for the $14,000. I take Mr. Emard's evidence to really bear out that understanding. He shows that an offer was

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made to the bank to pay $1,500 for the notes which amounted to $5,115.84. That offer was made by letter of Mr. Emard dated 17th December, 1884. It was not accepted. Then Mr. Emard says that he verbally made an offer of $2,000 which the authorities of the bank seemed disposed to accept, but before definitely accepting it and declaring themselves ready to settle for the amount they manifested the desire that their other claim against Lamoureux which was secured by the endorsement of Brossard & Chaput, amounting (as he gives the figures) to $8,385.32, should also be settled.

In this Mr. Emard agrees with what is told us by Mr. Campbell the liquidator.

Mr. Emard then speaks of what was done towards providing for the larger claim. He says that Lamoureux, being able to pay only $2,000, asked Emard to make an offer to redeem (*racheter*) those notes, whereupon he first ascertained that he could procure $3,000 through Mr. Dupras, and then made a proposition to the bank. I have been desirous of seeing the terms of that proposition. It was noted, Mr. Emard tells us, on a telegraph blank which was produced in evidence but which I have not been able to find. It is said not now to be with the record. I have been more anxious to see it because other documents which were not set out in the printed case before us, but which remained with the record and have been sent up, do not fully sustain Mr. Emard in the view of the settlement which his oral evidence presents. His recollection seems to be that what he paid to the Exchange Bank was not $8,000 but only $7,934.56, that sum being composed of Madame Lamoureux's $2,000, of the $3,000 advanced by Dupras and Emard, and of $2,934.56 from Brossard & Chaput. But the cheques by which he paid the moneys are produced and are for the full amount of $8,000.

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There were four cheques, viz., $1,000, $2,000, $3,000 and $2,000, the amounts not being thus divided by reference to the sources from which the money came, but for convenience in retiring the notes which were held by different banks.

From this evidence I cannot resist the conviction that on the part of the Exchange Bank there was simply one composition for $8,000, and that the bank dealt only with Lamoureux, or with Emard representing Lamoureux, and not with the appellants Brossard & Chaput. Those gentlemen contributed a part of the money. Brossard says it was $3,000, the same amount for which the mortgage was given by Lamoureux, and the amount which we find from the written evidence of Emard's cheques was paid to the bank. I am satisfied that whatever money he raised, whether the full $3,000, or $65\frac{44}{100}$ short of that sum, was raised because he was exposed to be called on as endorser of the $8,000 of notes, and I do not see any reason to doubt that the amount for which he took the note, and which was precisely 35 per cent of the full amount of the notes, was arrived at by a reckoning based on the notion that 65 per cent would be provided for in some way by Lamoureux. But the actual settlement being the acceptance from Lamoureux of a sum which seems to allow a fairly liberal discount for cash, being as I have said about 57 per cent in place of 65, making a rebate of $1,100 or so which was 12 per cent of what the composition at 65 per cent would have come to, I do not see that the motive which led Brossard to raise the money is so material, or that the $3,000 advanced by him differs, in its relation to the general creditors, from the $3,000 advanced by Dupras and Emard. The last named sum was advanced, as it appears, upon an understanding between Dupras, Emard and Lamoureux that the difference between $3,000 and $5,453.07

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(which was 65 per cent of the $8,389.34), viz., $2,453.07, was to be shared among the three. That would seem to give $817.69 to each of the three. There is a slight difference as they computed the figures, for they deducted $819.45 as the share of Lamoureux from $5,453.07, leaving $4,633.62, and for that amount Lamoureux gave to Dupras and Emard his five promissory notes at dates from two to twelve months from the 11th of January, 1884.

This somewhat remarkable arrangement is based on the idea that the $8,389.34 of notes were bought from the Exchange Bank for $3,000, giving the purchasers the right to rank for 65 per cent under the composition arrangement, but ignoring Brossard & Chaput, who, if they paid money in the character of endorsers, and accommodation endorsers, would certainly have had some right to the notes.

We have in evidence the following document which is not consistent with the theory that the notes were purchased for $3,000, nor on the other hand with the proved fact that the payment made to the bank was the full $8,000 as evidenced by the four cheques already referred to, but which, being an order addressed by the endorsers to the bank, properly treats the endorsers as the persons entitled to control the notes :—

MONTREAL, 9th January, 1884.

To the Liquidators of the Exchange Bank of Canada:

Please remit to our attorney Mr. J. U. Emard all the notes endorsed by us and held by the Exchange Bank upon payment of five thousand nine hundred and thirty-four dollars and eighty-six cents, $5,934.86.

BROSSARD, CHAPUT & Co.

Mr. Brossard when examined with reference to this order insisted, as he did throughout his evidence, that the settlement with the bank was one settlement for $8,000, $3,000 of which was advanced by his firm. We must keep in mind, as before noticed, the distinction between arrangements about procuring funds and the transac-

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tion with the bank. One thing that seems clear enough is that the $5,000 of notes, although included in the one composition with the bank, were yet, as between the other parties, understood as going to Madame Lamoureux as if redeemed by her $2,000. The order just read deals with the other notes and not with the $5,000 worth.

Whatever importance attaches at present to the order seems to me to be in its recognition of the legal right of the endorsers to the notes, which is ignored in the arrangement which treated them as belonging to Dupras and Emard.

The real transaction seems to have been a loan of $3,000 from Dupras and Emard for which those gentlemen were to be paid an exorbitant rate of interest, and another loan of $3,000 from Brossard & Chaput which they were to be repaid according to the tenor of the promissory note given them by Lamoureux, payment being secured by a mortgage given, not only in consideration of that loan, but in substitution for a previous mortgage which they released.

I think this case turns essentially on the questions of fact in which I cannot agree with the understanding of the evidence acted on in the court below.

The plaintiffs found their right to attack the transaction with the defendants on their subrogation to the rights of the Exchange Bank as holders of the $8,000 of notes. In that sense only are they parties to the composition. My conclusion is that they are not holders of the notes but that the notes were satisfied by the composition paid to the bank, the plaintiffs being simply creditors of Lamoureux for the $3,000 they lent him. I am not now disputing the power of Lamoureux to promise to repay the plaintiffs their loan with abnormal interest, I am merely dealing with their *locus standi* as compounding creditors. I do not

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think they sustain that character and therefore, in my opinion, they have no right to maintain this action. Further, I am not satisfied that the position of the defendants is open to successful attack by any compounding creditor. I think the proper conclusion from the whole evidence is that the money paid by the defendants Brossard & Chaput was a loan from them to Lamoureux to assist in the payment of his composition. They were parties to the composition deed, but that was as creditors for another debt. This loan was a later matter and was not subject to the composition deed.

Lamoureux had the right to secure its payment by a pledge of part of his assets. To use the language of James L.J. in *Ex parte Burrell* (1):

> He had bought the assets from his creditors * * * He was absolute master of those assets in exactly the same way as any other purchaser.

Or in the language of my brother Strong in *Beausoleil* v. *Normand* (2):

> He was left free to deal with his assets as he thought fit, subject only to this that, like every other debtor, he was bound not to make any fraudulent disposition of them so as to defeat the just claims of his creditors.

I am of opinion that the appeal should be allowed.

Appeal allowed with costs.

Solicitors for appellants: *Mercier, Beausoleil, Choquette & Martineau.*

Solicitors for respondents: *Ouimet & Emard.*

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(1) 1 Ch. D. 537, 551.

(2) 9 Can. S. C. R. 711, 717.