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*May 8, 9.
*June 14.

FRANCOIS GOSSELIN (PLAINTIFF) APPELLANT.

AND

THE ONTARIO BANK (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Sale of goods—Suspensive condition—Term of credit—Delivery—Pledge—Shipping bills—Bills of lading—Indorsement of bills—Notice—Fraudulent transfer—Insolvency—Banking—Bailee receipt—Brokers and factors—Principal and agent—Resiliation of contract — Revendication—Damages—Practice—Pleading — 52 Vict. ch. 30, secs. 64, 73.

The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills and places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper measures in order to ascertain these facts and obtain a clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee. The Chief Justice dissenting.

Held, per Taschereau C.J. dissenting:—Where a sale of goods has been completed by actual tradition and delivery the mere absence of the consignee's indorsement upon shipping bills representing the goods made in the name of the vendor cannot have the effect of reserving any right of property in the vendor. If the goods have been sold upon terms of credit, the unpaid vendor has no right to revendicate such goods after they have passed into the possession of a third person in the ordinary course of business, and, in the present case, on failure of the conservatory seizure and in the absence of any right of the plaintiff to revendicate the goods, the alternative relief prayed for by his action should not be granted.

APPEAL AND CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, by which the judgment of the Superior Court, District of Mon-

*PRESENT:—Sir Elzéar Taschereau, C.J., and Girouard, Davies, Nesbitt and Idington, JJ.

treal (Pagnuelo J.) (1) in favour of the plaintiff was reduced to $2,667.10 and modified accordingly.

The following statement of the circumstances of the case is taken from the notes of reasons for the judgment of His Lordship, Mr. Justice Pagnuelo, at the trial.

"The plaintiff sued for the recovery of 5,324 bales of hay and 54 bills of lading granted by several railway companies to the plaintiff in May, 1894, and prayed that the defendants should be ordered to return the hay and the bills of lading, and in default, condemned to pay him $5,244.50. He alleged that he agreed to sell hay to the firm of Marsan & Brosseau at $8.50 per ton; that he loaded the hay on cars at various railway stations and took said bills of lading, from the railway companies, in his own name, consigned to himself at New London, Conn., New York and Boston; that he forwarded the bills to Marsan & Brosseau as evidence of the shipments, without being indorsed by him, thereby retaining the ownership in the hay represented by the bills of lading; that there were in all 54 cars of a value of $5,244.50; that Marsan & Brosseau illegally transferred the bills of lading to the Ontario Bank, without the plaintiff's indorsement and without paying for the hay; that Marsan & Brosseau are notoriously insolvent, and were insolvent at the time of the transfer by them of said bills of lading to the bank, to the knowledge of said bank; that Marsan & Brosseau had no right to transfer the bills of lading to the bank and the bank acquired no right in them, gave no value and received them in fraud of the rights of the plaintiff, and for the purpose of obtaining an undue preference over the creditors of Marsan & Brosseau; and the plaintiff also

(1) Q.R. 26 S.C. 430.

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prayed for the resiliation of the sale by him to Marsan & Brosseau and to be acknowledged as the owner of the hay and of the bills of lading;

"The bank, after a general denial, pleaded that Marsan & Brosseau became the owners of the hay sold by plaintiff to them; that the bills of lading were not made with the object of enabling plaintiff to retain the ownership of the hay until paid for; that plaintiff well knew that Marsan & Brosseau had no means to pay for the hay except either by delivering the hay and obtaining the money from the purchaser, or by pledging the bills of lading with a bank for the purpose of obtaining advances thereon; that the hay in question was intended to be shipped to foreign parts, and the bills of lading were delivered to Marsan & Brosseau to enable them to finance the adventure; that at the time of the institution of the action the bills of lading were not in the possession of the bank, nor the hay represented thereby; that at the time of the transactions Marsan & Brosseau were believed to be merchants in good standing and solvent, and the bank dealt with them and made advances in good faith, in the usual course of business and for valuable consideration; it denied having received the bills of lading in fraud of the rights of the plaintiff or of the creditors, or for the purpose of obtaining an undue preference over them; that neither the hay nor the bills of lading were found nor seized in the possession of the bank, which is not liable to return the same nor to pay the value of the hay.

"There was no allegation or pretension that the bills of lading were ever indorsed by anybody, and there is the allegation that the hay and bills of lading were no longer in the bank's possession. This last allegation, as a matter of fact, was not true, because

the bills of lading were under its control and the hay was under its control, in fact being on the way at the time and still on this continent.

"It appears from the evidence that the hay in question was to be shipped to England to be sold there, and that the railway receipts or inland bills of lading were to be exchanged for ocean bills of lading through Marsan & Brosseau or their agents, and sold in England also through the same agents; that plaintiff's name was entered on said railway receipts as shipper and consignee for the purpose of retaining the control over said hay and of retaining the ownership thereof until paid, the plaintiff expecting the ocean bills to be made to his order as shipper and consignee; that Marsan & Brosseau on receiving said railway receipts from plaintiff forwarded to him bills of exchange at 30 days, some of which bills of exchange the plaintiff discounted at his own bank and retired when due; the others he returned to Marsan & Brosseau after they became bankrupt on the 28th of May, 1894; that the bank made advances to Marsan & Brosseau upon these railway receipts, without the personal indorsement of the plaintiff and upon the sole indorsement of Marsan. I have come to the conclusion that all the advances made on that hay were made on the shipping bills or railway receipts, although the manager of the bank declared that 26 cars had been pledged to the bank by Marsan & Brosseau upon ocean bills obtained by them, in their favour, and indorsed by them. * * I find, also, in his evidence, statements which enable me to say that all the advances made on this hay were made on railway receipts.

"When the railway companies were presented with those railway receipts with the name of Gosselin and then the name of Marsan & Brosseau on, they would

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make no objection and take the signature of Gosselin as being genuine; therefore they made no objection to giving in their stead ocean bills to the order of Marsan & Brosseau. That was done to the knowledge of Mr. King all the time. * * He explains that at the time of the suspension of business by Marsan & Brosseau the bank had on hand 20 shipping bills, and these shipping bills were transferred by the bank to their own agents without any indorsement at all, and * * ocean bills were obtained * * without indorsement, so the bank had to give a guarantee to the railway companies on account of a large number of cars for which ocean bills were asked to be made in the name of the bank without indorsement by Gosselin. The witness continues 'but in the ordinary course of business Marsan & Brosseau would take those from me on a bailee receipt and exchange them for the ocean bills payable to their order, which I would negotiate in the regular way.'

"It is evident then from this that the advances were made to Marsan & Brosseau on those railway receipts because Mr. King would not part with them afterwards and deliver them over to Marsan & Brosseau to be exchanged for ocean bills without taking a bailee receipt for them, thereby constituting Marsan & Brosseau the bank's agent to exchange those bills of lading. It was then their property. If it had not been their property, they would have had no business to take a bailee receipt and constitute Marsan & Brosseau the bank's agents for that purpose. * *

"So long as Marsan & Brosseau carried on their business, and until they stopped carrying on their business on the 28th May, the bank always used Marsan & Brosseau as their agents to exchange the bills of lading. After that they had no more use for Mar-

san & Brosseau, and they transmitted these railway receipts to their agent, to make the exchange for ocean bills, and then it was that the bank gave their letter of guarantee to the railway company. * *

"Mr. King was sure that the railway receipts were indorsed by Marsan & Brosseau by putting on the name of Gosselin, and so he was aware of the transaction all the time. The evidence goes on; 'Q. You are sure they were indorsed? A. Yes. Q. Then you remember of having these bills of lading in your hands —the original bills? A. No, I do not remember.' How is that if he made all the advances on the railway receipts which he handed back to Marsan & Brosseau as their trustee, and bailee receipts, to be exchanged for ocean bills? He repeats that in so clear a manner that I must take his words, especially when they are against the bank, as I must say he has been a very reluctant witness in the case. He first started by saying that he could give no information, that all the books of the bank relating to this transaction were burnt years ago, when they moved into new offices, and they burned all their old books, and he forgot to tell his assistant not to burn the books relating to this matter. I must say he was very reluctant to give us the facts in this case, but one by one the facts came out and now we have his evidence before us which settles that matter so far as I am concerned.

"Marsan & Brosseau would therefore by authority from plaintiff indorse plaintiff's name on said receipts, and the bank knew that Marsan & Brosseau signed plaintiff's name, and never objected; and Marsan & Brosseau acted only as agents and bailees for the bank in exchanging said bills. * *

"I now come to that part of the case which has

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been brought out in the evidence, but was not pleaded specially,—that every time a car was sent to Marsan & Brosseau by the plaintiff, along with the railway receipt, Marsan & Brosseau would at once make a bill of exchange upon themselves for the amount of the car, accept it and send it over to the shipper. Gosselin says that he made this agreement with Marsan & Brosseau. He had already sold them a large quantity of hay for years, and at the time when these cars were loaded they were his debtors for over $3,000. He would not advance them any more and he made a special bargain with Marsan that he would put the railway receipts to his own order. * *

"At the time of the action plaintiff's hay was in the possession of the bank under the bills illegally and wrongfully transferred to it by Marsan & Brosseau; the plaintiff never agreed to part with the hay in question until he was paid for the same, and he retained the legal possession and control of the same by shipping on railway receipts to his own order as shipper and consignee; the plaintiff, by taking Marsan & Brosseau's drafts and discounting some of them for his own accommodation, did not thereby release his control of the hay; if Marsan & Brosseau had no means to pay for the hay except by pledging it, such pledge could not legally be made without the plaintiff's consent and signature when he would see to the payment of his claim, while, by ignoring plaintiff's rights under said railway receipts, Marsan & Brosseau have used the advances made by the bank upon the railway receipts, for the satisfaction of other and previous claims of the bank against Marsan & Brosseau, or of other creditors of Marsan & Brosseau;

"The evidence shews that the money received was

put to the credit of Marsan & Brosseau, in their bank account, who drew thereon their own cheques to pay previous debts they had at the time, and even that part of the money was used for paying over $5,000 to the bank upon a previous shipment of hay. * * The hay had to be unloaded from the ship, to be stored and other expenses had to be incurred. The bank became nervous, and when they received from Marsan & Brosseau 32 railway receipts, including some of Gosselin's and some from other traders, upon which they wanted advances to be remitted to England, on bills of lading, as I have just stated, Mr. King sent a letter to Marsan & Brosseau returning the bills of exchange, but retaining bills of lading, and saying that he would agree to open to them an overdraft account to the amount of $1,900 upon the 32 cars covered by so many bills of lading that he had in hand; he would not credit them in the bank account for the amount, but he would allow them to overdraw their account to the extent of $1,900, and, if they sent other railway receipts to make 75 altogether, he would raise the overdraft to the amount of $4,000.

"Marsan & Brosseau had to submit to this and say nothing. They sent other railway receipts, altogether to the amount of 75, and the power to over-draw was raised to the amount of $4,000; but two days afterwards the bank obtained from Marsan & Brosseau two cheques to the amount of $5,000 to cover the bank against probable loss in England on the hay which had already been shipped; that is, they used the 75 cars to cover previous advances. That was against the law as it stood then, * * at that time it could not be done; that transaction was evidently for the object of covering past advances. Marsan & Brosseau were to overdraw $4,000, but they were asked to give

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two cheques of over $5,000 to pay drafts sent to England with hay previously shipped to England. There are statements in the record to shew that those $5,000 were paid for a certain number of drafts discounted, so that the money which Marsan & Brosseau obtained on that occasion from the bank * * was used to pay a previous debt of the bank.

"It is true that plaintiff intrusted Marsan & Brosseau with the railway receipts for the purpose of exchanging them for ocean bills of lading, as the hay was intended to be shipped to England, but he had reason to expect that the ocean bills would be made to his order, or his consent for the substitution of another consignee on the ocean bills of lading would be asked.

"As the transaction took place those railway receipts indorsed by Marsan with Gosselin's name and his own name, were replaced by ocean bills to the order of Marsan & Brosseau, who handed them over to the bank, and so Gosselin lost all his rights. * *

"I consider, therefore, that the plaintiff never parted with the legal possession of his hay, that he never indorsed and never authorized Marsan & Brosseau to indorse for him his name on the said railway receipts." * *

The following exhibits, filed of record, shew the conditions of the shipping bills which have been referred to:

"EXHIBIT D 1. Shipping Receipt Central Vermont Railway, representing 19 others in the same form.

St. Alexander, P.Q., May 8, 1894.

"RECEIVED FROM FRS. GOSSELIN,

BY CENTRAL VERMONT RAILROAD.

"The property described below, in apparent good

order, except as noted (contents and conditions of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.

"It is mutually agreed, in consideration of the freight charged for this service, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, shewn or indorsed hereon, and which are hereby agreed to by shipper and by him accepted for himself and his assigns as just and reasonable.

MARKS, CONSIGNEES AND DESTINATION.	DESCRIPTION OF ARTICLES.	WEIGHT, SUBJECT TO CORRECTION.
C. V. 4623 N. D. 2797 Frs. Gosselin New London, Ct. to London, England New York, N.Y. Via for Central Vermont Railroad.	One car hay, 104 One car hay, 99 Bales For export O. R. of F. & W.	

W. SMITH,
Freight Agent.

90 GEO. H. JANEWAY,
New York, N.Y.

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"EXHIBIT NO. 21.—Shipping Receipt Canadian Pacific Railway representing two others in the same form.

"CANADIAN PACIFIC RAILWAY COMPANY.

"This company will not be responsible for any goods mis-sent, unless they are consigned to a Station on their Railway. Rates, Weights and Quantities entered on receipt of Shipping Notes by shippers or their agents are not binding on the Company, and will not be acknowledged. All goods going to or coming from the United States will be subject to Customs' Charges, etc.

St. John's, Que., May 16, 1894.

"*RECEIVED from* FRS. GOSSELIN *the undermentioned Property, in apparent good order, addressed to*

FRS. GOSSELIN,

New York.

to be sent by the said Company, subject to the terms and conditions stated above and upon the other side, and agreed to by the Shipping Note delivered to the Company at the time of giving this Receipt therefor for export to London, Eng.

No. OF PACKAGES AND SPECIES OF GOODS.	MARKS.	WEIGHT, LBS.	BACK CHARGES.
One car Hay.		20,000 More or less	

96 bales shipper's count

Owner's risk of fire and water.

Soo Line car 6622.

Via St. Polycarpe Malone & Adirondack div. of N. Y. C. & H. R. Ry.

care of WM. JAMES, New York.

(Signed) L. P. TIMMONS, *Agent C.P.R.*"

"EXHIBIT NO. 24.—Shipping Receipt Grand Trunk Railway representing three others in the same form.

"GRAND TRUNK RAILWAY COMPANY OF CANADA.

"This Company will not be responsible for any Goods mis-sent, if they are consigned elsewhere than to a Station on its Railway. Rates, Weights and quantities entered on Receipts or Shipping Notes are not binding on the Company, and will not be acknowledged. All goods going to or coming from any place out of Canada will be subject to Customs' charges, etc.

Coaticooke, Date, May 16th, 1894.

"*RECEIVED from* FRS. GOSSELIN *the undermentioned Property, in apparent good order, addressed to*

FRANCOIS GOSSELIN,
New York for export to
London, England.

to be sent by the said Company, subject to the terms and conditions stated above, and to those upon the other side of this shipping receipt, and to the terms and conditions of the current classification of freight and tariff, all of which are agreed to by the shipping note delivered to the Company at the time of giving this receipt therefor, as a special contract in respect of said property.

"A charge of not less than $1.00 per car per day, or fraction thereof, will be made when cars are delayed beyond 48 hours in loading or unloading.

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No. of Packages, Species of Goods, said to be	Marks.	Quantity or Weight, Lbs., said to be	Back Charges.
One car Hay (95 Bales more or less) at owner's risk of fire and water. G.T.R. Car 8554. Via Coteau, Malone and Adirondack Div. N. Y. C. & H. R. R. R. care WM. JAMES, New York. (Signed) GEO. PINKHAM, *Agent G.T.R.*"			

Finally, the learned judge concludes: "The transfer of said hay by Marsan & Gosselin to the Ontario Bank being illegal, and having transferred to the bank no right to the possession or ownership of said hay, the bank was the wrongful possessor thereof, and therefore the plaintiff was entitled to seize the hay and the bills of lading in their hands; the bank has disposed of the hay and is responsible to the plaintiff for its value; whereas 53 cars of hay have been so transferred to the bank, containing hay to the value of $3,190.90, according to exhibits p. 28 and p. 29, for which the sum of $256.46, dividend received from Marsan & Brosseau's estate, must be deducted, leaving a balance of $4,934.44.

"The sale by plaintiff to Marsan & Brosseau of the hay in question is cancelled, the plaintiff is declared to have been and to be owner of said hay and bills of lading, and I condemn the Ontario Bank to deliver over to the plaintiff the said hay, and bills of lading within fifteen days, and on default thereof, to pay the plaintiff the sum of $4,934.44 with interest from the service of this action on the 7th of June, 1894, and costs."

On appeal, the Court of King's Bench, appeal side,

by the judgment now appealed from, considered that the proof of record did not justify so large a condemnation against the bank, but that Gosselin had a right to recover the value of the hay contained in 27 of the cars only, and reduced the amount of the judgment accordingly.

The plaintiff now appeals, seeking to have the judgment of the trial court restored, while the bank asserts the cross-appeal to be entirely relieved from liability. The questions at issue on this appeal are discussed in the judgments now reported.

Brodeur K.C., Aimé Geoffrion K.C. and *Gosselin* for the appellant and cross-respondent, cited *McGillevray* v. *Watt*(1); *Baile* v. *Whyte*(2); McLaren on Banks and Banking, pp. 149, *et seq.;* arts. 1065, 1492, 1497, 1745, 1902, 2421 C.C.; Benjamin on Sales (7 ed.) p. 372—3rd, 4th, 5th, and 6th principles—p. 373—reservation of the *"jus dispondendi"*—p. 356 and secs. 386-387, "jurisprudence"—p. 715, sec. 697—"transfer by indorsement and delivery of bills of lading; 3 R.L.N.S. p. 441; *Gilmour* v. *Letourneux*(3); *Canadian Bank of Commerce* v. *Stevenson*(4); *Bank of Hamilton* v. *Halstead*(5).

Lafleur K.C. and *Kenneth P. Macpherson* for the respondent and cross-appellant, referred to arts. 1488, 1499, 1543, 1739, 1740, 1745, 1746, 2420-2422, 1978, 2268, C.C.; arts. 5643-1546 R.S.Q.; "The Banking Act, 1890," 53 Vict. ch. 31, sec. 73; 42 & 43 Vict. ch. 19 (Que.); 4 Am. & Eng. Encycl. of Law, 547; 2 Encycl. of Laws of England, 123; Benjamin on Sales (7 ed.) pp. 372, 373, 856; Campbell on Sales of Goods and Commercial Agency, p. 265; and cited the decisions

(1) 31 L.C. Jur. 49, 278.
(2) 13 L.C. Jur. 130.
(3) Q.R. 1 Q.B. 294.
(4) Q.R. 1 Q.B. 371.
(5) 28 Can. S.C.R. 235.

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in *Crowell* v. *Van Bibber*(1) ; *Merchants Bank of Canada* v. *Union Railroad and Transportation Co.*(2) ; *Emery's Sons* v. *Irving National Bank*(3) ; *Fowler* v. *Meikleham*(4) ; *Fowler* v. *Stirling*(5) ; *Molsons Bank* v. *Janes*(6) ; *Johnson* v. *Lomer*(7) ; *Moss* v. *Banque de St. Jean*(8) ; *McGillevray* v. *Watt*(9) ; *City Bank* v. *Barrow*(10) ; *Coxe* v. *Harden*(11) ; *Browne* v. *Hare* (12) ; *Joyce* v. *Swann*(13) ; *Van Casteel* v. *Booker* (14) ; *Key* v. *Cotesworth*(15) ; *Ex parte Banner; re Tappenbeck*(16) ; *Exchange Bank* v. *City and District Savings Bank*(17) ; *Brandao* v. *Barnett*(18) ; *London Chartered Bank of Australia* v. *White*(19) ; *Thompson* v. *The Molsons Bank*(20) ; *Insky* v. *The Hochelaga Bank*(21).

THE CHIEF JUSTICE (dissenting).—J'opinerais pour le maintien de l'appel de la banque, et le renvoi de l'action de Gosselin et de son appel. Il n'a pas crû, et avec raison en face de la preuve, pouvoir soutenir devant nous l'allégué de sa déclaration qu'il n'avait pas fait une vente complète du foin à Marsan *et al.* mais qu'il s'en était réservé la propriété jusqu'à paiement, et a entièrement abandonné cette prétention. Il n'a pas même cité les décisions sur lesquelles il aurait pu en loi l'étayer, la preuve le lui eusse-t-elle permis. *Forristal* v. *McDonald*(22) ; *La Banque d'Hochelaga* v. *Waterous Engine Works Co.*(23). Et la cour dont est appel a fait une juste appréciation des

(1) 18 La. Ann. 637.
(2) 69 N.Y. 373.
(3) 18 Am. Rep. 299, at p. 303.
(4) 7 L.C.R. 367.
(5) 3 L.C. Jur. 103.
(6) 9 L. C. Jur. 81.
(7) 6 L.C. Jur. 77.
(8) 15 R.L. 353.
(9) 31 L.C. Jur. 49, 278.
(10) 5 App. Cas. 664.
(11) 4 East 211.
(12) 4 H. & N. 822.
(13) 17 C.B.N.S. 84.
(14) 2 Ex. 691.
(15) 7 Ex. 595.
(16) 2 Ch. D. 278; 24 W.R. 476.
(17) 14 R.L. 8.
(18) 12 Cl. & F. 787.
(19) 4 App. Cas. 413.
(20) 16 Can. S.C.R. 664.
(21) Q.R. 10 S.C. 510.
(22) 9 Can. S.C.R. 12.
(23) 27 Can. S.C.R. 406.

faits, quoique je ne puisse adopter les conclusions qu'elle en a tirées, en basant son jugement, non pas sur une promesse de vente ou une vente sous condition suspensive ou résolutoire mais bien sur une vente actuelle et effective. "La vente était parfaite," dit justement le savant juge en chef Lacoste au nom de la cour. Et le demandeur, Gosselin, ne le conteste pas dans son factum, pas plus qu'il ne l'a fait à l'audition.

Il l'a d'ailleurs admis sous serment dans son affidavit pour jugement contre Marsan *et al.* La cour de première instance avait aussi en termes précis annulé la vente; c'était, en termes non équivoques, admettre qu'il y en avait eu une; on n'annule pas ce qui n'a jamais existé.

Or, il en étant ainsi comme question de fait, il en ressort nécessairement qu'en loi Marsan *et al.* sont devenus *instanter* propriétaires absolus de ce foin. Et la présomption, qu'en mettant les connaissements ou lettres de voiture en son nom le demandeur s'en était réservé la propriété, est complètement écartée.

La vente est parfaite (décrète l'art. 1472 C.C.), par le seul consentment des parties quoique la chose ne soit pas encore livrée, et le contrat d'aliénation d'une chose certaine et déterminée rend l'acquéreur propriétaire de la chose par le seul consentement des parties, quoique la tradition actuelle n'en ait pas eu lieu, dit l'art. 1025; et ceci s'applique aussi bien aux tiers qu'aux parties contractantes, dit l'art. 1027; de Folleville, de la Possession des Meubles, page 161; Demolombe, Oblig. vol. 1er. No. 409. Ainsi les créanciers du demandeur n'auraient plus eu le droit de saisir entre ses mains le foin ainsi vendu à Marsan *et al.;* Demolombe, Oblig. vol. 1er, No. 472; Larombière, Oblig. sous art. 1141, No. 18; *Young* v. *Lambert*(1).

(1) 6 Moo. P.C. (N.S.) 406.

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The Chief Justice.

Et pourquoi? Parceque tant vis-à-vis les tiers que vis-à-vis le demandeur, Marsan *et al.* étaient devenus les propriétaires actuels du foin, même en supposant qu'ils n'en auraient pas été mis de suite en possession. Le demandeur n'avait certainement plus le droit, lui, de le vendre ou donner en nantissement à la banque ou à qui que ce fût. Quelqu'un cependant devait avoir ce droit. On ne peut, comme le prétendrait le demandeur, concevoir, sous les circonstances, l'idée d'un article de commerce frappé d'indisponibilité. Et, si le demandeur n'avait plus le *jus disponendi* c'est parce qu'à Marsan *et al.* seuls il était passé. Il est impossible pour le demandeur de prétendre qu'il était convenu entre ses acheteurs et lui qu'ils n'auraient pas le droit de revendre. C'était pour revendre, et uniquement pour revendre, et revendre avec toute la diligence possible, et il le savait, qu'ils achetaient. Et de plus, il n'ignorait pas qu'ils étaient, dans l'intervalle, dans l'impossibilité de le payer aux termes convenus sans obtenir sur nantissement du foin les fonds nécessaires pour ce faire. Si le demandeur eût insisté sur la condition que ses acheteurs n'auraient pas, quoique propriétaires, le droit de revendre ou mettre en gage, ces derniers lui auraient tout simplement dit qu'il devait bien savoir qu'avec cette condition toute transaction entre eux était impossible.

Maintenant, si Marsan *et al.* sont devenus propriétaires du foin, ils ont pu transférer leurs droit à la banque qui, en vertu des articles sus-cités, est devenue propriétaire absolue même avant tradition; 2 Aubry & Rau, par. 183, No. 6. Sa bonne foi n'a pas été mise en doute ni par l'une ni par l'autre des cours provinciales et ne pouvait l'être.

Le demandeur repose toute sa cause contre la banque sur ce prétendu manque de tradition. Mais, en

fait et en loi, sa position n'est pas tenable. Marsan *et al.*, dès leur achat, laissant de côté pour le moment le fait de la tradition manuelle des connaissements, sont devenus par leurs agents et voituriers, les seuls possesseurs actuels, *manû*, de ce foin, possesseurs *pro emptore*. Ils en ont dès lors eu en fait le contrôle exclusif, *corpore et animo dominantis*, engagé les voituriers, payé le fret, et auraient été les seules victimes, avenant le cas de perte *in transitû*. A eux seuls auraient été payables les dommages qu'auraient pu causer les fautes des voituriers dans le transport. Les faits de la cause repoussent complètement la proposition du demandeur, qu'en mettant les connaissements en son nom, il se soit réservé la possession légale. Ces connaissements ne sont pas même à ordre, mais en son seul nom comme personne dénommée. Lyon Caen & Renault, 5 Dr. Comm. No. 701, 713, *et seq.*; Buchère, Valeurs Mobilières, No. 451. Et d'ailleurs, ce n'est pas la possession légale des connaissements dont il s'agit, c'est la possession de fait, la possession matérielle du foin même.

Or cette possession de fait, le demandeur s'en était complètement dessaisi. Sa propre déclaration l'allègue spécialement. Son jugement contre Marsan *et al.* en est, d'ailleurs, une admission non équivoque. Il a cessé de posséder *animo dominantis* ce qu'il avait vendu. Et c'était dans l'unique but de permettre à ses acheteurs de revendre aussitôt possible ou d'obtenir de la banque, si nécessaire, les avances pour le payer lui-même, qu'il les avait constitués les porteurs des connaissements et les possesseurs du foin. *Molsons Bank* v. *Janes* (1); *Fowler* v. *Meikleham* (2). Il n'avait aucune intention d'aller lui-même à New York ou à Boston, et savait parfaitement qu'il lui

(1) 9 L.C. Jur. 81. (2) 7 L.C.R. 367.

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aurait été impossible d'exiger que les connaissements lui fussent retournés pour son endossement avant que la revente fût possible. Il doit être présumé, sous les circonstances, avoir autorisé Marsan *et al.* à transférer les connaissements et à signer son nom au dos d'iceux, si nécessaire. Il n'a obtenu leur consentement à acheter qu'à la condition qu'ils pourraient revendre ou mettre en gage à leur gré. Il espérait, sans doute, qu'ils le considéraient comme créancier privilégié, et verraient à ce qu'il fût le premier payé sur le produit de leur revente, et c'est dans ce seul but qu'il a mis les connaissements en son nom tout en les mettant en possession actuelle du foin comme propriétaires. Il a été deçu en cela; ses acheteurs l'ont trompé, mais la banque ne doit pas être la victime. Sur lui seul doivent peser les conséquences de l'abus par ses acheteurs de la confiance qu'il avait reposée en eux.

Je retourne à la prétention du demandeur qu'en mettant les connaissements à son nom seul, il n'est pas censé avoir livré le foin à Marsan *et al.*, en supposant que ce moyen lui compète malgré l'admission contraire que comporte le jugement qu'il a pris contre eux. Lui est-il possible de soutenir que les tiers dans le commerce, et surtout la banque vis-à-vis qui depuis longtemps il avait montré la plus grande confiance dans Marsan, étaient tenus de traiter la tradition manuelle à eux des connaissements comme illusoire, sans but, et sans aucune conséquence? Mais pourquoi les leur remettre, pourquoi les en faire les porteurs? N'était-ce pas pour qu'ils s'en servent, pour qu'ils en retirent le bénéfice? Ces connaissements constituaient des droits incorporels, des titres à des droits contre les voituriers, des *indicia* de la propriété.

Pickering v. *Busk* (1); *Cole* v. *North Western Bank* (2). Or ces titres, quoique non à ordre ou au porteur, pouvaient être vendus ou cédés. Ils n'étaient pas frappés d'inaliénabilité. Or comment pouvaient-ils être vendus ou cédés? Par la délivrance manuelle, dit la loi, ou par un transport formel. La délivrance à Marsan *et al.* les en constituait vis-à-vis les tiers les acquéreurs par le fait même. La vente des créances et droits d'action contre des tiers est parfaite entre le vendeur et l'acheteur par la délivrance du titre, s'il est sous seing privé, et, vis-à-vis le vendeur ou cédant, l'acquéreur ou cessionnaire en est de suite saisi. L'article 1570 C.C. le dit expressément.

Et, dit l'art. 1494, la délivrance des choses incorporelles se fait par la remise des titres. Même eussent-ils été à ordre l'endossement de ces connaissements par Gosselin n'était pas nécessaire pour les transmettre; leur négociation aurait pu se faire au moyen d'une cession ordinaire et dans les termes du droit commun. C'est ce que la cour de cassation a expressément décidé dans plusieurs causes, entre autres celles citées au No. 35 de Sirey, Code Annoté, sous l'art. 1690, C.N.; voir 4 Bravard, Dr. Comm. page 382; Lyon Caen & Renault, vol. 5, Dr. Comm. No. 701. Et par l'art. 1573, il n'y a que les billets pour la livraison de grains ou autres choses payables à ordre qui peuvent être transportés par endossement. Les titres nominatifs à une personne dénommée, comme ceux au porteur, sont donc transportés par la simple délivrance. Et l'art. 2421 qui ne donne le droit de transporter un connaissement par endossement que pour un connaissement à ordre laisse à douter si un endossement par Gosselin de titres payables à lui seul comme ceux-ci l'étaient, aurait conféré à ses acheteurs

(1) 15 East 38. (2) L.R. 10 C.P. 354.

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plus ou même autant de droits que la délivrance manuelle l'a fait. Ils sont devenus à toutes fins que de droit investis du *jus disponendi* et des connaissements et du foin.

Laissant ces considérations de côté, à tous points de vue de la cause, le demandeur eût-il quelques droits contre la banque, son action en revendication et en demande de résolution de la vente à Marsan *et al.* faute de paiement du prix ne peut-être maintenue.

D'abord par l'art. 2268 du Code Civil, la possession actuelle par la banque à titre de propriétaire, tant des connaissements que du foin en question même, empêche la revendication, la banque étant aux droits de commerçants en pareilles matières et les ayant acquis dans le cours ordinaire de leur commerce. Beauchamp, Code Civil, sous art. 2268, No. 14. Cet article (il est bon de noter) s'applique maintenant expressément au contrat de nantissement par le statut 42 & 43 Vict. ch. 18, sec. 1, passé depuis la décision de la chambre des lords dans le cause de *City Bank* v. *Barrow*(1).

Puis par l'art. 1999, le vendeur non payé n'a pas d'action en revendication de la chose vendue si la vente a été faite à terme ou si la chose vendue est passée entre les mains d'un tiers qui en a payé le prix. *Moss* v. *Banque de St. Jean*(2); Troplong, Priv. & Hyp. 185 à 200. Et par l'art. 1543, le droit de résolution d'une vente de meubles faute de paiement du prix ne peut-être exercé qu'autant que la chose reste en la possession de l'acheteur, en sa possession physique et ostensible.

Or. ici, le demandeur l'admet, la vente à Marsan était à terme; de plus, il l'allègue lui-même, la banque était, lors de l'institution de l'action, en possession

(1) 5 App. Cas. 664. (2) 15 R.L. 353.

actuelle et du foin et des connaissements, et elle en avait payé le prix. Bédarride, Achats et Ventes, No. 328. En ne saisissant pas le foin *in transitû* entre les mains du voiturier, le demandeur a admis que Marsan *et al.* et la banque en avaient été mis en possession actuelle. *Rogers* v. *Mississippi and Dominion S.S. Co.* (1) et causes y citées. Le demandeur, sentant la force de cette objection à son action telle que formée, a tenté d'y répondre en invoquant l'équité contre le texte même de la loi. "Si je n'ai pas droit de revendiquer, dit-il, j'ai un droit d'action contre la banque, soit en dommages, soit parcequ'elle s'est approprié sans droit ce qui m'appartenait,—ou un privilège ou droit de préférence sur ce foin, ou enfin un droit quelconque, et mon action ne peut-être déboutée." C'est là une proposition qui n'est pas soutenable. S'il n'a pas droit à l'action telle qu'il l'a prise, elle doit être renvoyée purement et simplement, sauf à juger du mérite de toute nouvelle action qu'il peut juger à propos d'intenter quand elle viendra devant nous. De son action en revendication, qui est une action réelle, il ne peut faire une action personnelle. Il est loisible sur une telle demande sans doute, de prendre alternativement des conclusions personnelles. Mais ces conclusions subsidiaires doivent nécessairement tomber avec l'action principale, si elle n'est pas fondée. Il n'y a lieu à les accorder que dans le cas où le droit à la demande en revendication étant fondé, les meubles en litige ne peuvent pas être remis au demandeur parcequ'ils ne sont plus en la possession du défendeur. Il va de soi que si la demande en revendication est non fondée parceque le défendeur était légalement propriétaire en possession, l'action en son entier doit être déboutée. Le fait que la demandeur n'a pu saisir ne peut sup-

(1) 14 Q.L.R. 99.

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pléer la base légale qui a manqué à l'action dès son origine.

On nous a cité un grand nombre de causes. J'y applique en bloc le *dictum* si rationel de Lord Halsbury dans la cause de *London Joint Stock Bank* v. *Simmons*(1) :

> No one case can be an authority for another when the solution rests upon the evidence.

Tant qu'à la loi qui régit le litige, il ne peut y avoir de doute, et les parties n'en ont point soulevé. La loi commerciale anglaise n'a de force dans la province de Québec que dans des cas exceptionels sous aucun desquels la présente cause tombe.

GIROUARD J.—The whole difficulty, as I understand it, arises from a misconception of the true nature of the contract of sale agreed to by the parties, although I believe the case is a very plain one. The original bills of lading were issued in favour of the appellant, who did nothing to deprive him of the rights he acquired under the same and the agreement; that is the whole case. He should succeed.

The contract of sale was perfect and binding by their mere consent as held by the courts below, although the thing sold was not delivered; arts. 1025, 1472, C.C.; but it was subject to a suspensive condition or condition precedent that the property and its legal possession were not to pass till the price was paid; arts. 1087, 1473, 1475, C.C.; and that was the reason why all the railway bills were issued consigned to the appellant, who also appeared as the shipper. Thus both parties had their respective rights secured, the purchaser by getting manual possession of the bills of lading, and the vendor by announcing to

(1) [1892] A.C. 201.

the world that the property was not to pass without his order. Neither could sell or pledge without the consent of the other as long as the contract was in force. This is found by the two courts below and proved beyond doubt, in my opinion.

The appellant alleges in his declaration that he "agreed to sell," etc. As I understand the meaning of these words they are synonymous to "did sell," for a sale is not possible without an agreement; it is a contract. All the judges seem to have thus considered the transaction. It is suggested that as plaintiff admits in his affidavit for judgment by default against Marsan & Brosseau that they bought from him (*achetaient de moi*) the hay in question, it was a simple and ordinary sale, and not one suspended by a condition precendent. But this is not the full statement of the plaintiff, for he commences his affidavit by declaring *"Les faits relatés dans la déclaration sont vrais."* The declaration fully sets up the suspensive condition, and when a few lines lower down he says that Marsan & Brosseau bought the hay, he evidently meant and said that they did so in the manner and form alleged in his declaration.

He alleges in his declaration:

> That the said bills of lading for the said hay were forwarded to the said defendants Marsan and Brosseau as evidence to them of each of the said shipments, but the said bills were not indorsed by the said plaintiff and the said plaintiff retained, until paid and settled for, the ownership and proprietorship of the said hay as represented by the said bills of lading.

This appeal involves no difficult legal question; the law applicable to a case like the present one has been laid down in very clear terms by this court.

First, we have the decision rendered in 1883 in

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Forristal v. *McDonald*(1), where the plaintiff had assigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments, and he, without making such payments, had sold the oil to the defendants for value. The court held that the plaintiff, having retained the property in the oil and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchaser the price of the oil.

In a more recent case of *Banque d'Hochelaga* v. *Waterous Engine Works Co.*(2), in 1897, this court held that a sale, made subject to a suspensive condition that the property should not pass until the price be paid, is valid, and that no property passes till the payment is made. This court, by a majority judgment confirming the Court of Appeal, went so far as to hold that in such a case the thing sold, in that instance machinery incorporated with an immoveable, can be claimed by the vendor even against an hypothecary creditor in good faith and for value, although the sale had not been recorded in any public office, or published anywhere, and the incorporation had been done with the consent of the vendor or owner of the machinery. The present case is not similar except as to the effect of a suspensive condition. Chief Justice Strong apparently speaking for the court said, at page 413:

> The contract of sale may by English law be modified in any way the parties may agree, and in particular it is open to them to suspend the operation of the general effect of the contract in respect of the vesting of the property in the vendee, and to provide that it shall not pass until the price is fully paid. It has, however, been assumed, and I accept it as a settled point in the case, that the law of the province of Quebec is to furnish the rule of decision in the present case. No proof of the law of Ontario was made and the court had a right, therefore, to assume that it

(1) 9 Can. S.C.R. 12. (2) 27 Can. S.C.R. 406.

was identical with the law of Quebec upon the point involved, as indeed it is. Then it cannot for a moment be pretended that there was anything illegal in this stipulation that the vendor should retain the property. Mr. Justice Würtele fully explains the principles of the French law on this head, and the authorities he refers to and the extracts he has given from Laurent and Aubry & Rau, beyond all question state the law correctly. To these authorities, that of many other authors might be added.

The judges of the two courts below have not referred to the above cases, especially the latter one. As it is a Quebec case they thought that the rule was hardly open to any doubt or discussion. Mr. Justice Pagnuelo, the trial judge, says so in express terms and finds only the facts to be somewhat complicated. They all agree that under the railway bills no property and no legal possession passed to Marsan, Brosseau or any one else.

They only differ upon the appreciation of the facts. Both courts have found, as a matter of fact, that 27 cars of the hay had been pledged to the bank by Marsan & Brosseau under the railway bills of lading, and as to these cars both courts condemned the bank to pay the value of the hay. But as to the balance of the hay contained in the 26 cars, the Court of Appeal would not adopt the conclusion of the trial judge, as, in their opinion, the plaintiff had not sufficiently proved that the hay in these 26 cars had been pledged to the bank, under the railway bills of lading, although no comment is made upon the evidence. As to those cars, simply remarks Chief Justice Lacoste, plaintiff's remedy is against the railway companies.

There is no doubt that as to the 27 cars, ocean bills of lading were obtained and delivered to the bank after the advances had been made on the railway bills.

Mr. King, the manager of the bank, admits this in his first deposition. He was, however, "a very reluctant witness," observes Mr. Justice Pagnuelo. The

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learned judge, in a long opinion where he fully reviews the evidence, finds that all the fifty-three cars had been pledged to the bank under the original railway bills. I am inclined to agree with him in this finding of fact. The bank knew that there were original railway bills for the 26 cars as well as for all the other cars, which had all been held by the bank and were given up only to obtain ocean bills. As much is also admitted by Mr. King:

Q.—Will you please look at theso shipping bills. I see the name of the consignee there is the plaintiff, not Marsan & Brosseau; how could Marsan & Brosseau negotiate these bills of lading with you without indorsement?

A.—I understand they were in the habit of negotiating them in that way continuously: I was informed so at the time, and I was informed by the agent of the Central Vermont Railway, that he would issue through bills of lading for any documents of that kind.

Q.—Would not the other shipping bills be made to the same order, that is the ocean shipping bills?

A.—No, the ocean shipping bills would be to Marsan & Brosseau.

By the court:

Q.—To Marsan & Brosseau?

A.—Yes.

By plaintiff's counsel:

Q.—And you were having these ocean bills made to replace these?

A.—Yes, because Marsan & Brosseau had stopped business at that time, but in the ordinary course of business, Messrs. Marsan & Brosseau would take those from me on a bailee receipt, and get them exchanged for the ocean bills, payable to their order, which I would negotiate in the regular way.

Q.—Were you negotiating the transfer of these shipping bills for ocean bills yourself?

A.—After Messrs. Marsan & Brosseau stopped business, yes—not before.

Q.—And you were asking the railway companies to make the ocean bills in the name of Marsan & Brosseau, for bills of lading that were consigned to other parties?

A.—No, not after they stopped business.

By the court:

Q.—Before they stopped business?

A.—Before they stopped business the exchange was made by Marsan & Brosseau, not by the bank.

By plaintiff's counsel:

Q.—But at the time the exchange was made you had advanced upon the bills of lading?

A.—Yes.

Q.—You had made your advances upon the bills of lading before the bills of lading were exchanged for ocean bills?

A.—Yes.

Q.—And it was Marsan & Brosseau who were obtaining this transfer after the bills of lading had been negotiated with you, by advances made by you?

A.—Yes.

Q.—How was that?

A.—They would arrange for shipment of the stuff from Boston or New York, or wherever it might be, and I would hand them such receipts as these in trust.

Q.—Who to?

A.—To Marsan & Brosseau.

Q.—You would return the bills of lading in trust to Marsan & Brosseau.

A.—Yes, on what we call a bailee receipt, and Mr. Marsan or his agent or whoever it might be, would take them to the railway office and bring back to me the ocean bills of lading payable to their order which would be attached and dispatched to the parties to whom they might be selling the stuff on the other side.

This language is plain enough. Mr. King has not corrected it in any way, although he was examined twice at great length, first in January, 1903, when he appeared as the first witness for the plaintiff, and the second time a year after when he was the last witness for the bank. The fact that he was the general manager of the bank and the very man who had personally attended to the banking operations of Marsan & Brosseau is of considerable importance. Under arts. 315 and 316 of the Code of Civil Procedure, it is the testimony of the party. The trial judge relies upon that given in the first place when the mind of the witness, interested as he was, was free from the influ-

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ence of the developments and discoveries of a long *enquête* and trial, and I cannot for a moment suppose that an appellate court is in just as good a position as he was to appreciate that testimony. It is indeed very remarkable that it agrees entirely with the issue as then joined between the parties, as we will see in a few moments.

It is said that witness Sutton, the bookkeeper of Marsan & Brosseau, throws a different light upon the transactions. As I read his long deposition he does not; and, moreover, he cannot speak with accuracy on this matter. He speaks from the books of Marsan & Brosseau, kept by him nine years before, which are not complete, the car book and others having been accidentally burnt, and even if complete cannot make evidence against the plaintiff. He declares several times that he had nothing to do with the banking business of the firm, nor the papers necessary to carry it out; all this was always attended to by Mr. Wilfrid Marsan personally; he is sure he never spoke once to Mr. King about it. He says:

> Je n'ai jamais eu de pourparlers avec Monsieur King pour le compte de la banque. * * *
>
> Q.—Est-ce que vous ne prépariez pas les papiers pour la banque?
>
> R.—C'est lui même, Marsan, qui voyait à cela. Il avait cela sous sa charge.

And he repeats several times:

> Ce n'est pas moi qui faisais les affaires de banque. C'est Monsieur Marsan qui escomptait cela et puis il m'apportait le resultat.

He knows so little of the transactions with the bank and how they were conducted that he never mentions the "bailee receipts" referred to by Mr. King. It is not upon testimony of this kind that the evidence of the manager of the bank can be ignored. The trial

judge did not do so, and I think no appellate court ought to disturb his finding. This finding is so true that, before the bank got the last ocean bills of lading through W. P. Holland & Co., its agents, after the insolvency of Marsan & Brosseau, it granted to the railway company on the cars on which the hay was being carried, a letter of guarantee that the railway company will not suffer by reason of issuing ocean or through bills without the indorsement by the shippers of the railway bills.

The railway companies evidently thought that Marsan & Brosseau, as in previous years, could obtain ocean bills without the order of Gosselin, but that the bank could not after their insolvency. They all could do so validly, by making ocean bills consigned to Gosselin. This might not have been practical, but we have nothing to do with inconveniences. The clear way to get over this difficulty was to disinterest Gosselin and pay what was due to him. By issuing these ocean bills to the order of Marsan & Brosseau or W. P. Holland & Co., the railway companies misunderstood their obligation or duty; possibly they may be responsible to Gosselin for the loss, as suggested by the Court of Appeal, but their mistake did not give a title to the bank, because it knew that these ocean bills were substitutes for the railway bills issued in favour of appellant; in fact this substitution was done at the request of the bank. The Court of Appeal so held as to 27 cars and I cannot see how, on the evidence, a distinction can be made as to the other cars.

In neither the declaration nor the pleas is a word said of the ocean bills of lading. Issues are raised between the parties as to the original railway bills only, and the bank claims as holder of the said bills

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and not as holder of ocean bills. When examined *sur faits et articles,* a short time after joining the issue before the trial, the bank was asked:

Q.—28. N'est-il pas vrai que vous avez vendu le foin représenté par les connaissements (bills of lading) dont il est question en cette action et que vous en avez perçu le produit?

R.—Oui.

This answer, which has been overlooked by the court of appeal, according to the express enactments of our codes, constitutes what is termed a judicial admission, *un aveu judiciare,* and the bank cannot afterwards be allowed to contradict it, unless error or mistake be alleged and proved. Arts. 364 to 363, C.P.Q.; art. 1245, C.C.

I, therefore, agree with Mr. Justice Pagnuelo that the bank should pay the price of the 53 cars, namely, the sum of $4,934.44, less the sum of $125, admitted by both parties to be a final dividend received by Gosselin out of the insolvent estate of Marsan & Brosseau, the whole with interest and costs in all the courts.

I have said nothing of six cars which, as argued by the appellant, with 20 cars, were deducted by the Court of Appeal, because it is conceded that, as to these six cars, no ocean bills were issued at the time any advance was made, and therefore the bank must have obtained the hay upon the original railway bills.

I might content myself with these few remarks, but as the case is one of considerable commercial importance I will endeavour to review all the objections presented at the argument.

It is contended by the bank that the sale was not one for cash, and that consequently under art. 1888, C.C. the vendor could not proceed by revendication, and his action must be dismissed *in toto.* I am not prepared to concede that it was a credit sale.

True, Marsan & Brosseau subsequently sent Gosselin drafts for the full amount of the purchase money to help him to pay the farmers who had supplied the hay; not one draft was met at maturity and many were returned when they assigned a few days after. This course was adopted only to accommodate Gosselin and not to change the character of the sale. The paper was not accepted in payment or settlement of the price. The bills of lading remain in the same position as before; there was no indorsement, no order of delivery, no receipt or discharge, and Gosselin had past experience for not doing so as Marsan & Brosseau were his debtors for over $3,000 upon transactions of the preceding year, which were all closed by railway bills consigned to them. And finally, how can it be said that a sale which is suspended and can take effect only when the price is paid is not a cash sale in law?

Perhaps it was, in fact, a credit sale, but a credit sale is capable of a suspensive condition and it is especially to protect the vendor in such a case that the condition stipulated by him becomes effective and beneficial.

But suppose it was a credit sale in law and in fact, and granting that a writ of revendication could not be resorted to, can we not maintain the main prayer of the declaration that the sale be rescinded and that a personal condemnation be made for the payment of the price against both the parties who appropriated and converted to their own use and benefit both the railway bills and the proceeds of the hay? The revendication was a mere accessory process in the cause which might succeed or not, and finally was not granted by the courts below, as nothing was found to seize, but its defeat cannot be, and in the opinion of

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the two courts below was not, fatal to the demand, which was entirely independent of the right to revendicate. They maintained the conclusions of appellant's demand, which were as follows:

> That by the judgment to be rendered herein the said agreement or promise to sell said hay to the said defendants Marsan & Brousseau be resiliated and cancelled and the said hay declared to be the property of and returned to the said plaintiff and the said bills of lading as representing the same, and the said defendants, Marsan & Brousseau, and the said other defendants the Ontario Bank, ordered to return to said plaintiff the said above mentioned hay and the said bills of lading as representing the same within such delay as this honourable court shall fix, and in default of which that the said defendants may be jointly and severally adjudged and condemned to pay and satisfy to the said plaintiff the said sum of five thousand two hundred and forty-four dollars and fifty cents with interest.

In the face of arts. 1065, 1087, 1473, 1497, and 1543, of the Civil Code, it cannot be seriously contended that they have erred in doing so. Chief Justice Lacoste correctly, it seems to me, lays down the true rule of law in these few words:

> C'est en vertu d'une règle commune aux contrats en général reproduite dans l'article 1065 que Gosselin exerce son droit. "Dans le cas de contravention du débiteur (dit cet article) le créancier peut demander la résiliation du contract d'ou naît l'obligation!" Ici l'obligation de payer le prix n'a pas été remplie, le vendeur peut demander la résolution du contrat de vente. Cette régle est confirmée par l'article 1545 C.C. au titre de la vente. S'il n'en était pas ainsi, le vendeur serait dans une situation absurde. Marsan & Brousseau étant en faillite, l'article 1497 le dispensait d'effectuer la livraison et il serait toujours resté en possession du foin qui n'aurait pas été sa propriété. Telle n'a pu être la volonté du législateur.

The respondent insisted strongly upon arts. 1488, 1489 and 2268, of the Civil Code, as permitting a pledge consented to as security for advances made or to be made under the Quebec statute passed in 1879, 42 & 45 Vict. ch. 19. But there are in those articles, as

well as in that statute, several conditions required for the validity of the sale or pledge. It is not sufficient that the goods be obtained from "a trader dealing in similar articles." The pledgee must be in possession (arts. 1966, 1970 C.C.) and in good faith, and finally, under art. 1966 of the Civil Code, no pledge can take place except "with the owner's consent," expressed or implied. The French version, having a comma before the word "with," shews plainly that these words apply to the whole article. This disposes of the proposition that the bank acquired under ocean bills issued in favour of Marsan & Brosseau, and indorsed by them to the bank. They were not owners.

The bank cannot claim to have acted in good faith in this matter in a legal sense at least. It was informed from the beginning and knew, and the whole world was informed by the appellant in the railway bills, that he remained the proprietor and in legal possession of the hay represented by the railway bills. If any one was willing to make advances on the security of these bills, knowing that he was not dealing with the legal possessor and owner, he should have made inquiry and ascertained the facts, and either obtained the consent of the consignee or at least provided for the price agreed to be paid to Gosselin; and if he failed to do so, it was at his own risk and peril. Whether the bills of lading are to be considered to be negotiable or not, a delivery order from the consignee or his receipt for the price, or at least a tender of the same, was necessary to relieve and free the bills of the condition which was attached to the same. I think the regular course would have been an indorsement by him, for bills of lading, whether payable to order or not, are negotiable by the law mer-

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chant, subject to certain limitations, as provided for in arts. 1745, 2421, C.C., and 52 Vict. ch. 30 (D.).

The appellant relied upon the Bank Act of 1890 in force at the time these transactions took place. He holds that this Act amends the common law, the Civil Code, as far as banks are concerned, and I agree with him in that contention. Section 64 so declares in express terms. Then comes section 73, which enacts that a bill of lading acquired by a bank

> shall vest in the bank, from the day of the acquisition thereof, all the right and title of the previous holder or owner thereof.

Marsan & Brosseau had no right or title whatever except on the payment of the price agreed to and, therefore, had nothing to transfer except on the fulfilment of that condition.

The trial judge has dealt at great length with the alleged money advances made by the bank for the bills of lading. He expresses the view that no extemporaneous advances were made as required by the Bank Act, sec. 75. The evidence shews that Marsan & Brosseau had been insolvent for many months previously, and that when they failed they had liabilities exceeding $100,000 and a very small estate; it paid only five cents on the dollar. When they got plaintiff's hay in May, 1894, they had their bank account largely overdrawn all the time, to which new overdrafts were allowed when plaintiff's railway bills came in. It may be that these overdrafts do not meet the requirements of sec. 75 of the Bank Act (changed since) as to contemporaneous negotiation. However, I do not propose to pronounce upon this branch of the case. It involves the examination of a complicated and difficult account mixed up with other accounts, and I must confess that I do not feel equal to

the task, especially as there is no necessity for the undertaking.

Before closing I wish to refer specially to a recent decision of the House of Lords, *Farquharson Bros. & Co.* v. *King & Co.*(1). The appellants, who, according to the head-note,

were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk, under an assumed name, fraudulently sold timber of the appellants to the respondents, who knew nothing of the appellants or of the clerk under his real name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders to the respondents:

Held, that the appellants, not having held out the clerk to the respondents as their agent to sell to the respondents, were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority himself, could not give the respondents any title; and that the appellants were entitled to recover from the respondents the value of the timber.

Referring to the language that His Lordship had used in a previous case, with reference to the maxim invoked also by the present respondents, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who has enabled such third person to commit the fraud, the Lord Chancellor said, at page 332:

The language of the learned judge (Savage C.J.) quoted by me is this: Speaking of a *bonâ fide* purchaser, who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." Those words "who by his indiscretion" appear not to have made much impression upon those who were

(1) [1902] A.C. 325.

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commenting upon this matter. What indiscretion did the appellants here commit? They entrusted their clerk with the delivery orders. It is said that in some exceptional cases he was allowed to make a contract; but what has that got to do with it? No one knew that outside the firm themselves; and you might just as well say in the case of a shopman in a furniture broker's shop, that because he is there, because he habitually delivers goods to the orders which his master receives, that gives him to all the world the power of giving a title if he steals his master's tables and chairs and delivers them to somebody else.

The present case is much stronger. Here the public is warned that the apparent possessor of the bills is not owner or real holder. The plaintiff, who is publicly and privately the true and only owner and holder in legal possession, has done nothing to enable Marsan & Brosseau or any one else to dispose of his property in fraud of his rights. He is not guilty of any indiscretion or imprudence. He has given no authority, even in a limited sense, to sell or pledge. He remained within the limits of his rights. On the contrary the bank, knowingly or innocently it matters very little which, illegally in any event, trespassed upon them. The bank knew that all the railway bills were issued in favour of the appellant; it had received every one of them from Marsan & Brosseau. It knew that they never had the legal possession of and had no title whatever in the hay in question and, therefore, had nothing to transfer except on the fulfilment of the condition as to the payment of the price. Unfortunately it relied upon the wrong willingness of the railway companies to issue ocean bills, without the order or consent of the true owner and possessor, and without providing for the payment of what was due to him under the contract. It cannot be allowed to invoke ignorance of law to advance good faith and avoid responsibility; it got the proceeds of the hay and must

pay the price agreed to, although the railway companies may also be liable. Banks when dealing with this kind of security must ascertain that they are contracting with the owner or holder or his agent or assignee before they can get a title. Bills of lading are not like bills of exchange and promissory notes, where actual honesty goes very far to protect the holder. But if a bill or note payable to the order of a payee be taken by a bank or any one else without the indorsement of the payee, or with a forged indorsement, honesty or honest blundering will not be sufficient to give a title to the bank. Likewise in cases of restrictive indorsements which prohibit or merely restrict the transfer of the ownership of a bill of exchange, the holder is bound to notice the restriction and comply with their requirements; his honesty will not save him from the consequences of his failure in this respect. See sec. 35 of the Bills of Exchange Act, 1890, which reproduces the common law. Surely the holder of a bill of lading cannot be in a better position.

To sum up:

1. The effect of the sale of the hay was suspended till the payment of the price.

2. The price never having been paid, appellant was entitled to a resiliation of the sale and to demand from the purchasers and the bank the hay in question, and in default the price agreed to.

3. The manual possession by Marsan & Brosseau or the bank of the bills of lading consigned to the vendor himself and not indorsed by him did not vest them with the legal possession, nor the title to the hay which remained in the appellant.

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4. The bank cannot be considered in law to be in good faith.

5. Even if in good faith, the bank did not obtain legal possession or acquire from the true owner or holder of the hay, and no pledge is valid under the Code or the Bank Act without possession by the pledgee and consent of the owner of the thing pledged.

6. The bank only acquired the rights of Marsan & Brosseau subject to the same suspensive condition as to the payment of the price. If the hay realized more than this price the bank may keep the excess; if less it must, however, pay the full price as Marsan & Brosseau were bound to do.

7. The right of the appellant to resiliation of the sale, and a personal condemnation against both Marsan & Brosseau and the bank, exist notwithstanding the failure of revendication.

For these reasons I am of opinion that the appeal of the appellant should be allowed and the judgment of the Superior Court restored, less a sum of $125, with costs in all the courts and that the cross-appeal of the respondent be dismissed with costs. However, I am alone of that opinion with my brother Idington.

We agree that the sale was conditional and that the judgment of the court of appeal should be confirmed, the Chief Justice dissenting. Mr. Justice Davies, moreover, is for allowing the principal appeal as to six cars. As this conclusion is better than that of the court of appeal and meets my views in part, and without withdrawing anything from the above opinion, Justice Idington and I accept the result arrived at by Mr. Justice Davies.

The cross-appeal is therefore dismissed with costs

and the principal appeal of appellant is allowed in part, and the judgment of the Court of Appeal is modified by adding the price of the six cars, namely, $562.33, less a sum of $125, with interest and costs in all the courts.

DAVIES J.—In this case so far as the 27 cars of hay are concerned on which the bank made the advances to Marsan & Brosseau on the inland bills of lading deliverable to Gosselin and not indorsed by him, I am of the opinion that the judgment of the Superior Court, confirmed by the Court of Appeal, was right.

On this branch of the case I do not desire to add a word to what has been said by the courts below and by my brother Girouard in his judgment, which I have had the privilege of reading.

With respect to the 20 car loads of hay as to which the Court of King's Bench reversed the judgment of the Superior Court and held the bank not to be liable to Gosselin, I concur in the judgment of the Court of King's Bench.

The question with regard to these 20 cars is whether the advances made by the bank to Marsan & Brosseau were made originally upon the inland bills of lading, which were deliverable to the plaintiff Gosselin, or were made *bonâ fide* and in good faith in the ordinary course of business to Marsan & Brosseau upon ocean bills of lading deliverable to themselves and indorsed to the bank by them. I am of the opinion that the advances were made in good faith upon the ocean bills of lading, as found by the court of appeal, and that, therefore, the bank is not liable, under the Code, for these 20 cars to the plaintiff in this action.

The question is largely, if not entirely, one of fact,

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and while I admit that the evidence of King, the bank manager, when first given would justify the conclusion that the bank might have made the advances originally on inland bills of lading deliverable to Gosselin, his subsequent explanations when he was recalled, after Sutton, the bookkeeper of Marsan & Brosseau, had been examined, read together with Sutton's positive testimony, place the matter beyond reasonable doubt.

As I have the misfortune to differ on this one point of fact only from by brother Girouard, I cite the evidence on which I rely as follows :

The witness Sutton, the accountant of Marsan & Brosseau, speaking of the 26 cars of hay, says, at page 72

> There were 20 cars discounted by drafts attached to through bills of lading.

and again at pages 187-188:

> Q.—At what date were these cars transferred to the bank, the first 26 or 27 which you have traced in p. 26?
>
> A.—The first six cars in p. 26 were transferred to the bank on the 21st of May as collateral security to my knowledge; it was upon them that there were advances; that is to say they were given as collateral security and the 20 other cars were discounted on the 17th of May according to our books.
>
> Q.—Why?
>
> A.—For discount. There were through bills of lading and drafts on the bank and the bank advanced us upon them. It advanced the amount specified in the margin.
>
> Q.—Were any cars mentioned in Exhibit p. 26 transferred to the bank in the form of shipping receipts inland bills?
>
> A.—No.
>
> Q.—None at all?
>
> A.—None at all.
>
> Q.—Not one?
>
> A.—No; there were ocean bills of lading made for that day on which we transferred to the bank.
>
> Q.—Were they all in the name of Marsan & Brousseau?
>
> A.—The through bills of lading.

Q.—Is it mentioned in Exhibit p. 26?

A.—I believe so; they were always made in the name of Marsan & Brousseau.

Q.—The entries in your books indicate that all your cars enumerated here were transferred in the form of ocean bills of lading obtained from the agents of Marsan & Brousseau?

A.—Obtained from the railway agents.

Q.—Marsan & Brousseau were exchanging the shipping receipts for ocean bills?

A.—Yes.

Q.—Have you the date of the discounts?

A.—Yes, it is on these 26 cars.

And again, at page 190, the same witness Sutton repeats emphatically that there were 27 cars in the form of inland bills, and 20 cars and 6 cars (26 in all) in the form of ocean bills of lading.

The evidence of King is as follows:

Q.—Now, will you take communication of the Exhibit D 2 now filed, and state what that is?

A.—Mr. Sutton in his evidence stated that some twenty cars had been transferred to the bank which I had been unable to identify when first examined, but on the numbers given by Mr. Sutton, who stated that these cars had been exchanged by the firm of Marsan & Brousseau for ocean bills of lading at their order, and lodged with the bank attached to sterling drafts on London, then I was able to locate them by the sterling drafts and the ocean bills of lading; and I find that these several sterling drafts were discounted in the regular way for the firm of Marsan & Brousseau and put to their credit on the seventeenth of May $2,763.18, and the other on the eighteenth day of May, $3,227.71. These deposit slips correspond with entries in Exhibit p. 24. I file the deposit slips as D 4 and D 5.

Q.—As in your possession originally, when you were first examined these drafts afforded no information as to the identity of the hay?

A.—No, there was no possibility of my telling whose draft it was.

Q.—This was just an ordinary transaction of discount in the regular way of business?

A.—Yes, the ordinary purchase of a sterling draft with the document attached, and it went to the firm's credit in the usual way of business.

On this evidence the Court of Appeal found as a fact, and I fully concur with them, that these 26 cars

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of hay came to the bank in the form of ocean bills of lading, deliverable to Marsan & Brosseau, and that the advances were made by the bank on these ocean bills in good faith, and so far as 20 cars are concerned that the advances were contemporaneous with the receipt of the bills.

The only point on which I differ from the court of appeal is with respect to the advances made upon the last six cars of hay on the 21st May, and just before Marsan & Brosseau assigned.

In fact it cannot properly be said to be a difference of opinion, but a finding on a question of fact apparently overlooked by the court of appeal.

The trial judge had found that the advances made upon these 6 cars were not contemporaneous advances with the handing over of the bill of lading, but were really "advances to pay a previous debt due by Marsan & Brosseau to the bank."

If so it would be in violation of the 75th section of the Bank Act of 1890, which was in force at the time the transaction occurred, and the plaintiff could recover for the value of this hay.

The court of appeal appear, as I have said, to have overlooked the point. I followed the argument very closely and also the additional memoranda or supplementary factums which counsel on both sides were asked to give on the special point, and I reached the conclusion after carefully going over the extracts from the bank books produced as exhibits and the evidence, that so far as these 6 cars were concerned 66 tons and 312 lbs. of hay of a value of $8.50 per ton amounting to $562.33, the appeal must be allowed, and that amount added to the judgment in plaintiff's favour, because the debt or advance of the bank was not "negotiated or contracted at the time of the acqui-

sition by the bank" of the bill of lading on which it was making the advances, as provided by the 75th section of the Bank Act of 1890.

Then there was an amount of $125 recovered by the plaintiff Gosselin from the estate of Marsan & Brosseau, which, it was agreed at the argument, should be deducted from the amount awarded him as against the bank.

I would, therefore, allow the appeal for the $562.33 and costs, and deduct from the amount of the judgment so increased the said sum of $125.00.

NESBITT J.—I concur with the judgment of the Court of King's Bench.

IDINGTON J.—It was attempted to rest the appellant's claim on the provisions of the Civil Code, and especially upon arts. 1489 and 2268, coupled with the enabling provisions of the Bank Act.

In the light of the case of *The City Bank* v. *Barrow*(1), which turned upon the same and other provisions, I do not think the Ontario Bank can rely here upon such and other provisions of the Code as may be read with those specially referred to.

It is said *City Bank* v. *Barrow*(1) no longer applies because of the amendment by 42 & 43 Vict. ch. 18, sec. 1, which reads:

> Articles 1488, 1489 and 2268 of the Civil Code apply to the contract of pledge.

But what is the "contract of pledge?"

Art. 1966 of the Code says:

> Pledge is a contract by which a thing is placed in the hands of a creditor, or being already in his possession is retained by him with the owner's consent in security for his debt.

(1) 5 App. Cas. 664.

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The owner cannot be said, on the facts here, to have pledged thus the goods in question.

Art. 1489, C.C., will not operate so as to constitute Marsan the owner.

Nor will this article apply in any way inasmuch as it is intended to have effect only in the cases of goods lost or stolen.

See *Canada Paper Co.* v. *The British American Land Co.*(1), where it was held in appeal by the Court of Queen's Bench for Quebec to have such limited meaning.

It is said by Beauchamp, in his notes on art. 1488, C.C., that neither that article nor art. 2268 C.C., can have the effect of enabling a valid sale to be made and title acquired by the purchaser of stolen goods.

Does art. 1488 C.C., apply to this as a commercial matter?

It is impossible here to give the bank a title unless within the provisions of the Bank Act.

And I think, therefore, that art. 1488 C.C., must be read, whatever it means, as impliedly excepting such transactions as get vitality only by and through the Bank Act.

It must be confined to those cases where complete operation can be had by virtue of the local law of Quebec quite independently of reliance on anything beyond.

Can what transpired give the bank any title under the Bank Act?

The bank is limited by sec. 64 of that Act to such buying and taking of pledge as authorized by the Act.

Section 73 enables a bank to acquire:

> All the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise

(1) 5 Legal News 310.

were received and acquired by the bank if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise.

Under this section the bank can only receive such title as the owner or person from whom it received the goods.

In this case the bank did not acquire any title from the appellant, Gosselin, who held the shipping receipts.

The unauthorized act of Marsan & Brosseau in procuring ocean bills of lading to be issued in their names and in fraud of Gosselin did not transfer any title to them, and, therefore, their indorsement of such ocean bills of lading to the bank did not pass any title to the bank.

Marsan & Brosseau were not the agents of Gosselin for the purpose of having issued any such bills of lading to themselves.

All they had any right to do was possibly to see that the ocean bills of lading were issued to Gosselin in exchange for the shipping receipts which were in his name.

The interpretation of the expression "agent" by sub-sec. 3 of sec. 73 does not in any way extend such limited authority as to give any force or effect to his fraud.

Marsan & Brosseau were not intrusted with the possession of the goods, nor were the goods consigned to them, nor could the possession of the shipping receipts in Gosselin's name be said to be proof of the possession or control of the goods or authorizing, or purporting to authorize, either by indorsement or by delivery of them, to transfer or receive the goods thereby represented.

If the possession of such a shipping receipt could

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enable one entrusted with it, only for a specified purpose, to pledge the goods it covered, no shipper would be safe in doing anything by an agent.

If authority be needed, for elementary propositions such as most of these are, the cases of *Cole* v. *North-Western Bank*, [1875](1); and *Johnson* v. *Credit Lyonnais Co.*(2); upon the Factor's Act, which rests upon and gives expression to the same principle as the provisions of the Bank Act, are ample.

The Court of King's Bench in the judgment appealed from recognize that Marsan & Brosseau were not brokers, factors or commission merchants within the provisions of the Civil Code relied upon.

Obviously this is so, and even if they were they were not employed by Gosselin as such and, therefore, derived no authority from such provisions.

The court recognizes not only this, but also that the documents in question did not give authority to assign the goods or receive them.

I am unable to see how giving such documents into the hands of any one could deceive a third party or lead him to believe that the agent receiving them got the right of contracting.

No evidence is pointed out in support of this, beyond the document, and the evidence of Gosselin is all the other way.

The evidence of Mr. King as he first gave it clearly supports Gosselin and, when his amended statement is fully considered, it reduces the question to this—that he had no knowledge but the presentation of the ocean bills of lading in Marsan & Brosseau's names.

That being the result of fraud could give the bank no better title than Marsan & Brosseau had.

(1) L.R. 10 C.P. 354. (2) 3 C.P.D. 32.

Mr. King gives no evidence that he relied on a single thing that Gosselin had done to mislead him.

The former dealings between Gosselin and Marsan & Brosseau, as independent seller and buyers respectively, could not furnish such evidence.

This is not the case of agents who had long, or in a single case, acted for a principal and had been held out by him as such, where the persons dealing through such agents might claim to throw the loss on the principal.

I think the appeal should be allowed with costs and the judgment of the trial judge restored.

Since writing the foregoing I have had the pleasure of reading the judgment of my brother Girouard and what he points out as to the evidence, the procedure and form of action, confirms my previous impressions.

The formal judgment of the majority of the court was pronounced, as follows, by His Lordship Mr. Justice Girouard:

The cross-appeal of the bank is dismissed with costs, the Chief Justice dissenting, and the principal appeal of Gosselin is allowed in part with costs, the Chief Justice and Nesbitt J. dissenting, by adding $562.33 to the amount of the judgment of the Court of Appeal, less $125, and the bank is, therefore, condemned to pay to appellant $3,104.43 with interest

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thereon from the 7th June, 1894, and costs in all the courts.

Appeal allowed, in part, with costs; cross-appeal dismissed with costs.

Solicitor for the appellant: *L. A. Gosselin.*

Solicitors for the respondent: *Campbell, Meredith, Macpherson & Hague.*