CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

HENRY ARCHBALD *et al., ès qual.* (PLAINTIFFS) ..... } APPELLANTS ; 1895

AND *Feb. 26,28.

M. NOLAN DELISLE *et al.* (DEFENDANTS)..... } RESPONDENTS. *June 26.

JOEL C. BAKER *et al.* (DEFENDANTS IN WARRANTY) ..... } APPELLANTS ;

AND

M. NOLAN DELISLE *et al.* (PLAINTIFFS IN WARRANTY). ..... } RESPONDENTS.

WILLIAM MOWAT *et al.* (INTERVENANTS) ..... } APPELLANTS ;

AND

M. NOLAN DELISLE *et al.* (CONTESTANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Costs, appeal for, when it lies—Action in warranty—Proceedings taken by warrantee before judgment on principal demand—Joint speculation—Partnership or ownership par indivis.

Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle,

*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau King and Sedgewick JJ.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M.N.D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J.C.B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses.

Held, affirming the judgment of the Superior Court, and of the Superior Court sitting in review, that the facts did not establish

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them.

Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made.

APPEAL from the judgment of the Superior Court for Lower Canada, District of Montreal (in Review) (composed of Ouimet, Davidson and deLorimier JJ.) affirming the judgment of Jetté J. in the Superior Court.

In 1864 the late William Workman and A. M. deLisle of Montreal, entered into a joint adventure under the name of the Workman and deLisle syndicate, on several occasions purchasing considerable real estate for purposes of speculation, the profits being divided equally from time to time as made. The business was managed by William Workman up to the time of his death in February, 1878.

Upon the death of William Workman, A. M. deLisle and the executors of William Workman (Joel C. Baker, Robert Moat and John Moat) continued the business of the syndicate.

On the 17th February, 1880, A. M. deLisle died, and M. Nolan deLisle *et al.* (the respondents) are his legal representatives. The business of the syndicate still continued to be managed by the representatives of the original parties.

The executors of the late William Workman, finding it necessary to realize the interest of their testator in the joint property in order to settle certain bequests made by the will, offered such interest for sale by public auction in March, 1882, and it was purchased for the greatest part by Thomas Workman, brother of William Workman. The transfer to Thomas Workman was executed on the 24th July, 1882, but not registered, to avoid difficulties as to titles, and a *contre*

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

lettre of that date, executed by Thomas Workman, Robert Moat, as tutor to his son William (a grand-nephew of Thomas Workman and a legatee under the will of William Workman) and Mrs. J. C. Baker (a daughter of William Workman and also a legatee under his will), set forth that the said purchase was made and paid for to the extent of five elevenths in favour of William Moat, and to a like extent in favour of Mrs. Baker, leaving Thomas Workman interested to the extent of one eleventh.

The William Workman estate was still left with large undivided interests in *bailleur de fonds* and mortgage claims.

The business which represented the interest of the estate William Workman and the deLisles was then known as the Syndicate Workman and deLisle, and that represented by the interest between Thomas Workman and the deLisles was known for the purpose of distinction and had separate books under the name of deLisle and Workman syndicate.

In 1881 the deLisle and Workman syndicate engaged a man called Cotté as book-keeper. He kept the books of the William Workman private estate and the books of the Syndicate Workman and deLisle, and the Syndicate deLisle and Workman. The usual course of business was for the representatives of the Workman interest, who for this purpose acted through Mr. J. C. Baker, and the representative of the deLisle interest, who acted through Mr. Nolan deLisle, to look after their respective interests, and for Cotté, from time to time, as profits were made, to deliver to Mr. Nolan deLisle cheques or cash, as the case might be, for the deLisle share, and to deposit with Moat & Co. the bankers of the Workman estate, the cheques and cash for the other share. No power of attorney was given by one to the other. Cotté continued to act as book-

keeper until the 24th May, 1888, when he fled the country on its being discovered that he had in the course of his duties embezzled from all the estates.

In 1889 Thomas Workman died, leaving as executors Henry Archbald, John Murray Smith, and Walter Norton Evans, the appellants in the principal suit under consideration in the present appeal.

This suit was brought by the said executors against the representatives of the late A. M. deLisle to recover the sum of $2,743, part of the defalcations of Cotté, which represented moneys which should have been received by the representatives of Workman and for which the plaintiffs alleged they had a right to make the defendants responsible.

The defendants, besides pleading to the principal action, brought an action in warranty against J. C. Baker *et al.*, the representatives of the William Workman estate, claiming that, in so far as the principal plaintiffs had suffered any loss for which they might have a recourse, such loss had been suffered by the negligence of the William Workman estate represented by Baker in the common office, in not looking after Cotté.

Further, the defendants having asserted in the principal action that the said Thomas Workman was merely a *prête-nom* for others, William Moat and J. C. Baker, as well personally as executor of his wife, in whose interest the late Thomas Workman had purchased the share of the syndicate property, as before mentioned, intervened to ratify and support the proceedings taken by Thomas Workman's executors to the extent of ten elevenths of the sum claimed.

The facts of the case and the nature of the proceedings will be more fully understood from the judgment of Mr. Justice Taschereau hereinafter given.

Geoffrion Q.C. and *Abbott* Q.C. for appellants.

Beïque Q.C. and *Lafleur* for respondents.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

The judgment of the court was delivered by

TASCHEREAU J.—This is a case of a rather complicated nature, and the fact that the voluminous evidence, oral and documentary, submitted to our consideration, is partly taken in reference to another case, not before us upon this appeal, has made the investigation of the evidence adduced more than usually difficult.

The principal action, *Archibald* v. *deLisle*, which I shall consider first, is one by the Thomas Workman estate against the deLisle estate. The plaintiffs, now appellants, are the testamentary executors of the late Thomas Workman. It is necessary, for a proper understanding of my remarks, that I should, *in limine*, state the precise nature of the controversy between the parties.

The plaintiffs, appellants, allege by their declaration:

1. That they are the legal representatives of the late Thomas Workman.

2. That at all the times hereinafter mentioned, the said Thomas Workman, or the plaintiffs as his legal representatives, were interested jointly and in equal shares with the defendants, in certain real estate in the district of Montreal, in a joint adventure which was carried on by them together, and the returns from which were equally divided from time to time between them.

3. That the said Thomas Workman departed this life on the ninth day of October, one thousand eight hundred and eighty-nine.

4. That during all the times and periods hereinafter mentioned one Honoré Cotté was the book-keeper and kept the accounts of the said joint adventure, and received the cash of the said joint account.

5. That whilst acting as such book-keeper the said Cotté received from time to time large sums of money, which he did not credit in the books showing the transactions and receipts made on behalf of the plaintiffs and defendants on such account, but embezzled the same.

6. That heretofore, to wit, on or about the twenty-third day of May, eighteen hundred and eighty-eight, the said Cotté absconded, and that thereupon an inquiry was made into the transactions of the said joint account, whereby it appears that large sums of money had been so embezzled by the said Cotté.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

7. That by agreement between the parties the course of business between them under which the said joint account was conducted, was that all sums of money received by the said Cotté for the said joint account, and available from time to time for division between the said co-adventurers, were deposited in the bank, to the credit of a certain adventure carried on by the representatives of the late William Workman and the defendants and known as the Workman and deLisle syndicate, and thereupon cheques were drawn for the amounts to which the said Thomas Workman, or the plaintiffs or defendants, were entitled according to their share in the said amounts so deposited, or so received by the said Cotté for the purposes of the said joint account, and available for division, and the same were charged in the books of the said joint account as moneys paid to the respective co-adventurers.

8. That the cheques for the amounts to which the said Thomas Workman became entitled were always drawn to the order of his bankers, Messrs. R. Moat & Co., and in the ordinary course of business should have been handed by the said Cotté to the said firm in exchange for their receipts.

9. That during the year eighteen hundred and eighty-five cheques to the order of R. Moat & Co. were drawn and signed by the representatives of the Workman and deLisle syndicate on the second of November, the third of November and the fifth of November, for the sums respectively of two hundred dollars, one hundred and twenty dollars, and five hundred dollars, forming a total of eight hundred and twenty dollars currency, being parts of amounts received by the said Cotté, and available for division, and to which the said Thomas Workman was entitled ; and the said cheques having been so drawn, the said amounts were charged in the books of the said joint account by the said Cotté as cash paid to the said Thomas Workman.

10. That the said Cotté did not deposit the said cheques with the said R. Moat & Co., in accordance with the agreement between the said parties, and the usual conduct of the said business, but retained the same in his possession, although the amount thereof had been charged as having been received by the said Thomas Workman or the plaintiffs, whereby the balance of cash at the credit of the said joint account was made to appear greater than it actually was, and the amount of the shortage of the said Cotté was made to appear less and the fraud and embezzlement of the said Cotté were concealed to the extent of the amount of the said cheques.

11. That the facts of the said transaction were only discovered by the plaintiffs and the said Thomas Workman after the absconding of the said Cotté.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

12. That the said cheques, having been so retained by the said Cotté, were never presented for payment, but remained and are now in the possession of the said Workman and deLisle syndicate, and the funds available therefor from time to time in the said bank account have been drawn out upon other cheques for the uses of the said joint adventurers and went into and became part of the funds of the said joint adventurers.

13. That by reason of the premises the plaintiffs have sustained damage to the extent of eight hundred and twenty dollars, and the defendants were benefited to that extent.

14. That during the year eighteen hundred and eighty-seven the said Cotté charged in the books of the said joint account as cash payments made to or on behalf of the said Thomas Workman, the following sums, namely :

On the first of September, eighteen hundred and eighty-seven, four hundred dollars.

On the second of November, six hundred dollars.

On the sixteenth of November, three hundred dollars.

On the thirtieth of November, two hundred dollars, none of which sums were ever paid by him, or received by the said Thomas Workman.

15. That the said Cotté further received from one Morin at different times sums amounting to four hundred and twenty-three dollars and ten cents, which sums were payable by the said Morin entirely to the said Thomas Workman, the said defendants having no interest therein whatever.

16. That, notwithstanding, the said Cotté received the said sums of money, and credited them to the joint account of the said business, and wrongfully paid them into the funds of the said joint account, by reason whereof the said defendants were benefited to the extent of the said sum of four hundred and twenty-three dollars and ten cents, and the said plaintiff and the said Thomas Workman were damaged to the extent thereof.

17. That on the discovery of the said transactions the plaintiffs required the defendants to allow an entry to be made in the books of the said joint account, crediting them with the amount of said sums charged against the account of Thomas Workman, and of moneys belonging to him received by the said Cotté which went into the funds of the said joint account, to the end that the plaintiffs might be credited and receive from the funds of the said joint account the said amounts, as by law they are entitled to do.

18. That the defendants refused to pay the said amount, or to allow the said entries to be made.

19. That the plaintiffs declare that they are willing that the said cheques should be cancelled, upon payment by the said defendants to

them of the said sums, or upon their receiving credit therefor in the books of the said joint account.

20. That the said sums united form a total sum of two thousand seven hundred and forty-three dollars and ten cents, which the plaintiffs now claim from the defendants.

The defendants pleaded to this action that they and the plaintiffs were joint owners and not partners: that from lands sold each party received his share and neither is responsible to the other; that while they had an office and books in common the respective parties attended to their own interests; that defendants took care Cotté paid them their share and it was through plaintiffs' gross negligence that he embezzled the latter's share; that especially did this occur through the fault of Baker, who persisted in employing Cotté even after his intemperate and untrustworthy habits had been pointed out by the defendants; that the four cash items charged were amounts received by Cotté for plaintiffs, which they should have immediately demanded and received from Cotté as the defendants immediately demanded and received the similar amounts by him collected for them; that with regard to the cheques, the defendants obtained at the same time similar cheques for similar amounts received by Cotté or plaintiffs; that Cotté, knowing defendants would immediately present their cheques, took care to provide funds, but relying on the negligence of Baker kept plaintiffs' cheques in his own possession, and they were found in his drawer after he had fled from the country; that with regard to the Morin collections the money belonged exclusively to plaintiffs, and through the like negligence Cotté, who made the collection, was permitted to embezzle it; that the defendants never were the agents of the plaintiffs for collections or responsible therefor, or for the dishonesty of Cotté, who was the agent of Thomas Workman alone; that defendants have never, in any shape, benefited by

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the Morin moneys so belonging to Thomas Workman, and any entries to the contrary are erroneous.

By consent the action was taken for a specific sum instead of an action *pro socio* or *communi dividendo*, so that no question arises as to its nature and form.

By the judgment of the Superior Court the action was dismissed. That judgment was confirmed in the Court of Review, Mr. Justice Davidson dissenting.

I will refer immediately to a question of law, arising from the facts in evidence, which was argued before us as it had been in the two courts below. The plaintiffs contend that they and the defendants were partners in the speculation in question, and that the rules applying to partnerships should govern the present controversy. The defendants, on the other hand, take the position that there was no partnership between themselves and the plaintiffs, but a mere ownership *par indivis*, and that what Cotté embezzled was the plaintiffs' moneys, they, the defendants, having got their half and nothing more.

On this point the appellants have failed to convince me that the Superior Court, Jetté J., and the majority of the Court of Review, who held that there was no partnership between the parties, were wrong, though, it must be conceded, that there is room for the appellants' contention to the contrary (1). The considérants of the formal judgment of the Superior Court on this point are, however, to my mind unanswerable, and I would adopt them without further remarks. Nolan deLisle, I may further remark, had clearly not the power to form a partnership between his principals and the plaintiffs.

I do not see, however, that the plaintiffs' case would at all be strengthened if they had succeeded in establishing that there was a partnership in the matter. If,

(1) Troplong, Société, nos. 19 *et seq.*

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

as found in the courts below, the loss of the plaintiffs' share by Cotté's frauds was after a division between them and the defendants, or rather, I should say, that it was exclusively the plaintiffs' share that was embezzled by Cotté, and by their negligence, or the negligence of their agent, their case fails whether there was a partnership or a mere joint ownership *par indivis* between them and the defendants. It is unquestionable law that partners may stipulate that the profits of the concern will be divided at fixed periods before the end of the partnership (1). And that is what, expressly or tacitly, took place between the plaintiffs and the defendants. Art. 1844 of the Civil Code has therefore no application here, as after each such division the partnership, as it were, is at an end, *quoad* the sums or things divided. Each of the partners then becomes individually the owner of the sums or things divided. Then the plaintiffs themselves, in their declaration, allege that the sums they claim is their share. Now that is a clear admission that there must have been a division, for otherwise these sums would belong to the partnership.

I now pass to the evidence. It would be perfectly useless for me to give the details of it here. There are two facts, I may remark, upon which there is no room for controversy. The first is, that no fraud whatever is charged or proved against the defendants or their agent, Nolan deLisle. That was conceded at the argument. And the second, that the defendants received no benefit whatever from the moneys embezzled by Cotté. They did not receive a cent more than they were entitled to. They escaped from Cotté's frauds by being more vigilant than the plaintiffs. That is what, as a matter of fact, the two courts below have found to be the result of the evidence, and that find-

(1) 7 Pont no. 430 ; 26 Laurent, nos. 440 *et seq.*

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

ing is, to my mind, entirely supported, assuming that to be a matter of inference from the facts proved upon which we could interfere. The plaintiffs, had they acted as the defendants or their agent did, would not have been the victims of Cotté's frauds. Cotté was in fact, it seems to me unquestionable, enabled to pursue his systematic fraudulent dealings by the plaintiffs' negligence. He calculated on their dilatoriness to conceal his plundering. Had the deLisle estate followed the plaintiffs' ways of doing business Cotté would have robbed them as he did the plaintiffs. That is the whole case, and that being established the plaintiffs are out of court. *Vigilantibus non dormientibus subvenit lex.*

I entirely agree in the elaborate judgment delivered by Mr. Justice Ouimet in that sense in the Court of Review, and in the carefully drawn *motifs* of Mr. Justice Jetté in his formal judgment in first instance.

I should add that, as to the Morin item, $423.10 claimed by the action, for the reasons given by the two courts below, the plaintiffs' claim must also fail. Nolan deLisle swears that as a matter of fact this sum was never paid to the concern, and consequently that the defendants never received the half of it. Upon contradictory evidence the two courts below have come to the conclusion that this was so, and that conclusion must stand.

I would dismiss the principal appeal with costs *distraits* to the attorneys of the respondents.

Now, as to the appeal on the action in warranty, deLisle *et al* v. Baker *et al.* The deLisles, upon being sued by the Thomas Workman estate in the action I have considered as above, took an action in warranty against Baker *et al.* the appellants on this issue, as executors of the William Workman estate. They set

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

forth by their declaration the issues on the principal action, and allege that the transfer to Thomas Workman was mainly to serve the interests of the principal parties interested in the estate of William Workman, and on the understanding between the transferors and transferees that the business should continue to be managed, as it had previously been, on behalf of the William Workman's estate, to wit, by Baker who employed Cotté; that the said estate deLisle never undertook to manage the business of Thomas Workman or the parties to whom he lent his name, but it was to be looked after by the William Workman estate, through the negligence of which any loss suffered has arisen. Wherefore it is prayed that Baker *et al.* as executors of the William Workman estate, be condemned to indemnify deLisle *et al* from any condemnation obtained against the latter.

The defendants in warranty, now appellants, denying these allegations, pleaded that it was arranged that all moneys should be paid direct to Moat & Co. as the bankers of Thomas Workman; that the executors of William Workman had no power to make the alleged arrangements, which however, did not exist; and they had no interest in the new joint account.

The judgment *a quo* declares that the executors of the William Workman estate, the present appellants, were rightly sued in warranty by the deLisles, and maintains the action in warranty, but concludes that as the principal action against the deLisles had been dismissed the court could condemn them, the appellants, only to the costs of the action.

An objection has been taken by the respondents, deLisle *et al.*, that this is upon this issue an appeal merely for costs, which, in accordance with the jurisprudence of this court, following the rule laid down

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

by the Privy Council and other courts in England, we should not entertain (1).

But this case is not governed by that rule. In *Yeo* v. *Tatem* (2), the Privy Council held that although an appeal will not lie in respect of costs only, yet, where there has been a mistake upon some matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. I refer also to *Attenborough* v. *Kemp* (3); and to *Inglis* v. *Mansfield* (4), where Lord Brougham said:

> In the House of Lords, as well as in the Privy Council and Court of Chancery, you cannot appeal for costs alone, but you can bring an appeal on the merits, and if that is not a colourable ground of appeal for the purpose of introducing the question of costs, the Court of Review will treat that not as an appeal for costs, but will consider the question of costs as fairly raised.

The present appeal falls under the rule laid down in these cases.

Here, what the appellants complain of is that, in law, the action in warranty against them should have been dismissed, and that there is an error, in law, in the judgment appealed from, which maintains it. And under the cases above cited this is not, in my opinion, an appeal merely for costs, though the result of the error in law which they complain of was, under the circumstances, by the judgment of the court *a quo*, merely to make them liable for the costs.

The case is quite distinguishable from those of *Moir* v. *Huntingdon* (5); and *McKay* v. *The Township of Hinchinbrooke* (6). What we held in those cases is, that where the state of facts upon which a litigation went through the lower courts has ceased to exist, so that

(1) *Witt* v. *Corcoran*, 2 Ch. D. 69; *Richards* v. *Birley*, 2 Moo. P. C. (N. S.) 96; McQueen's Practice, 769; *Crédit Foncier* v. *Paturau*, 35 L. T. N. S. 869; Cases cited in 14 Canada Law Journal, 283; *Levien* v. *The Queen*, L. R. 1 P. C. 536.
(2) L. R. 3 P. C. 696.
(3) 14 Moo. P. C. 351.
(4) 3 Cl. & F. 371.
(5) 19 Can. S.C.R. 363.
(6) 24 Can. S.C.R. 55.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the party appealing has no actual interest whatsoever upon the appeal but an interest as to costs, and where the judgment upon the appeal, whatever it may be, cannot be executed or have any effect between the parties except as to costs, this court will not decide abstract propositions of law merely to determine the liability as to costs, where these were in the discretion of the courts below, for it might well be that the condemnation to such costs would have been the same though the party appealing had succeeded on the merits of the case; the condemnation as to costs in such a case by the court appealed from is not a necessary legal consequence of the judgment on the merits. It is not sufficient that a matter of law or of principle is involved; the party seeking to appeal must have an actual interest to have that question reviewed. Such was the course followed by the Privy Council in *Martley* v. *Carson* (1), to which I referred in *McKay*

(1) 20 Can. S. C. R 694. The judgment of the Privy Council is as follows:

Whereas there was this day read at the board a report from the judicial committee of the Privy Council dated the 4th July instant, in the words following, viz.:

Your Majesty having been pleased, by your general order in council of the 22nd November, 1890, to refer unto this committee a humble petition of Robert Carson in the matter of an appeal from the Supreme Court of Canada between Truman Celah Clark, appellant, and the said Robert Carson, respondent, setting forth that the above named appellant, alleging that he felt aggrieved by a judgment of the Supreme Court of Canada of the 30th April, 1889, petitioned Your Majesty in Council for leave to appeal from the said judgment to Your Majesty in Council, which leave was granted by an order of Your Majesty in Council of the 8th February, 1890; that the appellant duly lodged his petition of appeal in the Privy Council office on the 1st December, 1890; that the appellant, when he petitioned Your Majesty in Council as aforesaid, did not disclose the fact that by a deed poll dated the 13th October, 1885, duly executed by him and registered in the Land Registry Office, in the city of Victoria, British Columbia, he conveyed to his wife, Barbara Clark, all his right, title and interest in and to all the real estate owned by him, together with all easements enjoyed therewith, which said real estate and easements claimed are set forth in the statement of defence and counter-claim of the

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

v. *The Township of Hinchinbrooke* (1). But here the case is quite different. By the judgment against which the appellants, defendants in warranty, now appeal, they have been declared to be the warrantors of the plaintiffs in warranty. And as the plaintiffs on the principal action have appealed from the judgment dismissing their action, they might have obtained here a reversal of that judgment and obtained a condemnation against the defendants deLisle, plaintiffs in warranty. That condemnation would then have reflected on the appellants, defendants in warranty, as it is *res judicata* between them and the plaintiffs in warranty, so long as that judgment stands, that they are their warrantors against the condemnations on the principal action. (In what form, and by what means, the plaintiffs in warranty could then have obtained a judgment against the defendants in warranty we are here not concerned with). It follows clearly that the appellants Baker *et al.*, have an interest upon this appeal distinct and separate altogether from the condemnation to costs. They are, or were when they took this appeal, exposed to suffer from the consequences of the judgment which declares them to be warrantors of the plaintiffs in warranty, and are consequently entitled to be heard upon their appeal asking to be relieved from that judgment.

Now, as to the legality of that judgment. The only point it determines, as I have previously remarked, is that the estate William Workman is the warrantor of

appellant in the action, and humbly praying that Your Majesty in Council will be pleased to rescind the said order in council of the 8th February, 1890, giving leave to appeal as aforesaid, and to dismiss the appeal with costs.

The Lords of the Committee, in obedience to Your Majesty's said general order of reference, have taken the said humble petition into consideration, and having heard counsel for the parties on both sides, their Lordships do this day agree humbly to report to Your Majesty as their opinion that this appeal ought to be dismissed.

(1) 24 Can. S. C. R. 55.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

the deLisle estate on the action instituted against the latter by the Thomas Workman estate. As I have said, it is the testamentary executors of the William Workman estate who are accused of negligence by the plaintiffs in warranty, and it is for that negligence that the plaintiffs in warranty ask that the estate itself of William Workman be held liable. It seems to me doubtful, if, in such a case, it is not only the executors personally, and not *qua* executors, against whom the action should have been brought. I refer on this to what we held in this court in *Ferrier* v. *Trepannier* (1). However, in the view I take of the case I will assume that the estate of William Workman was rightly brought into the case through its executors. I may also assume in favour of the plaintiffs in warranty, present respondents, that their action in warranty could be brought as it has been, and that they were not obliged to wait till a condemnation was obtained to then proceed against their warrantors by a principal action. That seems to me a mere matter of form, and a question which obviously may give rise to many difficulties in the procedure under certain circumstances, but which, as I view it, cannot affect a case where the principal action and the action in warranty are both *en état*, and together submitted for judgment. I refer to the authorities cited in *Gauthier* v. *Darche* (2). The authorities cited in *Central Vermont* v. *La Compagnie d'Assurance* (3), from the modern jurisprudence in France, evidently relate to controversies as to procedure or jurisdiction, and the Court of Queen's Bench, in that case, would perhaps have hesitated to dismiss the action in warranty had they found that the accident there in question had been caused by the negligence of the defendant in warranty.

(1) 24 Can. S. C. R. 86. (2) 1 L. C. Jur. 291.
(3) Q. R. 2 Q. B. 450.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

There are a number of reported cases in France where, for instance, the return by a bailiff being impugned, the bailiff is sued in warranty, and called in the case to defend his acts and indemnify the party who employed him for all condemnations and damages that he may be liable to or suffer, in consequence of the illegality of said acts. Bioche (1) refers to many cases of that nature.

It is, after all, a mere question of words and of the name of the proceeding. For it is only as regards the principal action that the action in warranty is an incidental demand; between the warrantee and the warrantor it is a principal action (2); and that action may be brought only after the judgment on the principal action. The plaintiff in the principal action may object to the delay which might result from the defendant's action in warranty, but if he does not I do not see that the defendant in warranty has any interest to object to the manner in which he is called in, where no question of jurisdiction arises or he does not suffer any prejudice thereby.

In a recent case of *Compagnie l'Abeille*, in the Court of Appeal of Paris (3), a common carrier, sued in damages for an accident to one of his passengers, brought an action in warranty against a third party whose negligence had been the immediate cause of the accident.

And the books are full of such instances, where two actions *en responsabilité* are joined under the name of warranty.

In another class of cases, an instance of which is *re Granier* v. *Cambard* (4), before the Court of Cassation, a third party is brought in as warrantor *en garantie*

(1) Vol. 4 Verbo "garantie."

(2) 2 Berriat Saint-Prix, procédure, page 485; Cases cited in Sirey, Table gén. v. garant. no. 48.

(3) Pandectes Françaises, receuil mensuel, 95, 2, 36.

(4) Pand. Fran. rec. men. 95, 1, 86.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

simple et responsabilité in an action *en déclaration d'hypothèque* (1).

The case of *The Royal Electric* Co. v. *Leonard* (2) is distinguishable. There the action in warranty had been taken by the plaintiff on the principal action, and the action was based on a contract with a third party. Moreover, the conclusions of the action in warranty, as shown by the judgment of my brother Fournier who delivered the judgment of the court, were absolutely untenable.

The appellants' contentions on this point would not seem to me well founded.

I would, however, allow the appeal, on the ground that the dismissal of the principal action was, under the circumstances of the case, fatal to the action in warranty. The court having held on the first action that the defendants deLisle were not liable to the Thomas Workman estate, it follows that the William Workman estate is not liable towards them, the de-Lisles. The declaration in warranty is based on the essential allegation that "in so far as the said principal plaintiffs have suffered any loss in the premises for which they have any recourse against the said estate deDisle, such loss has been suffered by the negligence of the said William Workman estate, represented in the said common office by the said Joel C. Baker in not looking after the said Cotté, and preventing him, which they could easily have done with common care and prudence, from robbing the said Thomas Workman or those he represented."

Now, it being determined that the principal plaintiffs have not suffered any loss for which they have any recourse against the estate deLisle, the estate deLisle, upon their own allegations, have no action in warranty against the William Workman estate.

(1) See also *re Geoffroy* v. *Raffaillat*, Pand. Fran. rec. men. 95,2, 62; and Chauveau's annotation to a case of *Santel* v. *Brocard*, 44 Journal des Avoués, p. 270.

(2) 23 Can. S.C.R. 298.

1895

ARCHBALD v. DELISLE.

BAKER ve DELISLE.

MOWAT v. DELISLE.

Taschereau J.

Mais je dois supposer, says Boncenne, (vol. 3, p. 419) ce qui d'ailleurs est le plus ordinaire, que les deux causes réunies sont parvenues jusqu'à leur terme commun, avec le demandeur originaire, avec le défendeur qui s'est, à son tour, constitué demandeur en garantie, et le tiers qu'il a fait assigné pour y répondre. Le premier perd-il son procès? Les deux autres le gagnent a la fois, et il est condamné envers eux à tous les dépens ; car son action avait rendu nécessaire le recours en garantie.

That is, of course, when the defendant in warranty was a warrantor of the principal defendant. If he is not a warrantor, and has wrongly been called in as such, the action in warranty is dismissed with costs against the plaintiff in warranty. But in both cases it must be dismissed. No question of that kind as to costs arises iu the present case; none were asked against the principal plaintiffs (1).

The action in warranty consequently fails, in my opinion, whether the William Workman estate were warrantors of the deLisle estate or not. If they are not warrantors, *cadit questio*? If they are warrantors it is only of condemnations that might have been given against the warrantee, not of all false accusations or unfounded complaints that the warrantee might be subject to.

The plaintiffs in warranty might very well have postponed the bringing of the action in warranty till after the judgment on the principal action. They elected to take proceedings against their warrantors before they had themselves been condemned; they have done so at their own risks. They based their action upon an eventuality, and that never happening they alone must bear the consequences thereof, for the defendants, appellants on this issue, if at all their warrantors, were warrantors of their damages and condemnations, not of their fears of damages, nor of con-

(1) Comp. Bioche, procéd. vo. désistement, nos. 54, 157, and Sirey, 32, 1, 492, and 37, 1, 401; also Brusseau-Laisney, procéd. vol. 4, and no. 278.

tingent liabilities. It is not their fault if an unfounded action has been taken against the warrantee. And it is likewise not their fault if the warrantee did not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiffs.

In the case I previously referred to of *La Compagnie l'Abeille* (1), the principal action was dismissed in appeal, and the court declared consequently "qu'il n'y a lieu de statuer sur la demande en garantie," and condemned the plaintiff in warranty to the costs on his action. We should perhaps adopt that course here. For, to use the words of the Cour de Cassation, in another case of 8th January, 1894 (2): "Il n'y a plus en effet de garantie à exercer, lorsque sur la défense du garantie, la demande originaire tombe."

In a previous case, a *considérant* of a Court of Appeal was as follows:

Attendu que l'action en garantie a été soumise aux premiers juges, que s'ils n'y ont pas statué, c'est que, en écartant la demande principale, ils n'avaient pas besoin de s'occuper de la demande en garantie (3).

And the Cour de Cassation, in an action *en garantie formelle*, held that:

Attendu que l'action principale étant écartée, il ne peut pas y avoir lieu à garantie (4).

And, said the same court in the same sense, in another case:

Le demandeur qui succombe au principal peut être condamné aux frais de l'action en garantie, sur le seul motif qu'elle a eu pour cause la demande principale, sans que la Cour soit tenue d'apprécier le mérite de cette action en garantie (5).

I have already remarked that here no costs were asked against the principal plaintiffs.

(1) Pandectes Françaises, 95, 2, 36.
(2) Pand. Fran. rec. men. 95, 1, 63.
(3) Sirey 41, 2, 20.
(4) Sirey, 36, 1, 251.
(5) Sirey, 68, 1, 217; 68, 1, 41 67, 1, 109.

1895

ARCHBALD v. DELISLE.

BAKER v. DELISLE.

MOWAT v. DELISLE.

Taschereau J.

In the province of Quebec, in apposite cases of *Peck* v. *Harris* (1) and *Lyman* v. *Peck* (2), on appeal, the principal action having been dismissed, the action *en garantie*, was also dismissed with costs against the plaintiff *en garantie*.

In a case of *Aylwin* v. *Judah* (3), the court having dismissed the principal action, held on the action *en garantie formelle* that the court could not consequently adjudicate upon it, and ordered the costs thereof to be paid by the plaintiff in the principal action.

In an action of *Fraser* v. *St. Jorre*, and *St. Jorre*, *plaintiff in warranty* v. *Dumais*, *defendant in warranty*, Mr. Justice Casault, in 1877, at Kamouraska, having dismissed the principal action adjudicated as follows on the action in warranty:

> Considérant que le défendeur en garantie était le garant formel du demandeur en garantie, qu'il aurait dû prendre son fait et cause et que les moyens qu'il a invoqués dans ses défenses à la demande en garantie n'étaient pas une réponse à la dite demande en garantie, les dites défenses du défendeur en garantie sont renvoyées avec dépens, et vu le renvoi de l'action principale, l'action en garantie est renvoyée sans frais.

I would allow the appeal of the defendants in warranty and declare that the principal action having been dismissed, a decision on the merits of the action in warranty has become unnecessary, with an order that the costs on that issue be paid by the plaintiff in warranty to the defendants in warranty, *distraits* to their attorneys.

There remains the appeal on the intervention *Moat et al.* v. *deLisle et al.*

In consequence of the pretension set forth by the defendants in an amended plea to the principal action, that the late Thomas Workman was only a *prête-nom*, William Moat and Joel C. Baker, the latter both per-

(1) 6 L. C. Jur. 206. (2) 6 L. C. Jur. 214.
(3) 7 L. R. C. 128.

sonally and in his capacity of executor under the will of his wife Louisa Frothingham Workman, became intervenants, as representing ten elevenths of the amount sued for by the Workman estate in the principal action, and prayed *acte* of their concurrence and approval of the conclusions taken in the principal demand for one eleventh.

The defendants in pleading to the intervention practically repeated their defences to the principal action and again concluded for its dismissal.

The principal action have been dismissed, the courts below dismissed the intervention. No other judgment was possible; having espoused the cause of the plaintiffs, their joint owners, the intervenants must bear the consequences of the defeat of the action. Consequently, the principal appeal being dismissed, the appeal on the intervention must likewise be dismissed with costs *distraits* to the attorneys of the respondents in that appeal.

A good many irregularities appear in connection with the proceedings on this issue. They, however, affect questions of practice, or matters in the discretion of the court of first instance, with which we cannot interfere.

Appeals in the principal action and the intervention dismissed with costs.

Appeal in the action in warranty allowed with costs.

Solicitors for the appellants: *Abbotts, Campbell & Meredith.*

Solicitors for the respondents: *Barnard & Barnard.*