WILLIAM S. SHAW.....APPELLANT; 1881

AND *Feb'y. 23.
*Mar. 3.

KENNETH McKENZIE *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

Capias—Affidavit—Art. 798 *C. C. P.—Want of reasonable and probable cause—Damages.*

S., a debtor resident in *Ontario*, being on the eve of departure for a trip to *Europe*, passed through the city of *Montreal*, and while there refused to make a settlement of an overdue debt with his creditors, *McK. et al*, who had instituted legal proceedings in *Ontario* to recover their debt, which proceedings were still pending. *McK. et al* thereupon caused him to be arrested, and *S.* paid the debt. Subsequently *S.* claimed damages from *McK. et al* for the malicious issue and execution of the writ of *capias*.

McK. et al, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent *McK.*, one of the defendants,

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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for his belief that the appellant was about to leave the Province of *Canada* were as follows:—"That Mr. *P.*, the deponent's partner, was informed last night in *Toronto* by one *H*, a broker, that the said *W. J. S.* was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and deponent was himself informed, this day, by *J. R.*, broker, of the said *W. J. S's* departure for *Europe* and other places." The appellant *S.* was carrying on business as wholesale grocer at *Toronto*, and was leaving with his son for the *Paris* Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by *McK.*, that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that *S.* would not pay him, that he might get his money the best way he could."

Held: that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side), affirming the judgment of the Superior Court, by which the plaintiff's action was dismissed.

The facts and pleadings of the case sufficiently appear in the head note, and the judgment of Mr. Justice *Taschereau* hereinafter given.

Mr. *McLaren* for appellant:

The facts of the case are, that a dispute having arisen between the parties as to the date from which the four months for the payment of the teas purchased by appellant from the respondents should run, the latter took a suit in *Ontario*, which was contested as premature. When appellant was about to take the steamer on his way to visit the *Paris* exhibition, he was arrested at

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Montreal on a writ of *capias*, issued under article 798 C. C. P. Now, this affidavit is plainly insufficient to justify the issuing of a *capias*, and all the judges have admitted that it was insufficient, and that the *capias* could have been quashed on the ground that *Mackenzie* should have specially stated in his affidavit his reasons for believing that *Shaw's* leaving *Canada* was "with intent to defraud his creditors in general and the plaintiff in particular." The only reason given was that the appellant was about leaving the province.

It is well established in the urisprudence of *Quebec* that leaving the province is not of itself a presumption of an intent to defraud, but that the affidavit must contain reasons sufficient to satisfy the court that the debtor is actually about to leave with a fraudulent intent (1). We contend that the affidavit clearly establishes that the deponent did not state at the time any probable or reasonable cause, as he was bound to do, for issuing a *capias*, and that when the trial took place, respondents showed conclusively that they had no other reason for arresting appellant but the one they had stated in their affidavit, and, therefore, they were liable in damages for the wrongful issue and execution of the *capias*.

There was some evidence of what took place between *Shaw* and *Mackenzie* after the issue of the *capias*, but that evidence cannot be received for two reasons: first, it took place after the *capias*, and therefore cannot be a justification; and, secondly, such evidence is inadmissible, as, by the law of *Quebec*, a party to a suit cannot make evidence for himself (2), and any statement made by him in his own favor goes for nothing.

There was nothing secret or suspicious about *Sha s*

(1) See *Hurtubise* v. *Bourret*, 23 L. C. Jur. 130; *Henderson* v. *Duggan*, 5 Q. L. R. 364; *Laroque* v. *Clarke*, 4 L. C. R. 402; *Renaud* v. *Vandusen*, 21 L. C. J 44.

(2) C. C. P. Art. 251.

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departure. He was making a usual trip to *Europe*, and the high standing of *Shaw's* firm in *Toronto*, as proved by several witnesses, was evidently well known to respondents, who gave them four months credit for over $2,400 without question on this the first transaction they had with them; and it was surely incumbent on them to have obtained some definite and reliable information as to some fraudulent, or, at least, suspicious act of appellant, before taking such an extraordinary step as the arrest complained of. The arrest was public, and appellant suffered very serious damage, and appellant respectfully submits that under the circumstances and proof of record he is entitled to substantial damages, and confidently asks the allowance of his present appeal.

Mr. *Rose* followed on behalf of the appellant and relied on the following authorities:

1. As to the construction of the words "leave *Canada*." *Larchin* v. *Willan* (1), decided under 1 and 2 *Vic.*, c. 110, sec. 3, determines these words not to include a temporary absence.

2. As to the "intent":—See remarks of *James*, L. J.; and *Jessel*, M. R., *Ex parte*, *Gutierrez* (2); *Butler* v. *Rosenfelt* (3); *Freer* v. *Ferguson* (4); *Bowers* v. *Flower* (5), in which case intent to defraud was not drawn from a similar expression, as to "getting the money, if the creditor could"; *Damer* v. *Bushby* (6), is the leading practice case in *Ontario*, in *capias* actions.

As to "reasonable and probable cause:"—See *Hagarty* v. *G. T. R.* (7), citing *Broad* v. *Ham* (8); *Johnston* v. *Sutton* (9); *Daniels* v. *Fielding* (10); *Lyons* v. *Kelly* (11);

(1) 4 M. & W. 351.
(2) 11 Ch. D. 301.
(3) 8 U. C. P. R. 176.
(4) 2 C. L. Ch. Rep. (Ont.) 144.
(5) 3 U. C. P. R. 66.
(6) 5 U. C. P. R. 356.
(7) 4 U. C. Q. B, 321.
(8) 5 Bing. N. C. 725.
(9) 1 Term Rep. 544.
(10) 16 M. &. W. 199
(11) 6 U. C. Q. B. 279.

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Ruttan v. *Pringle* (1); *Thorne* v. *Mason* (2); *Torrance* v. *Jarvis* (3).

As to its not being necessary to set aside the writ:— See *Eakins* v. *Christopher* (4); *Bishop* v. *Martin* (5); *Griffith* v. *Hall* (6).

As to subsequent knowledge not availing to support allegation of reasonable and probable cause:—See *Crandell* v. *Crandell* (7).

Mr. *Doutre*, Q. C., for respondents:

The learned counsel stated there was a disputed debt between the parties; the fact is there was an overdue debt, and after the conversation which took place before the arrest, it cannot be said that the respondents, who were going to lose $2,000 had no reasonable and probable cause to cause the arrest. What guarantee had the respondents of the early, or even remote, return of the appellant? He was taking his son with him; his wife could have followed him at any time; what more was needed to justify the issue of the *capias*? It was for the appellant, and he has completely failed, to show the absence of probable cause for the issue of the *capias*. The respondents, on the other hand, proved that the credit of the appellant was at that time very much shaken; that he was obliged to buy for cash, and that but a few days before the issue of the *capias*, an assignee had been instructed to collect an account from him for debt contracted in *Montreal*.

Then I submit also that appellant in paying the amount, virtually assented and acquiesced in the proceeding of the respondents, to secure payment of their debt. In giving security he would have reserved the

(1) 1 U. C. C. P. 249.
(2) 8 U. C. Q. B. 239.
(3) 13 U. C. Q. B. 122-124.
(4) 18 U. C. C. P. 536.
(5) 14 U. C. Q. B. 418.
(6) 26 U. C. Q. B. 97.
(7) 30 U. C. Q. B. 513.

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right of contesting the *capias*, whilst he renounced the right by the payment without reserve. The learned counsel cited *Lapierre* v. *Gagnon* (1); *Baker* v. *Jones* (2); *McIntosh* v. *Stevens* (3); *Lajeunesse* v. *O'Brien* (4); *Prentice* v. *Harrison* (5); *Huard* v. *Dunn* (6).

Mr. *McLaren* in reply.

The judgment of the court was delivered by

TASCHEREAU, J.:—

This is an appeal from a judgment of the Court of Queen's Bench for the province of *Quebec*, affirming the judgment of the Superior Court, by which the plaintiff's action was dismissed.

The plaintiff, present appellant, claims damages from the respondents for the malicious issue and execution of a *capias* against him, the plaintiff, at *Montreal*, in July, 1878.

The defendant's first plea to this action is that the plaintiff having, when arrested, and without protest, paid the sum demanded from him, he has thereby acquiesced in the arrest and waived all his rights to the present action. All the judges in the two courts below have dismissed this plea, and I cannot see that their decision on this point can be controverted. A payment under duress can never be construed into an acquiescence or operate as a waiver. In the case of *Dennis* vs. *Glass* (7), a plea of this nature was put in by the defendant, but the Court of Appeal mulcted him in damages without even noticing this contention on his part. The case of *Lapierre* vs. *Gagnon* (8) is totally different from the present case, and cannot help the respondents.

(1) 8 Rev. Lég. 727.
(2) 17 U. C. C. P. 365.
(3) 9 U. C. Q. B. 235.
(4) 5 Rev. Lég. 24.
(5) 7 Jur. 580.
(6) 3 Rev. Lég. 28.
(7) 17 L. C. R. 473.
(8) 8 Rev. Lég. 727.

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The defendants' other pleas amount to the general issue and to a plea of justification, alleging that when they arrested the appellant they acted with reasonable and probable cause.

Of course, it was incumbent upon the appellant to prove the allegations of his declaration, and to give *primâ facie* evidence of a negative character to a certain extent; that is, that the respondents had had no probable cause to arrest him. In my opinion, this he has done to an extent seldom possible in such actions, and in the proof of a negative nature. I think, moreover, that the respondents, in the evidence they have adduced in support of their plea, far from establishing their contentions, have, on the contrary, added largely, in my opinion, to the strength of the appellant's case. In fact, not only in this case, but also in their original case against the appellant, and by the very terms of their own affidavit, upon which they arrested the appellant, it is clear and apparent that the respondents were and are under the impression that the fact alone of the departure of their debtor from the country was a sufficient ground to arrest him. Now, that is not the law.

Under article 798, C. C. P., the affidavit required to obtain a writ of capias must show "that the defendant has reason to believe, and verily believes, *for reasons specially stated in the affidavit*, that the defendant is about immediately to leave the Province of *Canada with intent to defraud* his creditors in general or the plaintiff in particular."

McKenzie's affidavit, under which the capias in question here was issued, is as follows:—

That deponent has reason to believe, and verily believes, that the said *William J. Shaw*, one of the defendants, who is presently in the said city of *Montreal*, is about to leave immediately the province of *Canada*, and Dominion of *Canada*, with intent to defraud his creditors in general and the plaintiffs in particular, and

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that such departure will deprive plaintiffs of their recourse against the said *William J. Shaw;* that the reasons of the said deponent for stating his belief as above, are: that Mr. *Powis*, the deponent's partner, was informed last night in *Toronto*, by one *Howard*, a broker, that the said *W. J. Shaw* was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and deponent was himself informed, this day, by *James Reid*, broker, of the said *W. J. Shaw's* departure for *Europe* and other places; and further deponent saith not,

Now, where are, in this affidavit, the reasons why the deponent construes *Shaw's* departure for *Europe* as done or projected with an intent to defraud? The deponent does not even attempt to give any. The existence of the debt and the departure from the country are, for him, sufficient to constitute an intent to defraud. This affidavit shows it clearly: the evidence in the present case corroborates it. *Howard* and *Reid*, the two persons who told *McKenzie* that *Shaw* was going to *Europe*, and whose names he relies upon in his affidavit, both swear positively that they never said anything to *McKenzie* which could lead him to believe that *Shaw* was leaving for good, or with any attempt to defraud any one. Here is what *Reid* says on the subject:

Question. Did you see either of the partners.

Answer. I saw Mr. *Mackenzie* and I think Mr. *Powis* also.

Question. Did you have any conversation about Mr. *Shaw?*

Answer. Yes.

Question. Will you please state what was said between you and them about Mr. *Shaw* on that occasion?

Answer. I think I mentioned to Mr. *Mackenzie* that I had heard Mr. *Shaw* was on his way to *Europe*, that he was expected to-day, that I had a letter from *Toronto* to that effect, that he was passing through the city on his way to the old country.

Question. Your information had come in a letter from *Toronto?*

Answer. Yes.

Question. Was your information to the effect that he was leaving the country for good, or only going on a trip?

Answer. Nothing to that effect.

Question. Nothing to the effect that he was leaving for good?

Answer. No; O certainly not.

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Question. Your information then was that he was taking a summer trip to *Europe?*

Answer. Exactly, on business or pleasure, I do not know which.

Question. Did you say anything to *Mackenzie, Powis* & Co., that would lead them to believe, or give them reason to believe, that Mr. *Shaw* was leaving the country for good?

Answer. I think not.

Question. Do you think any reasonable man could have inferred that from what you stated?

Answer. No; I think not.

Howard does not even remember to have told to *Powis* that *Shaw* was leaving for *England*, but is positive that if he did he said nothing that could induce *Powis* to believe that anything was wrong, or could be suspected, in this trip to *Europe.*

Shaw, at the time of the arrest, was on his way to *Europe* to attend the *Paris* exhibition with his son. He was carrying on a large wholesale grocery business in *Toronto*, where he had left his partner in charge of the business. His wife and another child he had also left in *Toronto.* He was in the habit of crossing the ocean almost every year. Far from trying to leave the country on this occasion furtively or secretly, it is in evidence that he was entertained by a number of the business men of *Toronto* at the club in that city before leaving; that his bankers and his business friends all knew of his intended trip; that for a month or two he had been unwell, and had been advised by his friends to leave his business for some time and recruit; that he was leaving for a couple of months for his health and recreation. Moreover, it is well known that any one in *Toronto* wishing to leave the country to defraud his *Montreal* creditors could do so without coming to *Montreal*, stopping over there for whole day, with his name publicly registered in one of the leading hotels of the city, and informing every one whom he meets of his leaving, as the appellant did on the occasion referred to.

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Of course, the present case is not concluded by *Shaw* proving that he was not leaving with the intent to defraud. Had the respondents reasonable and probable cause to believe him to be so leaving with such intent? is the question here.

The respondents themselves, examined as witnesses in this case, admit, as clearly as possible, that the fact by itself of *Shaw's* departure was for them a departure with intent to defraud. There is not a word of evidence that any one ever informed them of any such intent in *Shaw's* departure. *Powis*, one of them, was in *Toronto*, the day before. He was informed that *Shaw* intended to leave that evening. He is asked, on his examination as a witness in this case:

Question. Did you have any knowledge of any of the circumstances of his going to *England?*

Answer. I did not.

Question. Did you take any pains to inquire about whether he was going for good, or going on a trip, or to get information?

Answer. I took this much pains, that I was standing nearly all the forenoon around the *St. Lawrence* Hall, trying to find him, until about six o'clock in the evening.

Question. Had you any idea that Mr. *Shaw* was going to remain in *England*, to live there?

Answer. I did not know where he was going.

Question. Did you take any means to find out?

Answer. Nothing special.

Question. When you were in *Toronto*, on the 18th, and heard that he was coming down on the train that night on his way to *England*, did you take any means to find out whether he was leaving his business, breaking up his establishment, and going to *England* with a view to remaining there?

Answer. I did not.

And *McKenzie*, who made the affidavit, being examined, answers as follows:

Question. Did you ask your partner whether Mr. *Shaw* was going there on a trip or not?

Answer. No, sir.

Question. What was your idea, that Mr. *Shaw* was going there to live or going there on a trip?

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Answer. I don't know that I formed any idea of that nature at all.

That is admitting clearly that they never took the trouble to enquire at all about it. If *Powis* had, every one in *Toronto* would have told him that *Shaw* was going to *Europe* for his health and on a pleasure trip, and that he intended to return within two or three months. Now, as laid down by the Court of Exchequer Chamber in *Perryman v. Lister* (1), where there is a ready and obvious mode of ascertaining the truth, and the opportunity of doing so is neglected in such an action as the present, the absence of enquiry is an element in determining the question of the presence or absence of reasonable and probable cause. This case, it is true, was reversed in the House of Lords, *Lister v. Perryman* (2), but on the ground that the plaintiff in the case, having acted upon the information of a trustworthy informant, he was not obliged to make any other enquiry about it before acting on the information he had received. Here, there is nothing of the kind. The respondents had never received any information of *Shaw's* intention to defraud his creditors by leaving the country to settle abroad. They have not attempted to prove any. The evidence adduced by them tends to prove that *Shaw* & Co. in some instances, some eight or nine years before, had not promptly met their engagements, or had been refused credit. These facts have but little bearing on the case. For some of them, it is not even proved that the respondents were ware of them when they issued the capias against *Shaw*. It requires no authority to demonstrate that subsequent knowledge cannot support an allegation of reasonable and probable cause, that one cannot excuse, for instance, or explain, an act done in July, by facts which came to his knowledge only in August.

(1) L. R. 3 Exch. 197. (2) L. R. 4 H. L. 521.

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The respondents seem to say in this case: "Well, it may be that the reasons we gave in our affidavit to arrest *Shaw* were insufficient, but we had other and better reasons, which we now give in defence to his action." Now, they must be presumed not to have given these reasons in their affidavit, either because they were not then aware of them, or because they themselves believed these reasons not sufficient to arrest *Shaw*. If they were not then aware of them, they cannot now mention them as their excuse for arresting *Shaw*; and if they were aware of them, but did not think them sufficient to form the basis of their affidavit of intent to defraud against *Shaw*, they cannot expect us to consider them now sufficient to establish that they acted with reasonable and probable cause.

On the whole, I agree with the Chief Justice of the Court of Queen's Bench and Mr. Justice *Cross*, who dissented from the majority of the court appealed from, that *Shaw's* arrest was entirely unjustifiable, and that it is clearly established in the present case that the respondents had no reasonable or probable cause for issuing the writ of capias in question. Mr. Justice *Cross*, in the court below, would have awarded $500 as damages. We think it a fair and reasonable amount, and have agreed to this sum.

Appeal allowed with costs.

Solicitors for appellant: *McLaren & Leet.*

Solicitors for respondents: *Doutre & Joseph.*