ALEXANDER SHAW (PLAINTIFF),.....APPELLANT,

AND

ROBERT L. CADWELL, *et al.* (DEFENDANTS).....RESPONDENTS.

1889

*Mar. 22.

April 30.

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

Loan to Partner—Partnership—Liability—Art. 1867, *C.C.*

Where one member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for said loan, under Art. 1867 C.C. *Maguire* v. *Scott*, 7 L. C. R. 451, distinguished.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1), by which the judgment of the Superior Court, in review, which condemned the respondents to pay appellant $2,464.42 with interest and costs was reversed, and the judgment of the Superior Court which dismissed appellant's action was restored.

This was an action brought by the appellant to recover from the respondents, R. L. Cadwell and Henry J. Shaw, carrying on business in co-partnership under the name, style and firm of "The New York Piano Company," the amount of two promissory notes and interest accrued thereon, one dated 20th September, 1881, for $910.50, and the other dated 31st March, 1883, for $1,100, and both signed by Henry J. Shaw alone to the order of the plaintiff; the plaintiff alleging in his declaration that these notes were so

* PRESENT :—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

(1) M. L. R. 4 Q. B. 246.

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signed and given to him for money loaned by him to the firm "The New York Piano Company," and of which the said firm had the benefit; to which the defendants pleaded that the said firm did not get or borrow any amount of money from the plaintiff, or ever had any business transaction with him, but that the transaction was entirely between the plaintiff and his brother, Henry J. Shaw, personally, and not the firm.

From the evidence, which is reviewed at length in the judgment and in the report of the case in the court below (1), it appeared that although the money was used by the New York Piano Company, it was advanced to H. J. Shaw, personally, who was also a partner of the appellants' in the firm of Henry J. Shaw & Co., in the furniture business, which firm became insolvent and made an assignment for the benefit of their creditors.

Robertson Q.C., and *Falconer* for appellant.

The respondents would not be liable under the English law, but under article 1867, C.C., they are liable, for it is enough to show that the moneys were "applied to the use of the partnership." *Maguire* v. *Scott*, (2) and Codifiers' Report on Partnership (3). The authorities relied on by respondents in the court below are not applicable, as art. 1867 is not to be found in the French Code.

Geoffrion Q.C., and *Carter* for respondents. Art. 1867 C C., must be read with art. 1855 C.C.

The case of *Maguire* v. *Scott* (2), referred to in the authorities under article 1867, is entirely different from the present one; in that case it was a purchase of goods by one partner in his own name, the seller being

(1) M.L.R. 4 Q.B. pp. 251 et seq. (2) 7 L. C. R. 451.
(3) 3 vol., p. 30, No. 32.

in ignorance of the partnership, but the goods went into the partnership business at once, and the court held the partnership liable.

At the time of the making of the notes the appellant was aware of the respondents' partnership; he did not give credit to the respondents, but to his brother, Henry J. Shaw, and in such a case the law is very clear. See Pothier (Ed. Paris, 1825), Société (1); Story on Partnership (2); Pont. Société (3); Pardessus (4); Lindley on Partnership (5); Alauzet Soc. Civ. and Com. (6); Duranton (7); Duvergier (8).

Fournier and Taschereau JJ. were of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Cross in the Court of Queen's Bench (9).

GWYNNE J.—I am of opinion that the judgments of the Superior Court and of the Court of Queen's Bench at Montreal, in appeal, should be affirmed, for the reasons given in the judgment of Mr. Justice Cross, and that this appeal should be dismissed with costs. The case is purely one of fact, and the sole question is: To whom and upon whose credit did the plaintiff lend the money for which the two promissory notes sued upon were made? And, in my opinion, the proper conclusion to draw from the evidence is that the loans were made to, and upon the credit of, Henry J. Shaw, the maker of the notes alone, and not at all to, or upon the credit of, the New York Piano Company. The motive for the loan, I think, sufficiently appears upon the evidence of the plaintiff himself to have been an

(1) § 101, p. 489.
(2) 6th Ed., § 135, 137, 140, note 1
(3) Vol. 7, No. 651.
(4) Droit Commercial, 4 vol., 1025
(5) 3rd Ed., Vol. 1, p. 375, 376.
(6) Vol. 1, p. 143, No. 459.
(7) Vol. 17, No. 4.
(8) Vol. 5, § 404.
(9) M. L. R. 4 Q. B. 251.

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interest given to the plaintiff, by Henry J. Shaw, in the firm of Henry J. Shaw & Co. when the first note was given, which interest was increased about the time that the second loan was made and the second note given. The money lent to Henry J. Shaw, or money to the same or nearly the same amount, was, no doubt, put by Henry J. Shaw into the business of the Piano Company, in which firm Henry J. Shaw was a partner, but that was a matter wholly under the control of Henry J. Shaw, who might have done so, or have withheld from doing so, of his own free will and pleasure. The plaintiff's own conduct from the time of the making of the notes until some time after the firm of Henry J. Shaw & Co. became insolvent plainly, I think, shews that he never contemplated having any other security for the loans than Henry J. Shaw himself personally. The first note was made in September, 1881, payable in two months and the second in March, 1883, payable in 30 days. Yet the plaintiff, although, apparently, repeatedly making the most urgent demands upon Henry J. Shaw for payment of the money secured by the notes, as loans made to himself, does not appear to have ever made any demand upon the Piano Company, or in conversation even with any person to have alluded to them as his debtors, until after the failure of the firm of Henry J. Shaw & Co., nor until after he had had presented to him a statement of his account as appearing in the books of that firm purporting to shew him to be largely indebted to Henry J. Shaw, after receiving credit in the books of that firm for the two promissory notes.

The fair inference further to be drawn from the evidence, I think, is that it was subsequently to the receipt by the plaintiff of this statement of his account as appearing in the books of Henry J. Shaw & Co., that the plaintiff's son, who was employed then as

cashier in the New York Piano Company, gave the plaintiff the information as to the entries in the books of that firm upon which alone this action is based, and that then for the first time the plaintiff conceived the idea of making the Piano Company responsible upon Henry J. Shaw's notes so as aforesaid already credited to him in the books of Henry J. Shaw & Co., in which firm the plaintiff was a partner. But the entries made in the books of the Piano Company, under the circumstances in which they were made as appearing in the evidence, some of them having been made by the plaintiff's son without any apparent authority and, as pointed out by Mr. Justice Cross, corrected by cross-entries made apparently as soon as the entries were perceived by Henry J. Shaw, cannot have the effect of displacing all the other evidence plainly pointing to the conclusion that, in point of fact, the loans when made by the plaintiff were made to, and upon the credit of Henry J. Shaw alone personally, and were so regarded by the plaintiff, himself, for more than three years after the first note, and for nearly two years after the second, became due, and until (after having received, as aforementioned, the statement of his account as appearing in the books of Henry J. Shaw & Co., giving him credit for these notes,) he received from his son the information upon which he rests this action. The fact that Henry J. Shaw put the amounts which he borrowed from the plaintiff, or similar amounts, into the business of the Piano Company, does not, in my opinion, bring this case within article 1867, C.C., and make the Piano Company liable to the plaintiff upon the notes as for loans made to that company. That article, in my opinion, applies only to goods which constitute stock-in-trade of the partnership in the usual course of business and

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dealing of the firm and, as in *Maguire* v. *Scott* (1), to the implements necessary for and used in the carrying on of the partnership business, but not to money which one member of a partnership borrows upon his own credit and which, having so borrowed, he afterwards uses in the partnership business of his own free will, without being under any obligation to, or contract with, the lender so to do. In the English copy of the Code the word used is "objects" which are in the usual course of dealing and business of the partnership. In the French copy the word used is *choses*, &c., &c., &c.; neither of these words seem to be appropriate to cover *loans of money* made to one partner on his own personal credit and which he may or may not at his pleasure use in whole, or in part, for the purposes of the partnership.

STRONG and PATTERSON JJ. dissented.

Appeal dismissed with costs.

Solicitors for appellant: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Carter & Goldstein.*

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(1) 7 L. C. R. 451.