THE REVEREND H. J. PETRY *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

LA CAISSE D'ÉCONOMIE DE NOTRE DAME DE QUÉBEC (DEFENDANTS) ..... } RESPONDENTS.

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*May 12, 13.

*Nov. 17.

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

Bank stock—Substituted property — Registration—Arts. 931, 938, 939 *C.C.—Shares in trust—Condictio indebiti—Arts.* 1047, 1048 *C.C.*

The curator to the substitution of W. Petry paid to the respondents the sum of $8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P. one of the *grevés* and manager of the estate had pledged to respondents for advances made to him personally. J. H. P. *et al.*, appellants, representing the substitution, by their action demanded to be refunded the the money which they allege H. J. P., one of them had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show they formed part of the estate, and no *acte d'emploi* or *remploi* to show that they were acquired with the assets of the estate.

Held, per Ritchie C.J., and Fournier and Taschereau JJ.—affirming the judgment of the court below, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover. Arts. 1047, 1048 C. C.

Per Strong and Fournier JJ.—Bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that they have been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Arts. 931, 938, 939 C. C. (Patterson J. dissenting.)

APPEAL from a judgment of the Court of Queen's

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

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Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court (1) which dismissed the appellants' action.

The appellants claiming to represent the estate of the late William Petry and the substitution created by his will, by their action demanded to be refunded the sums which they allege the Reverend James Henry Parker, one of them, has paid, by error, as curator to the substitution, to the respondents to redeem thirty-four shares in the capital stock of the Bank of Montreal belonging to the substitution and which Wentworth Gray Petry one of the *grevés* and manager of the estate had illegally transferred to them.

The circumstances which gave rise to the litigation between the parties are as follows:

From the 12th February to the 1st of December, 1885, Wentworth Gray Petry borrowed from the respondents, an incorporated saving bank and loan company, divers large sums of money, upon his own notes secured by transfers of thirty-four shares in the capital stock of the Bank of Montreal. At the respective dates at which these transfers were made, these shares stood in the stock ledger of the Bank of Montreal, as being held by Wentworth Gray Petry, in trust, without any indication of the name of the beneficiary or *cestui que trust* for whom they were held.

On the 16th March, 1886, Petry, who had then become insolvent, and was indebted to the respondents in a sum of $9,400 paid them by a cheque of the Rev. George Henry Parker, curator to the substitution created by the will of the late William Petry, and drawn on the funds of the estate, a sum of $6,000, and on the same day or on the next day the balance of $3,400 was paid by a note of the Rev. M. Parker—bearing date the 16th March, 1886. Upon this settle-

(1) 16 Q.L.R. 193.

ment the notes of Petry were returned and he authorised in writing the respondents to transfer to Parker, in trust, the thirty-four shares of the Bank of Montreal which they held as security. The transfer being effected, Mr. Parker's note for $3,400 was subsequently paid, and the whole transaction was absolutely closed, as far as the respondents were concerned.

Nearly three years after this settlement had taken place, the Rev. George Henry Parker, in his capacity of curator to the substitution created by the last will and testament of the late William Petry, Gertrude Petry, his wife, and the Rev. Henry James Petry, two of the three surviving children of the late William Petry instituted this action. It was admitted that out of the $9,400 paid by Parker $768 were due by the estate William Petry and that it is only the difference of $8,632, claimed by the action, which was paid by error. It was not contended that there was any error of fact in the matter, but that the payment was made through an error of law which Mr. Parker declared he had only discovered in 1887, after the decision of the Privy Council, of the case of *Sweeny* v. *The Bank of Montreal* (1).

The appellants' action was dismissed in the Superior Court on the ground that two out of three conditions essential to the success of the action *condictio indebiti*, were wanting, viz., that there was no debt and that the payment was made by error.

The Court of Queen's Bench (appeal side) affirmed the judgment. Mr. Justice Bossé dissenting.

Irvine Q. C. & *G. Stuart* Q. C., for the appellants.

If Mr. Parker had refused to pay but had sued the bank for the restitution of the stock fraudulently pledged, could the bank have successfully resisted the

(1) 12 App. Cas. 617.

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action? In face of the decision of this court in *Sweeny* v. *The Bank of Montreal* (1), confirmed by the Privy Council (2), it would be difficult to do so, but it is pretended that by voluntarily paying the debt, for which he was no wise responsible, he has deprived himself of all recourse.

We submit, 1st, that the action *condictio indebiti* will lie when there is error in the use or consideration, as well as when there is error as to the existence of the debt. Arts. 1047, 1048, 1140.

See also Pothier, Prêt de Consomption (3), Larombière, Obligations (4), Aubry & Rau (5), Dalloz, Repertoire, Vo. Obligations (6), *Haight* v. *The City of Montreal* (7), *Baylis* v. *The City of Montreal* (8), *City of Montreal* v. *Walker* (9).

2nd. That the bank being a party to the fraud practised by W. G. Petry in pledging trust property, will not be heard to urge its own wrong-doing as a reason why the appellants should be deprived of their rights.

The bank at the time that it took the shares in pledge, had notice that they were held "in trust." At the time of the payments, now sought to be recovered back, it had express notice of the nature of the trust, by the cheques with which it was signed "G. H. Parker, curator," and by the acknowledgment of the indebtedness which it took from Mr. Parker for the sum of $3,400, balance remaining after payment of the $6,000: the acknowledgment of the indebtedness is expressed to be by "Revd. George Henry Parker of Compton, Curateur Succession feu W. Petry."

The bank is evidently in bad faith; it received

(1) 12 Can. S. C. R. 661.
(2) 12 App. Cas. 617.
(3) No. 142.
(4) 5 vol., pp. 612, 613.
(5) 4 vol. ss. 345, 442.
(6) No. 5511.
(7) M. L. R., 4 Q. B. 353.
(8) 23 L. C. Jur. 301.
(9) M. L. R. 1 Q. B. 469.

money which it knew it had no right to receive in consideration of the transfer of shares to their proper owner, which it had no right to withhold. *Bank of Montreal* v. *Sweeny* (1).

Hamel Q.C. and *Mr. Fitzpatrick* with him for respondent, relied on the reasons for judgment of Mr. Justice Larue in the Superior Court (2), and also contended that as it was alleged by the plaintiffs that the moneys belonged to a substitution it was necessary for them to prove that they had complied with all the requirements of the law in regard to substitutions and this had not been done (3). They also contended that the appellants' claim could not be maintained, because the curator to the substitution was not authorized to receive and claim the rights of those entitled under the substitution. See *Dorion* v. *Dorion* (4).

The institutes to make this claim should all be parties in the case and W. G. Petry, the respondents' debtor, is not a party to these proceedings, and the institutes cannot claim from the respondents what eventually may return by the effect of the substitution to W G. Petry, its debtor.

Sir W. J. RITCHIE C.J.—I concur in dismissing this appeal.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the late Chief Justice Dorion.

FOURNIER J.—I am opinion that this appeal should be dismissed for the reasons given by Mr. Justice

(1) 12 Can. S.C.R. 661.
(2) 16 Q.L.R., 193, *et seq.*
(3) Arts. 938, 939, 940 and 943 C.C.
(4) 13 Can. S.C.R. 193.

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Fournier J.

Larue in the Superior Court. I also adopt the view taken of the case by the late Chief Justice Sir A. A. Dorion of the Queen's Bench. The requirements of the laws with regard to the registration of the substitution have not been complied with. If the substitutes and *grevés* had such confidence in their manager as not to see that the necessary precautions had been taken to save the moneys belonging to the substitution, they cannot now complain if he has acted imprudently.

There is another reason why this appeal should be dismissed. It is not a case of *condictio indebiti*, for the curator to the substitution paid the debt of one of the substitutes with full knowledge of all the facts. The cases to be cited by my brother Taschereau are in point, and I concur with him in holding that the reasons given by the Superior Court for dismissing the appellants' action are good, and, therefore, that this appeal should be dismissed with costs.

TASCHEREAU J.—(Oral). Je suis d'avis de renvoyer le présent appel. L'action n'est pas prise en vertu de l'article 1047 du Code Civil, car cet article déclare que: "Celui qui reçoit par erreur de droit ou de fait ce qui ne lui est pas dû, est obligé de le restituer." Or, dans le cas présent il est évident que la Caisse d'Economie n'a reçu que ce qui lui était dû. Elle ne tombe pas non plus sous l'article 1048 qui déclare que:

"Celui qui paie une dette s'en croyant erronément le débiteur, a droit de répétition contre le créancier."

Dans le cas présent, les demandeurs n'ont certainement pas payé le montant parce qu'il s'en croyaient les débiteurs. L'article 1140 n'a pas non plus d'application:

"Tout paiement suppose une dette; ce qui a été payé sans qu'il existe une dette est sujet à répétition."

Il y avait ici un montant dû à la Caisse, par Wentworth Petry, et c'est cette dette que les demandeurs ont payée, non pas parce qu'ils croyaient erronément en être les débiteurs, mais purement dans le but de recouvrer les parts ou actions que Wentworth Petry avait données en gage à la Caisse. Les demandeurs allèguent qu'ils auraient eu le droit de recouvrer ces parts sans payer la dette de Wentworth Petry, sous l'autorité de la décision du Conseil Privé, dans la cause de *Sweeny* v. *Bank of Montreal* (1). Cela peut être. Néanmoins ce qu'ils ont payé était réellement dû à la Caisse.

Larombière (2) et Laurent (3) cités par le savant juge de la Cour Supérieure, dans ses notes rapportées en 16 Q.L.R. 193, ainsi qu'Aubry et Rau (4), sont autorités que, sous ces circonstances, les demandeurs ne peuvent pas recouvrer.

Pothier dit que lorsqu'une personne, qui a été payé, n'a reçu que ce qui lui était dû, il faut qu'il y ait eu erreur de fait, pour donner droit à l'action *condictio indebiti*. Et d'après la loi romaine " l'erreur dans la cause n'empêche pas la validité du paiement quand la chose est due d'ailleurs, et l'erreur dans le paiement donne lieu à la répétition seulement s'il y a eu erreur de fait, et si celui qui a reçu en est devenu plus riche, c'est-à-dire a reçu frauduleusement ce qui ne lui était pas dû. Thevenot-Dessaules dit : (5) " l'ignorance de droit s'admet rarement."** Le principe était que *nulla repetitio est ab eo qui suum recipit*, lorsque celui qui a payé l'a fait au nom du débiteur (6).

(1) 12 App. Cas. 617.
(2) 7 vol. art. 1377, ss. 10.
(3) 20 vol. n° 357.
(4) 4 vol. 733.
(5) Dict. Dig., vo. Erreur, Nos. 7 et 16.
(6) Idem vo. Ignorance, No. 5. Voir aussi Pothier *de condictione indebiti* No. 153.

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Le juge en chef Dorion pouvait bien dire, comme il l'a fait dans l'espèce, qu'il est douteux si le paiement par un tiers d'une somme légitimement due peut donner lieu à l'action *condictio indebiti*, excepté pour erreur de fait bien clairement prouvée.

Ici les demandeurs disent qu'ils se sont crus obligés de payer pour délivrer leur gage, et que ce n'est que subséquemment, par la décision *in re Sweeny* v. *Bank of Montreal* (1), qu'ils ont découvert leur erreur. Mais, dit la Cour de Cassation *re Leblanc* (2).

L'erreur fondée sur une jurisprudence ultérieurement reconnue fausse n'est pas une cause de la nullité de la convention. Pour l'action *condictio indebiti* proprement dite, il faut que la somme payée ne soit pas due.

Un endosseur d'un billet le paie après protêt. Plus tard, il découvre que le protêt était nul. Il ne peut répéter, parce que, dit la Cour de Cassation dans deux arrêts, ce qu'il a payé était dû (3) ; Mongaley et Germain, Code de commerce (4) ; Massé, Droit commercial (5) ; Nouguier (6) ; Pardessus, Droit commercial (7) ; Demolombe, Des contrats (8) ; aussi *in re* d'*Erlanger* (9). Et la répétition est toujours plus difficilement accordée que l'exception pour se refuser à payer (10).

Dans *Caldwell* v. *Patterson* (11), il fut jugé que—

The amount voluntarily paid on a protested bill of exchange by the drawer cannot be recovered on the ground of an error in the payment, in point of law.

Quelle est la cause du paiement ici ? Ou plutôt, qu'est-ce qui a été payé ? Clairement, la dette de Wentworth Petry. Et la Caisse se s'est pas enrichie aux dépens d'autrui. Elle n'a reçu que ce qui lui était dû. L'erreur des demandeurs a porté sur le motif qui

(1) 12 App. Cas. 617.
(2) S. V. 4, 2.677.
(3) S.V. 15, 1 26 ; S.V. 33, 1 639.
(4) Tome 1er, page 270.
(5) 5 vol. 162.
(6) 1 vol. 407.
(7) No. 434.
(8) 1 vol. 345 et 355. 8 vol. 295.
(9) S. V. 71 1, 197.
(10) 5 Duranton 127, 128 ; 6 Toullier, 69.
(11) 2 R. de Leg. 27.

les a fait agir. Mais la Caisse n'avait rien à voir à ce motif. Elle n'en a pas même été informée. Elle pouvait bien croire que c'était un prêt que les demandeurs faisaient à Wentworth Petry. Wentworth Petry l'a autorisé à remettre le gage aux demandeurs, et elle a dû le faire, sans s'enquérir des rapports qui pouvaient exister entre eux, les demandeurs et Wentworth Petry, ou des motifs qui les faisaient agir.

La différence entre la cause de l'obligation et le motif du contrat ressort de cette idée ; l'une est le but immédiat et direct que le débiteur s'est proposé d'atteindre en s'obligeant ; l'autre c'est la considération plus éloignée qui l'a déterminé à faire le contrat. Demante et Colmet de Santerre (1).

Ici, je le répète, c'est la dette de Wentworth Petry que les demandeurs ont de fait payée et voulu payer. C'est là la cause commune du paiement ; la seule cause de la réception du paiement par la Caisse. Ils ne l'ont pas fait, il est vrai, pour bénéficier Wentworth Petry, mais dans leur propre intérêt, et c'est là leur motif d'action, le but qu'ils voulaient atteindre.

Mais il y a une distinction à faire entre la cause d'un contrat, et le motif qui de fait a déterminé l'intention des parties, disent Massé et Vergé, sur Zachariæ (2).

Le motif du contrat est la *cause impulsive*, comme l'appelle Demolombe, (loc. cit.) et l'erreur sur les motifs, ajoute-t-il, n'est pas une cause de nullité.

Maynz, Obligations dit (3) :

Ainsi l'erreur relative aux motifs qui ont pu nous engager à contracter ne constitue amais une cause de nullité, l'erreur sur l'existence ou la nature légale de l'objet, l'erreur sur le droit du promettant est sans influence sur la validité de la convention, par la raison qu'elle tombe sur quelque chose en dehors de la prestation qui est l'objet soumis au consentement.

La Caisse ne pouvait refuser le paiement. Elle était obligée de l'accepter.

Et en la payant, les demandeurs sont devenus les créanciers de Wentworth Petry, qui a été, dès lors, complètement libéré vis-à-vis d'elle.

(1) 5 vol. Nos. 18, 46. (2) 3 vol. § 615, note 1.
(3) P. 127.

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Taschereau J.

De plus, Wentworth Petry a placé ces argents des demandeurs dans la société Petry et Beaulieu. Et les demandeurs, lorsqu'ils en ont été informés, en 1885, non en 1886, comme ils l'allèguent, ont reconnu Wentworth Petry et la société Petry et Beaulieu comme leurs débiteurs, ratifiant par là tout ce qu'il avait fait, en filant une réclamation contre le syndic de la faillite Petry et Beaulieu. Le placement fait par Wentworth Petry pouvait-il plus clairement être ratifié par eux?

Et en supposant que les demandeurs eussent pû recouvrer de la Caisse, est-ce qu'ils auraient pu le faire sans mettre Wentworth Petry en cause? Leur action tend à faire annuler le contrat de gage, fait entre Wentworth Petry et la Caisse. Comment pourraient-ils le faire en l'absence de Wentworth Petry? Ils allèguent bien, et prouvent qu'il a refusé de les joindre comme demandeurs, mais alors il fallait le joindre comme défendeur. Dans *Sweeny* v. *La Banque de Montréal* (1), Rose, le *trustee* qui avait mis en gage les parts des demanderesses était en cause. Dans *Raphael* v. *McFarlane* (2), une action du même genre, celui qui avait transféré sans droits des parts de banque appartenant au demandeur était aussi défendeur co-joint.

Je renverrais l'appel.

PATTERSON J.—This case being purely one of French law I do not pretend to discuss it with confidence, though we have had ample assistance in apprehending the views presented on each side, in the well-reasoned opinions of Chief Justice Dorion and of Mr. Justice Bossé, and in the full and able arguments of counsel. My opinion at the argument was in favour of the views of Mr. Justice Bossé the dissentient judge in the court below, and after a further careful consideration of the case I retain the same opinion.

(1) 12 Can. S. C. R. 661. (2) 18 Can. S. C. R. 183

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I do not understand that there is any conflict on questions of fact, although in one important particular something depends on the way the facts are looked at.

There is no dispute as to the fact that W. G. Petry held the shares of the Bank of Montreal stock "in trust," and that the bank, the respondents in this appeal, took the shares in pledge for the loan made to W. G. Petry personally, knowing that they were held in that manner. That being so, it would be against ordinary principles of fair dealing, and contrary to the doctrine acted on in *Sweeny* v. *Bank of Montreal* (1) and in *Raphael* v. *Macfarlane* (2) to hold that they were taken innocently, as against those beneficially entitled, or in good faith; wherefore it appears to me the defence of want of registration of the substitution, so strongly urged and so much relied on in the opinion delivered in the court below by the learned Chief Justice, is excluded by the terms of article 940 of the Civil Code.

Then as to the motive of the appellant in redeeming the shares, which is the fact that I say may be looked at in more than one way. The payment certainly had the effect of discharging W. G. Petry's debt to the bank, but it was not made for the sake of paying that debt. The motive was to save the shares for the estate, which the appellant Parker, by reason of a mistake in law, believed he could do only by repurchasing them, the price being measured by the amount of the debt.

Under that mistake the appellant Parker paid the money which belonged to the estate. Having discovered his mistake he demands a return of the money he paid, and is met in the first place by the defences to which I have just alluded and by another which, under the present constitution of the record would not be fatal to the action, but which only touches his personal

(1) 12 Can. S.C.R. 661. (2) 18 Can. S.C.R. 183.

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right to sue. The respondent says to him " True, you paid us the money and we have no right to retain it, but you who paid it are not the right person to demand the return of it." It appears to me that the position of Mr. Parker differs materially from that of the curator to the substitution in the case of *Dorion* v. *Dorion* (1) who was held not to be entitled to maintain an action to recover moneys belonging to the institutes which he had never had possession of.

I think, though with distrust of my conclusion, that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellants: *Caron, Pentland & Stuart.*

Solicitors for respondents: *Hamel & Tessier.*

(1) 13 Can. S. C. R. 183.