1892
*Oct. 6.
1893
*Feb. 20.

ALEXANDER W. STEVENSON, *Es qual.* APPELLANT;

AND

THE CANADIAN BANK OF COMMERCE ..... RESPONDENT.

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

Insolvency—Knowledge of, by creditor—Fraudulent preference—Pledge—Warehouse receipt—Novation—Arts. 1035, 1036, 1169 *C.C.*

W. E. E., connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England on the 30th June, a note of $5,087.50 due 1st October, signed by John Elliott & Co. and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July 146 barrels were sold, and the proceeds, viz., $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 13th July McDougall, Logie & Co. failed and W. E. E. was involved in the failure to the extent of $17,000, of which amount the bank held $7,559.30 and on the 16th July Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32. On the return of W. E. E. another note of John Elliott & Co. for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms, on their joint paper, of $2,660.53. The old note of $5,087.50 due 1st October,

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

and the one of $1,101.33 were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co. and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Ellliott & Co., and by them to the bank.

The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences.

The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th of July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference.

On an appeal and cross-appeal to the Supreme Court :—

Held, 1st, that the finding of the courts below of the fact of the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July, was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Art. 1036 C.C. Gwynne J. dissenting.

2nd, that the additional security given to the bank on the 10th of August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Art. 1035 C.C. Gwynne J. dissenting.

3rd, reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and that they could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Arts. 1169 and 1035 C.C. Gwynne and Patterson JJ. dissenting.

APPEAL AND CROSS-APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) varying the judgment of the Superior Court.

(1) Q. R. 1 Q. B. 371.

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The action was taken by the present appellant, Mr. Stevenson, as curator to the insolvent estate of William E. Elliott, formerly a wholesale oil merchant of Montreal, against the Canadian Bank of Commerce, to set aside certain transactions between Elliott and the bank as being fraudulent preferences; and to recover the amounts so received by the bank in fraud of the ordinary creditors of the estate.

The material facts upon which undue or fraudulent preference was charged were as follows:

William E. Elliott, the insolvent, was connected with two businesses in Montreal:

First there was an oil business carried on by him alone under the style of "W. E. Elliott & Co."

Secondly there was a wine business, in which he and one Alexander M. Finlayson were partners, carried on under the style of "Elliott, Finlayson & Co."

Both firms kept their bank account with the respondent bank.

On June 30th, 1887, W. E. Elliott offered for discount to Mr. Crombie the manager of the bank, a note signed by a firm of John Elliott & Co. (composed of Alfred G. Elliott, a brother of W. E. Elliott) dated June 28th, for $5,087.50, falling due October 1st, and endorsed by W. E. Elliott & Co., and Elliott, Finlayson & Co.

On July 5th, the bank received from Finlayson, who, besides being Elliott's partner in the wine business, was also his agent during his absence, promised security in the form of a warehouse receipt for 292 barrels of oil, made out to the order of W. E. Elliott & Co. and endorsed by them.

On the 13th of July a meeting was held of the creditors of McDougall, Logie & Co., a large oil manufacturing firm of Montreal, which had suspended payment some days previously, and it became a matter of public

notoriety that Elliott was involved in the failure to the extent of $17,000 for accommodation paper given by him to the failed firm, and of this amount, the Canadian Bank of Commerce held $7,559.30.

On the same day the bank at the request of Mr. Finlayson sold 146 barrels of this oil, and on the 16th July the bank got Elliott's customers notes from Finlayson, who was acting as agent for Elliott while in England, as collateral for the general liability of Elliott to the bank.

On August 8th Elliott returned and gave the bank an additional warehouse receipt for fifty-four barrels of oil.

On August 9th there was at the bank another note signed by John Elliott & Co. to the order of W. E. Elliott & Co. and discounted by Elliott, Finlayson & Co. The amount of this note was $1,101.33; it bore date April 12th, 1887, at four months, and was unsupported by collateral security.

Next day, August 10th, the two old notes of John Elliott & Co. endorsed by W. Elliott & Co. and Elliott, Finlayson & Co. for the respective amounts of $5,087.50 on which only $1,559.20 was now due, and which did not mature until October 1st, and the other unsecured note for $1,101.33, were withdrawn from the bank, and in their place were put two notes identical in terms with the former ones, bearing only the names of Elliott, Finlayson & Co. as makers, payable to the order of the bank.

On the substituted note for $5,087.50 was endorsed a memorandum stating that it was substituted for the former one, and was secured by the 146 barrels of oil remaining from the original number pledged.

On August 16th, two discounts went through the bank's books, to the credit of Elliott, Finlayson & Co.

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These were:

(1) A note for $3,500 bearing only the name of Elliott, Finlayson & Co., secured by 200 barrels of oil consisting of the 146 barrels remaining out of the 292 originally pledged and also the 54 barrels left by Elliott on August 8th with the bank.

(2) A note for $7,263.33 made by John Elliott & Co. to the order of W. E. Elliott & Co. by whom it was endorsed as well as by Elliott, Finlayson & Co. This note was nominally unsecured.

The proceeds of these discounts paid the balance due on the substituted notes—$2,660.53.

In the Superior Court Mr. Justice Loranger gave judgment in the plaintiff's favour for $4,591.24 being the value of the oil pledged after the 13th July, 1887, and the amount realized on the customers' notes, and also ordered the bank to deposit in court a promissory note of the face value of $1,174.76, or in default of doing so in the prescribed delay to pay that amount to the plaintiff.

From this judgment the bank appealed and the Court of Appeals reduced the condemnation to $1,603.46, and also ordered the deposit of a note still in their possession (1).

D. Macmaster Q.C. and *C. Geoffrion* Q.C. for appellant cited and relied on arts. 1032, 1035, 1036, 1975 and 1169 C.C.; Delorimier, Code Civil, on arts. 1032, 1034, 1035 and 1036 (2); Dalloz, Vo. Obligations (3); Larombière on Art. 1183 (4); Laurent (5).

Lash Q.C. and *Morris* Q.C. for respondents cited and relied on arts. 1139, 1488 and 1966*a*. C.C.; Leake on Contracts (6); *Pring* v. *Clarkson* (7).

(1) Q.R. 1 Q.B. 371.
(2) 8 vol. pp. L.S.E.Q. 66.
(3) No. 3000.
(4) 2 vol. p. 258, Nos. 41 and 42.
(5) 28 vol. No. 503.
(6) 3 ed. p. 769.
(7) 1 B. & C. 14.

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THE CHIEF JUSTICE:—I have read the judgment which has been prepared by my brother Fournier and I agree in the conclusion at which he has arrived, that the judgment of Mr. Justice Loranger was warranted by the evidence and ought to be restored, and I desire only to add a few observations to the reasons he has given. The fact of W. E. Elliott's insolvency from an early date in July has been established by the evidence of Mr. Stevenson (the appellant) a professional accountant who swears that it is apparent from the books of the oil business, and this is in no way contradicted. At all events after the meeting of the creditors of the firm of McDougall, Logie & Co., on the 13th of July, Elliott's insolvency became a matter of public notoriety, and the bank through its agent Mr. Crombie must be taken to have had notice of it. This last fact has been found by both the Superior Court and the Court of Queen's Bench and is no longer open to dispute. From that date Mr. Crombie was bound to know that the assets of W. E. Elliott belonged to his creditors and that he had no longer any right to deal with or dispose of them to their prejudice. Acting on this principle the Court of Queen's Bench have held that the transfer of bills receivable belonging to W. E. Elliott, made by Finlayson at the request of Mr. Crombie on the 16th of July, was an invalid transaction, for the reason that these bills were assets of an insolvent debtor which he had no right to abstract from the mass belonging to the general body of his creditors. The 200 barrels of oil, made up of 146 barrels, part of the 292 barrels originally pledged to the bank under an arrangement made in July when the note for $5,087 was discounted, and 54 barrels, the warehouse receipts for which were actually handed to Mr. Crombie by W. E. Elliott himself on the 8th of August after his return from Eng-

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land, have, however, been held by the Court of Queen's Bench to have passed out of the reach of the creditors. The reason alleged for this last conclusion is that Mr. Crombie had no notice that this lot of oil was the property of W. E. Elliott, it being apparently the property of another firm that of Elliott, Finlayson & Co., who were wine merchants, and in which firm W. E. Elliott was a partner. I cannot agree in this conclusion. Of the 200 barrels 54 were received directly from W. E. Elliott himself, who on the 8th of August, after his return from Europe, handed the warehouse receipt to Mr. Crombie at first without any specific appropriation. This was certainly notice to the bank that these 54 barrels were Elliott's property, and at all events it was sufficient to put the bank on inquiry, and if they had inquired they must have discovered (as the truth was) that the goods were assets which W. E. Elliott had no right to deal with in fraud of his creditors, and not having thought fit to inquire they are in the same position as if they had done so and had, as they inevitably must have done, ascertained the truth. My brother Patterson, who is so far of accord with me, considers, however, that as to the remaining 146 barrels the evidence is not sufficient to fix the bank with notice of the actual fraud which W. E. Elliott was perpetrating in withdrawing these goods from his creditors. I am, however, compelled to come to a contrary conclusion. The whole 292 barrels, of which these 146 formed part and which were pledged as collaterals for the $5,087 note discounted in July before there was any knowledge on the part of the bank of the actual fact of W. E. Elliott's insolvency, were arranged to be given to the bank as security for that discount by W. E. Elliott himself, so as to put him or Finlayson, who merely acted as his agent during his absence, in funds for the

purpose of the oil business. Then the effect of the transaction on the 10th of August, 1887, in pursuance of which the note for $5,087, which had then been partially paid by crediting the proceeds of the 146 barrels of oil sold, as well as another prior note for $1,001 bearing the same names, were satisfied and withdrawn from the bank by substituting two other notes of the same amount made by Elliott, Finlayson & Co., directly payable to the bank, was clearly a novation which had the same effect as a payment in money would have had as regards the former notes. The consequence was that the pledge did not attach to the new debt, but reverted to the debtor at that time represented by the creditors of the original pledgor. Then took place the transaction of the 16th of August under which the whole 200 barrels of oil were pledged anew, ostensibly by Elliott, Finlayson & Co., as collateral for a new note for $3,500 discounted. All this oil then in truth belonged to W. E. Elliott subject to the rights of his creditors. What right had the bank to suppose it belonged to Elliott, Finlayson & Co.? As regards the 54 barrels which they had received directly from W. E. Elliott I have shown they had such notice as must be held fatal to their title. But I am unable to say that they are in a more advantageous position in respect of the remaining 146 barrels. The bank knew that these were originally also the property of W. E. Elliott, and that they had been pledged for a loan made for his own use, for I think the circumstance that the proceeds of the original discount were carried to the credit of Elliott, Finlayson & Co. is a circumstance of little importance. It must have been known to Mr. Crombie when he got the warehouse receipt for the 292 barrels that Finlayson was acting as W. E. Elliott's agent, and held a power of attorney from him. The mere circumstance that the warehouse receipts (which I am con-

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vinced by the evidence of Mr. Davis were not deposited with the bank until after the 12th of July when one of them bears date) were handed in by Finlayson after Elliott's departure makes no difference, for he did this in his capacity of agent for Elliott. Then the very nature of the goods themselves indicated *primâ facie* that they were part of the stock in trade of the oil trading firm and not of the wine merchants. Altogether these circumstances pointed strongly to the fact that W. E. Elliott was pledging his own goods and not those of the wine business, in which he was a partner; and in the total absence of proof of any direct affirmation by Finlayson that the property in the oil belonged to his firm, I am of opinion that it must have been apparent to Mr. Crombie at the time of the original pledge that the oil really belonged to W. E. Elliott. At all events the attendant circumstances were such as to be quite sufficient to have made it incumbent on Mr. Crombie to have investigated the matter further when, after the insolvency and on the 16th of August, he again took the same goods in pledge after the property in them had by the transaction of the 10th of August become revested in W. E. Elliott. This unusual and irregular transaction of the 10th of August by which the novation already referred to was operated was carried out not only in the interest of the bank but also in the interest of W. E. Elliott, and there was therefore the additional circumstance to be taken into consideration that Finlayson, if the oil had been really the property of his firm, would not after it had been once set free from the original pledge be likely again to pledge it for the benefit of Elliott who was then notoriously insolvent. A little questioning, which I should have thought any careful man of business would have subjected the parties to, would have brought to light the fraud which Elliott was practising

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on his creditors. I am very far from saying that Mr. Crombie was consciously a party to any fraudulent scheme, but he did not take proper precautions, and the consequence of his forbearance to make the inquiries which the conduct of the parties ought to have suggested must be held fatal to the security he took.

In what I have said I do not of course mean to lay down any proposition of law; all I decide is that the circumstances referred to create a *primâ facie* presumption, not of law but of fact, that Mr. Crombie knew the oil belonged to W. E. Elliott and that this presumption has not been in any way rebutted. In other words I hold that it is established by sufficient circumstantial evidence that the bank was not in good faith.

The appeal must be allowed, the judgment of the Queen's Bench reversed, and that of the Superior Court restored with costs to the appellants in all the courts.

FOURNIER J.—L'appelant, en sa qualité de curateur à la faillite de W. E. Elliott, a intenté contre la banque, intimée, une action pour faire annuler certaines transactions entre elle et Elliott, comme ayant été faites en fraude des créanciers de ce dernier et pour recouvrer les montants reçus par elle au préjudice des créanciers d'Elliott.

L'honorable juge Loranger a rendu le jugement de la Cour Supérieure à Montréal pour $4,591.24, et a aussi condamné la banque à déposer en cour certains billets promissoires, au montant de $1,174.76, ou à défaut de ce faire dans le délai prescrit, l'a condamnée à en payer le montant au demandeur (l'appelant) en sa dite qualité de curateur.

La banque a appelé de ce jugement et la Cour du Banc de la Reine a réduit la condamnation à $1,603.46, et a aussi ordonné le dépôt des billets promissoires, par son jugement en date du 21 mai 1892.

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Le curateur duement autorisé par les créanciers demande la restoration en plein du jugement de la Cour Supérieure.

Les deux cours sont d'accord à déclarer que des préférences frauduleuses ont été faites en faveur de la banque, intimée, au préjudice des créanciers de W. E. Elliott et Cie.

L'insolvable, W. E. Elliott et Cie, faisait d'abord des affaires seul, sous le nom de W. E. Elliott et Cie, comme marchand d'huiles ; il faisait aussi commerce comme associé dans un commerce de vins avec Alexander M. Finlayson, sous les noms et raison de Elliott, Finlayson et Cie.

Dès le premier juillet, 1887, et avant cette date, W. E. Elliott et Cie était déjà insolvable. Ce fait est prouvé par le curateur qui en parle d'après la connaissance qu'il en a acquise par les livres de l'établissement, ainsi que par le fait que W. E. Elliott et Cie, avait beaucoup d'autres dettes qui n'étaient pas entrées dans leurs livres de compte.

Vers le 8 juillet, 1887, le dit W. E. Elliott et Cie dont les affaires étaient déjà en mauvais état, présenta à M. Crombie, gérant de la banque de Commerce, pour escompte un billet daté le 28 juin 1887, à quatre mois de date pour la somme de $5,087.50, signé par John Elliott et Cie, et demanda que le produit de l'escompte fût porté au crédit du commerce de vin, Elliott, Finlayson et Cie, et offrit comme sûretés collatérales des marchandises provenant du commerce d'huiles tenu par lui seul, sous le nom de W. E. Elliott et Cie.

D'après le témoignage de Crombie la banque aurait reçu le 5 juillet de Finlayson, associé d'Elliott dans le commerce de vin et son agent pendant l'absence du premier en Angleterre, les sûretés promises, sous forme de reçus d'entrepôts pour 292 barils d'huile, faits à l'ordre de W. E. Elliott et Cie et endossés par eux en faveur de

Elliott, Finlayson et Cie. Cependant l'un des reçus d'entrepôts pour partie des 292 barils porte la dat pu 12 juillet, une semaine après la date donnée par Crombie comme étant celle à laquelle il lui a été remis. Davis, courtier et gardien d'entrepôt, qui a émis un de ces reçus jure positivement qu'il l'a émis le 12 juillet et non pas avant.

Le 8 juillet le dit billet de $5,087.50 est escompté et entré dans les livres de la banque qui en porte le montant au crédit d'Elliott, Finlayson et Cie. Le même jour ces derniers donnent un écrit par lequel ils reconnaissent avoir donné les 292 barils d'huile comme sûreté collatérale du paiement du billet de $5,087.50.

Plus tard, vers le 13 juillet, ils autorisèrent la banque à réaliser sur l'huile qu'elle détenait comme sûreté collatérale, et à en appliquer le produit en déduction du billet de $5,087.50, quoiqu'il eût encore plus de deux mois à courir avant son échéance. La banque vendit en conséquence pour la somme de $3,528.30, cent quarante-six barils d'huile sur les 292 qu'elle avait reçus en gage. Elle en porta le prix au compte des dits Elliott, Finlayson et Cie, ce qui réduisit le montant du dit billet à $1,559.20, déduction faite des intérêts.

Le lendemain de cette vente dont elle toucha le prix l'intimée fit avec Elliott et Finlayson un arrangement par lequel elle consentit à remettre à John Elliott et Cie le billet de $5,087.50 dont ils étaient les faiseurs, et pour lequel les 292 barils d'huile avaient été transportés comme sûreté collatérale et sur lequel il restait encore dû une somme de $1,559.20. John Elliott et Cie, les faiseurs de ce billet, étaient solvables et l'intimée accepta au lieu de leur billet celui d'Elliott et Finlayson pour le même montant que le billet originaire de $5,087.50. Ce changement de débiteur accepté par la banque a eu l'effet d'opérer une novation de la dette et par conséquent son extinction conformément à l'art.

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1169 du Code civil. La banque par cette novation, équivalant à un paiement, perdit les 146 barils d'huile non vendus. D'après l'art. 1975 elle ne pouvait retenir le gage que jusqu'au paiement; ce paiement a eu lieu ici par une novation qui a mis fin au gage et a fait retourner les 146 barils d'huile non vendus à W. E. Elliott et Cie. Ils avaient été originairement mis en gage par ce dernier afin de laisser à Finlayson les fonds nécessaires pour conduire ses affaires en son absence. Le 10 août, ce but ayant été atteint, l'huile fut dégagée par la novation du billet qui a mis fin au contrat qu'elle avait fait lors de l'escompte du billet de $5,087.50. Lorsque cette transaction a été faite pour la substitution du billet, le 10 août, le dit W. E. Elliott était notoirement en faillite depuis le 13 juillet. De sorte que par la libération des 146 quarts d'huile opérée par la novation les dits 146 quarts d'huile redevinrent la propriété du dit W. E. Elliott.

Ces 146 quarts ainsi libérés du gage dans lequel ils avaient été compris avec 54 autres quarts d'huile restant encore à W. E. Elliott, formaient avec les dettes actives de son commerce la presque totalité de son actif. Nous allons voir maintenant le détail des opérations par suite desquelles la banque de concert avec Finlayson, l'agent de W. E. Elliott, réussit à se les approprier au préjudice des créanciers

Le 13 juillet survint la faillite de McDougall, Logïe et Cie, manufacturiers d'huile, de Montréal, dans laquelle W. E. Elliott et Cie se trouvait débiteur au montant de $17,000 pour des billets d'accommodation fournis à cette maison. Cette responsablilité entraîna la banqueroute de W. E. Elliott et Cie, qui devint alors notoire et publique, comme l'ont déclaré les deux cours Supérieure et d'Appel qui sont d'accord à fixer la faillite de W. E. Elliott et Cie au 13 juillet.

Finlayson, associé d'Elliott et qui conduisait ses affaires pendant l'absence de celui-ci, a connu le même jour, 13 juillet, toute l'étendue des responsabilités d'Elliott et Cie envers McDougall, Logie et Cie. Le montant de cette dette qui n'avait pas été entré dans ses livres avait l'effet inévitable de le rendre absolument insolvable. On va maintenant voir dans cette cause une chose bien rare ; c'est que, malgré la banque-route notoire de W. E. Elliott, la banque continue à transiger avec lui par son agent Finlayson et par son gérant Crombie, comme s'il eût joui de la plus grande solvabilité.

Le 16 août elle escompta les billets suivants pour Elliott, Finlayson et Cie 1. Un billet de $3,500 avec la garantie collatérale de 200 barils d'huile. Ces deux cents barils se composaient des cent quarante-six quarts restant des 292 originairement donnés en gage et qui avait été dégagés par le paiement de la dette, au moyen de la substitution de billets comme on l'a vu plus haut—et de 54 autres quarts que Elliott avait laissé à la banque le 8 août, sans en avoir reçu aucune avance ; 2. Un autre billet de $7,263.33 de John Elliott et Cie à l'ordre de W. E. Elliott et Cie endossé par eux et par Elliott, Finlayson et Cie. Le produit de ces escomptes servit à payer la balance due sur les billets substitués, $2,660.33, composée, savoir : de la balance de $1,559.20 sur le billet de $5,087.50 et celle de $1,101.33 montant d'un billet pour lequel il n'avait pas été donné auparavant de garantie. Sur le total de cet escompte se montant à au-delà de $10,000, $2,660.33 des dettes de W. E. Elliott et Cie seulement furent payées, et la balance, au delà de $7,000, fut employée à l'acquit des $7,000 de billets de McDougall, Logie et Cie, endossés par W. E. Elliott et Cie et détenus par la banque. Ce n'est qu'après avoir épuisé tout son actif par ces diverses transactions qu'Elliott et Cie fit cession en faveur de ses créanciers.

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La divergence d'opinion entre les deux cours est surtout quant à l'effet légal de la mise en nantissement des deux cents barils d'huile.

La Cour d'Appel a déclaré que la banque ne connaissant pas que l'huile mise en gage par Elliott, Finlayson et Cie n'était pas leur propriété, le nantissement qu'ils en avaient fait était valable. Au contraire dans la Cour Supérieure l'honorable juge Loranger a maintenu que la substitution de billets du 10 août, en libérant les faiseurs des billets originaires de $5,087.50 de John Elliott et Cie, avait mis fin au contrat fait lorsque le billet avait été escompté et que la banque avait alors perdu le droit de retenir les 146 barils d'huile qui avaient fait retour à W. E. Elliott, alors en faillite. La mise en gage qui en fut faite subséquemment, avec les 54 barils déjà laissés à la banque, le fut à une époque où la banqueroute d'Elliott et Cie était connue de la banque et partant nulle. La différence de $2,998.00 qu'il y a entre les deux jugements, repose entièrement sur la différence d'opinion entre les deux cours au sujet du nantissement des deux cents barils d'huile.

D'après le jugement des deux cours la banqueroute d'Elliott est devenue notoire le 13 juillet, et Crombie, le gérant de la banque, en a eu connaissance le même jour.

Il est évident que le jugement de la Cour du Banc de la Reine, quant aux 54 barils laissés vers le 8 août à la banque par W. E. Elliott, qui ne reçut alors aucune avance de fonds, est erroné, car il était notoirement en banqueroute depuis le 13 juillet. Il est vrai que plus tard, le 16 août, les 54 barils furent joints aux 146, restant du premier nantissement de 292, et furent donnés en garantie, mais après l'ouverture publique et notoire de la faillite de W. E. Elliott; le nantissement alors fait se trouve partant nul comme fait en fraude

des créanciers d'Elliott et Cie, pendant que celui-ci était en faillite.

La mise en gage des deux cents barils d'huile a été maintenue par la Cour du Banc de la Reine sur le principe que cette transaction a été faite dans le cours ordinaire des affaires, et qu'en l'absence de preuve de connivence entre les parties dans le but de commettre une fraude, et de connaissance de la part de la banque que l'huile n'appartenait pas à Elliott et Finlayson, la banque doit être considérée comme ayant acquis un titre légal à la dite quantité d'huile, avec plein droit d'en disposer pour son profit.

Ces transactions seraient sans doute valables s'il était vrai que la banque n'agissait pas de connivence avec Elliott et Finlayson et si elle ignorait que l'huile ne leur appartenait pas. Mais la preuve établit, au contraire, bien clairement que l'huile était la propriété de W. E. Elliott. Crombie, le gérant de la banque qui connaissait la faillite de W. E. Elliott depuis le 16 juillet, savait aussi que cette quantité d'huile appartenait à W. E. Elliott, parce qu'il avait eu les reçus d'entrepôts le 8 juillet, lorsque les 292 barils avaient été donnés comme sûreté collatérale la première fois. Il ne pouvait ignorer que la balance de 146 quarts avait été dégagée par le paiement du billet de $5,087.50 et était redevenue la propriété de W. E. Elliott le 10 août, à une époque où étant en faillite il n'était plus possible de la donner comme garantie collatérale.

Il n'est pas possible de considérer la banque comme agissant suivant le cours ordinaire des affaires lorsqu'elle retirait le 10 août le billet de $5,087.50, qui n'était dû que le premier octobre suivant, pour y substituer un autre billet du même montant, portant la même date, mais signé par Elliott, Finlayson et Cie, à l'ordre de la banque, perdant ainsi son recours contre le faiseur originaire, John Elliott et Cie, qui étaient con-

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sidérés comme solvables. Ce n'était pas non plus suivant le cours ordinaire des affaires de banque de prendre un billet payable à son ordre comme celui qui fut substitué.

C'était encore moins suivant le cours ordinaire des affaires d'escompter pour un failli dont elle connaissait, par son gérant Crombie, la faillite depuis un mois et de faire un contrat de nantissement que la faillite rendait nul.

N'est-il pas étrange que six jours après avoir fait cette substitution de billets et presque au moment de la faillite de W. E. Elliott, le gérant Crombie, avec la participation d'Elliott, Finlayson et Cie, ait eu recours à l'expédient de l'escompte d'un billet de $3,500 pour s'approprier les deux cents barils d'huile ? En effet, les 146 barils d'huile dégagés par la substitution de billets, avec les 54 livrés par W. E. Elliott à la banque vers le 8 août, furent donnés comme sûreté collatérale de ce nouvel escompte fait dans le but de cacher l'irrégularité des transactions de la banque avec Elliott et Finlayson. La mise en gage par Finlayson des 146 barils d'huile en garantie de ce nouveau billet de $3,500 est une reconnaissance complète qu'ils avaient été dégagés de la garantie du billet de $5,087.50 ; mais la faillite les avait fait revenir à W. E. Elliott. Crombie dit de ces transactions que le jugement de la Cour du Banc de la Reine a trouvée faite suivant le cours ordinaire des affaires :

I do not know what to make out of it.

D'après le témoignage de Crombie, le 16 avril 1887, le produit de l'escompte du billet de $7,263 et de celui de $3,500 se trouvait au crédit d'Elliott, Finlayson et Cie, et leur donnait une apparence de crédit. Mais un examen de l'emploi de ces argents fait voir que l'escompte de $7,263.33 n'était qu'une manœuvre de tenue de livres de compte, que la banque ne s'est nullement

départie de l'argent,—qu'il n'y a eu qu'un changement d'entrées dans le grand-livre.

Ce jour-là, le 16 août, la banque possédait pour $7,559.30 du papier déshonoré de McDougall, Logie et Cie, endossé par W. E. Elliott, qui se trouvait entraîné dans la dite faillite. Elliott, Finlayson et Cie étaient aussi endosseurs du papier de McDougall, Logie et Cie au montant de $2,288.51. La banque fit alors volontiers l'escompte des susdits deux billets dont le produit servit au paiement du papier de McDougall, Logie et Cie.

Indépendamment de la valeur des deux cents barils d'huile que la banque a illégalement obtenus par les moyens détournés ci-haut mentionnés, elle s'était, en outre, le 16 juillet, fait remettre des billets de pratiques du commerce d'huile de W. E. Elliott au montant de $2,768. Quant à ces billets le jugement de la Cour d'Appel a tout-à-fait confirmé celui de la Cour Supérieure. Il condamne l'intimée à remettre la somme reçue sur ces billets et à rendre ceux qui lui restent entre les mains. Le considérant de la cour du Banc de la Reine est en ces termes :

Considering that the Bank by its Manager, Alexander M. Crombie, had reason to know that the said William E. Elliott was insolvent on the 16th of July, 1887, when at his instigation the agent of the said William E. Elliott transferred to it the said promissory notes to the amount of $2,768.78, as collateral security for bills or promissory notes for which he might be liable, and when he was so liable to the Bank to the extent of $7,559.30, for accommodation given by him to the then suspended firm of McDougall, Logie & Co., and his own insolvency had become notorious ;

Considering that the said transfer was, in effect, a payment by an insolvent to a creditor knowing his insolvency, and that under article 1036 of the Civil Code it must be deemed to have been made with intent to defraud, and that the Bank appellant must therefore be compelled to restore the said promissory notes, or their value, for the benefit of the said William E. Elliott's creditors.

Ce considérant est fondé sur la preuve. D'ailleurs cette partie du jugement n'est pas attaquée.

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Mais le fait si emphatiquement déclaré que la banque, par son agent Crombie, a su qu'Elliott était insolvable le 16 juillet, ne doit-il s'appliquer qu'à la remise de billets. N'a-t-il pas aussi ses effets légaux sur la mise en gage des deux cents barils d'huile ? D'abord, il ne peut y avoir de difficulté par rapport aux 54 quarts d'huile qui ont été laissés à la banque, le 8 août par Elliott et Cie sans recevoir aucune avance. Ces 54 quarts étaient dégagés de tous liens et faisaient partie de la masse en faillite. Ni W. E. Elliott ni son agent ne pouvait plus en disposer. La remise gratuite qui en avait été faite le 8 août à la banque était nulle à cause de la faillite d'Elliott, suivant l'article 1034 Code Civil. Les 146 quarts dégagés par la novation opérée le 10 août ne pouvait plus, à cause de la faillite à la masse de laquelle ils étaient rentrés, faire le sujet d'un contrat même onéreux, ni par Elliott, ni par son agent, avec la banque, comme le gage qui en a été fait le 16 août par Finlayson, parce que d'après le jugement de la Cour du Banc de la Reine la banque avait connaissance par Crombie de la faillite d'Elliott. D'après l'article 1035 cette mise en gage du 16 août est nulle.

Il n'est pas facile de comprendre aussi pourquoi la Cour du Banc de la Reine n'a pas fait application des effets légaux de la faillite à la mise en nantissement des deux cents barils d'huile, comme elle l'a fait pour la remise de billets de pratiques. La raison qu'elle en donne est que la mise en nantissement a été faite dans le cours ordinaire des affaires, mais les faits cités plus haut prouvent que tel n'a pas été le cas. Cette transaction n'a été faite par la banque qu'avec la parfaite connaissance, qu'elle avait par son gérant Crombie depuis le 16 juillet, de la faillite de W. E. Elliott, et dans le but d'obtenir une injuste préférence sur les autres créanciers.

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En conséquence, l'appelant a droit d'obtenir, en addition au jugement de la Cour du Banc de la Reine, la somme de $2,998, produit de la vente des deux cents barils d'huile, et que la condamnation de l'intimé rendue par la Cour Supérieure soit rétablie avec dépens.

Appel alloué avec dépens et contre-appel renvoyé avec dépens.

TASCHEREAU J. concurred with FOURNIER J.

GWYNNE J.—The plaintiff sues as curator of the estate of one William E. Elliott who on the 18th August, 1887, abandoned all his estate and effects for the benefit of his creditors. At the time of such abandonment he was a partner with one Alexander M. Finlayson doing business together as wine and spirit merchants, under the name, style and firm of Elliott, Finlayson & Co., and he himself at the same time was carrying on a business of his own as a dealer in oil under the name of W. E. Elliott & Co. The declaration alleges that for some time prior to the said abandonment he was a customer of the defendant bank as was also the firm of Elliott, Finlayson & Co., and that Elliott himself and the firm of Elliott, Finlayson & Co. procured advances from the defendants upon negotiable paper, and that he the said William E. Elliott with intent to defraud his creditors made divers fraudulent and preferential payments to the defendants and gave them divers large quantities of oil and bills and notes and other negotiable instruments as collateral security to the defendants for their advances; and that he retired certain notes placed by him and by the firm of Elliott, Finlayson & Co. with the defendants for discount and upon which the defendants made certain advances, before the maturity of the said notes, and that the defendants, fraudulently and to the prejudice

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of the creditors of the said William E. Elliott, accepted payments on account of the said notes before maturity and released certain parties theretofore bound to the said William E. Elliott as parties to the said negotiable instruments and accepted, nominally from the said firm of Elliott, Finlayson & Co., but really from the said William Elliott, a large quantity of oil the property of the said William E. Elliott, as collateral for the pretended advances made by the defendants to the said Elliott and to the said firm of Elliott, Finlayson & Company; and that at the time the said preferential payments were made the defendants and their manager Alexander M. Crombie were aware of the fact that the said William E. Elliott was insolvent and unable to pay his creditors in full; and the said payments were made with the object of obtaining for the said defendants a preference over and above the other creditors of the said insolvent and that the amount of such preferential payments exceeded the sum of ten thousand dollars. The defendants met this declaration by a demurrer and a general denial of all the allegations in the declaration and especially by a denial that the defendants ever received from the said William E. Elliott any fraudulent and preferential payments and they averred that any collateral security which the defendants received was legally received.

The evidence in the case discloses the facts following namely, that on the 8th July, 1887, the defendants through their manager, Alexander M. Crombie, discounted for the firm of Elliott, Finlayson & Company a promissory note for $5,087.50 bearing date the 28th of June, 1887, payable three months after date, which was made by a firm styled John Elliott & Co., payable to the order of the said William E. Elliott & Co., and endorsed by the said William E. Elliott and by Elliott, Finlayson & Co. This note was discounted by the

defendants upon the hypothecation by way of collateral security of 292 barrels of oil whereof Elliott, Finlayson & Co. represented themselves to be and by certain warehouses receipts produced by them appeared to be the *bonâ fide* owners. The hypothecation of this oil was attempted to be assailed by the plaintiff at the trial but upon no solid grounds; and it is now unnecessary to discuss the grounds upon which it was assailed for the transaction has been maintained by the judgment of the Superior Court and no appeal from that judgment has ever been taken. That transaction, therefore, which lies at the foundation of a considerable portion of the subsequent transactions which are assailed by the plaintiff must now be regarded as absolutely unimpeachable.

Now upon the 13th July, 1887, a trading firm styled McDougall, Logie & Co. became insolvent and the failure of this firm disclosed the fact that William E. Elliott was liable as accommodation endorser upon the paper of the firm to the amount of about $16,000 or $17,000 of which paper to the amount of $7,559.30 was held by the defendants. In the paper so held by the defendants were two promissory notes which the defendants had discounted for W. E. Elliott, the one for $1,441.74, and the other for $1,541.62 amounting together to $2,983.36 made by McDougall Logie & Co., payable to and endorsed by Wm. E. Elliott & Co. At the time of the failure of McDougall, Logie & Co. William E. Elliott was not in Canada he having left for England about the 6th or 7th of July, after the defendants had agreed to discount for Elliott, Finlayson & Co. the above note for $5,087.50, with the hypothecation of the 292 barrels of oil as collateral security but before the actual discounting of that note which took place on the 8th July. When William E. Elliott left for England it appears, as testified by

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Alexander M. Finlayson, that he left with Finlayson a general power of attorney enabling him to act for Elliott in all matters relating to his private affairs and to the business of William E. Elliott & Co. Upon the failure of McDougall, Logie & Co. Finlayson communicated the information by cable to Elliott, who, as Finlayson swears, replied by cablegram that he, Elliott, on his return would settle everything. Finlayson swears that at this time he had no idea that Elliott was insolvent or likely to become so. In consequence of the two notes above mentioned, amounting to $2,983.36, having become due by reason of McDougall, Logie & Co.'s failure, Mr. Crombie applied to Finlayson, as representing Elliott, for some collateral security in respect of these notes. Mr. Crombie swears that at this time he had no information whatever of the insolvency of Elliott, nor had he until about the 3rd of September, upon his return from his vacation upon which he had left Montreal on the evening of the 15th August, and that when he left Montreal upon that occasion he entertained no doubt whatever of the solvency of Elliott. He said that when Elliott first did business with the bank, which was in the spring of 1887, he represented himself to be possessed of considerable means, and he presented a statement of his affairs which Mr. Crombie believed to be true and which showed him to be, if it had been true, perfectly solvent; in fact so much so that his liability to the amount o $16,000 or $17,000 upon McDougall, Logie & Co.'s paper did not shake Mr. Crombie's confidence in his solvency, although he says that it made him consider it to be his duty to ask for the collaterals upon McDougall, Logie & Co.'s failure, which he says he would have done if Elliott had been worth $100,000. He acted in that matter as he considered to be his duty to the bank, and he had no knowledge whatever of

Elliott's insolvency. That he was then insolvent there can be no doubt, and that he was an unscrupulous and dishonest man may be admitted, but he appears also to have been a clever concealer of his true character and of the true condition of his affairs, for not a single witness was called who spoke of any doubt as to his solvency having been entertained by any one, notwithstanding his liability as appearing on the paper of the insolvent firm of McDougall, Logie & Co.

The material question, however, in the present case, is the knowledge of the defendants or their officer of Elliott's insolvency at the time of the transactions with the defendants which are assailed by the plaintiff. The only officer of the defendants to whom such knowledge is imputed is their manager at Montreal, Mr. Crombie, who swears most positively not only that he had no such knowledge, but that he had not a doubt as to the solvency of Elliott until he heard of his insolvency upon his return from his vacation about the 3rd of September, and nothing has been suggested as bringing home knowledge of Elliott's insolvency save only the fact that he was upon McDougall, Logie & Co.'s paper as an accommodation endorser to the amount of $16,000 or $17,000. Upon the 16th July, 1887, Finlayson, acting under a power of attorney from Elliott, and believing as he swears Elliott to be then perfectly solvent, in reply to Mr. Crombie's request for collateral security for the notes of the insolvent firm of McDougall, Logie & Co., which had been discounted by the bank for Elliott, handed to him the promissory notes of divers persons made payable to W. E. Elliott & Co., but not then yet due, amounting in the whole to $2,768.78, to be held as such collateral security. Upon Elliott's return to Montreal on the 7th or 8th of August Finlayson informed him of what he had so done, of the

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notes so deposited with the defendants as such collateral security. They subsequently collected the sum of $1,593.24, and still have a note of John Paxton & Co. which is not yet paid, amounting to $1,165.32. Upon the 13th of July, 1887, Mr. Finlayson, acting on behalf of the firm of Elliott, Finlayson & Company, requested Mr. Crombie, as manager of the defendants, to sell 146 of the barrels of oil deposited as collateral upon the discounting of the note of the 28th June for $5,087.50, and to credit the firm with the proceeds as against the note. A sale was accordingly made of 146 barrels of the oil through Elliott, Finlayson & Company's broker to a firm named R. C. Jamieson & Co., upon their promissory note for $3,528.80 payable and paid to the bank on the 9th August, 1887, and by the defendants then applied in reduction of the said note for $5,087.50. Upon the return of Mr. W. E. Elliott from England, and on or about the 7th or 8th August, he called upon Mr. Crombie at the bank and deposited with him a warehouse receipt for 54 other barrels of oil as the property of Elliott, Finlayson & Co., with a view to their shortly obtaining an advance thereon from the bank. He spoke of being temporarily put about by the failure of McDougall, Logie & Co., who were largely indebted to him, and he stated that if an arrangement could be made whereby the defendants would give up the note for $5,087.50 of which John Elliott & Co. were makers, and also another note dated the 12th April, 1887, for $1,101.33 whereof John Elliott & Co. were also makers, and which would fall due on the 15th August, his brother Alfred Elliott, who represented John Elliott & Co., would assist him with a note or money sufficient to enable him to get over the temporary difficulty in which the failure of McDougall, Logie & Co. had placed him. Eventually it was agreed between Mr. Crombie and Elliott, Finlayson & Co.,

that as the bank still held 146 barrels of oil as collateral security for the balance which would remain due on the note for $5,087.50 after crediting thereto the proceeds of the 146 barrels sold to R. C. Jamieson & Co., the defendants would take notes of Elliott, Finlayson & Co. bearing the same dates respectively and for the same amounts respectively, and coming due respectively at the same periods as the notes for $5,087.50 and $1,101.13 which the bank already held, in order to enable them to get the assistance promised by John Elliott & Co. upon their getting the notes already given by that firm removed out of the way, and thus giving until the 15th of August when the note for $1,331.56 would fall due to enable the proposed arrangement with John Elliott & Co. to be completed. Accordingly upon the 10th of August, 1887, the defendants gave up to Elliott, Finlayson & Co. the said two notes made by John Elliott & Co., upon receiving from Elliott, Finlayson & Co, in substitution therefor their promissory notes as follows:—

Due 1st October, 1887. MONTREAL, June 28th, 1897.

$5,087.50. Three months after date we promise to pay to the order of the Canadian Bank of Commerce at our office in Montreal, five thousand and eighty-seven dollars and fifty cents for value received.

ELLIOTT, FINLAYSON & CO.

Upon the back of this note was endorsed the following memorandum:—

This note is substituted for that of John Elliott & Co. for same amount due 1st October, 1887, removed from the Canadian Bank of Commerce to-day and secured by warehouse receipts for oils, some of which have already been realized by the bank. This note to be returned to us on payment of the balance due 10th August. E., F. & CO.

MONTREAL, 12th April, 1887.

Due 15th August, 1887.

$1,101.33. Four months after date we promise to pay to the order of the Canadian Bank of Commerce, at our office in Montreal, eleven hundred and one dollars and thirty-three cents for value received.

ELLIOTT, FINLAYSON & CO.

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On the same day Elliott, Finlayson & Co. together with the above notes delivered to Mr. Crombie the letter following:—

MONTREAL, 10th August, 1887.

To the Manager of the Canadian Bank of Commerce, Montreal.

DEAR SIR,—Referring to John Elliott & Co.'s notes for $1,101.33 due 15th August and $5,087.50 due 1st October, discounted with you and which have been handed to us to-day we now replace them by our notes as per memo. at foot to which please attach the warehouse receipts you hold against John Elliott & Co.'s notes and credit us with the amount of cash realized by the sale of linseed oil. As soon as the balance of the loan is paid you we will claim our two notes.

Yours faithfully,

ELLIOTT, FINLAYSON & CO.

Memo—Our note 4 months 12th April due 15th August. $1,101.33
Our note 3 months 28th June due 1st October... 5,087.50

$6,188.83

Upon the 15th August when the note for $1,101.33 became due, Elliott, Finlayson & Co. brought to Mr. Crombie their own note for $3,500 made payable to the bank and falling due on October 3rd, and a note for $7,263.33 dated August 12 and payable five months after date made by John Elliott & Co. payable to W. E. Elliott & Co. and endorsed by W. E. Elliott & Co. and by Elliott, Finlayson & Co., and requested him to discount these notes for them with the hypothecation as security for the note for $3,500 of two hundred barrels of oil, namely, the 146 barrels already held by the bank as collateral to the note for $5,087.50 and the 54 barrels the warehouse receipts for which had been left with him on or about the 7th or 8th of August.

Mr. Crombie on the said 15th August before leaving Montreal on his vacation which he did on the evening of that day agreed to discount the two notes for them holding the warehouse receipts for the 200 barrels of oil as collateral security for the note for $3,500 and Elliott, Finlayson & Co. undertaking to pay the balance

remaining due on the note for $5,087.50 amounting to $1,559.20 and the note for $1,101.33 and he left instructions on leaving Montreal on the 15th with the bank officers that the said two notes should be discounted and the proceeds placed to the credit of Elliott, Finlayson & Co. which was accordingly done on the 16th August, upon Elliott, Finlayson & Co. hypothecating as agreed upon the 200 barrels of oil as collateral security for the note for $3,500. By the sale of this oil the defendants subsequently realized the sum of $2,998.

Upon this evidence the learned judge in the Superior Court rendered a judgment by which he adjudged that the defendants should pay to the plaintiff the sum of $4,591.24 being the amount realized by them from the notes handed to Mr. Crombie on the 16th July, 1887, and from the sale of the 200 barrels of oil hypothecated by Elliott, Finlayson & Co. on the 13th August, 1887, as collateral security for their note for $3,500 then discounted for them by the defendants and that they should give up to the plaintiff the note of Paxton & Co. payable to W. E. Elliott which they had not received payment of. This judgment is based upon a finding by the learned judge as stated in his judgment that the said notes and oil were the property of the said W. E. Elliott and were appropriated by him in fraud of his own creditors for the purpose of securing the debts of the firm of Elliott, Finlayson & Co. when he the said W. E. Elliott was insolvent. and that the defendants had become accomplices with the said W. E. Elliott in the committing the said fraud upon his creditors by accepting his property as security for advances made to the firm of Elliott, Finlayson & Co. when they knew the said W. E. Elliott to be insolvent. From this judgment the defendants appealed to the Court of Queen's Bench Montreal in appeal which court has varied the

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said judgment in the manner and for the reasons following as appearing in the judgment of that court:

Considering that the insolvency of the said William E. Elliott became notorious about the 13th day of July, 1887, when it became known at a meeting of the creditors of the firm of McDougall, Logie & Co., which had suspended payment, that he was involved to the extent of $17,000 for accommodation paper which he had given to that firm and of which the bank held paper to the extent of $7,559.30, and that the said William E. Elliott made a judicial abandonment for the benefit of his creditors on the 18th day of August, 1887;

Considering that the lot of 200 barrels of oil transferred to the bank on the 16th August, 1887, and held by the firm of Elliott, Finlayson & Co., under warehouse receipts issued in favour of the said William E. Elliott, but duly endorsed over by him to it, and was ostensibly its property, and that there is no proof that the bank was aware or even suspected that the said oil was not its property;

Considering that (under the arts. 1488 and 1966a of the Civil Code) the bank acquired a valid title to the said lot of oil when the said firm of Elliott, Finlayson & Co. on the 16th day of August, 1887, transferred it to the bank as collateral security for the payment of a promissory note for $3,500 payable on the 3rd day of October, 1887, and then discounted for the said firm, and the said bank cannot now be troubled for the said oil or for the said sum of $2,998, being the proceeds of the sale thereof;

Considering that the bank, by its manager, Alexander M. Crombie, had reason to know that the said William E. Elliott was insolvent on the 16th of July, 1887, when at his instigation the agent of the said William E. Elliott transferred to it the said promissory notes to the amount of $2,768.78 as collateral security for bills or promissory notes for which he might be liable, and when he was so liable to the bank to the extent of $7,559.30 for accommodation given by him to the then suspended firm of McDougall, Logie & Co., and his own insolvency had become notorious.

Considering that the said transfer was in effect a payment by an insolvent to a creditor knowing his insolvency, and that under art. 1036 of the Civil Code it must be deemed to have been made with intent to defraud, and that the bank appellant must therefore be compelled to restore the said promissory notes, or their value, for the benefit of the said William E. Elliott's creditors.

The judgment then proceeds to allow the appeal of the defendants against the judgment of the Superior Court as to the said sum of $2,998 realized from the sale

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of the said 200 barrels of oil, but condemns the defendants to pay to the plaintiff the sum of $1,603.46, the amount realized from the notes handed to Mr. Crombie on the 16th July, 1887, with interest thereon, and to deliver up to the prothonotary of the Superior Court of the district of Montreal the John Paxton & Co.'s note for $1,165.32 within a prescribed time, or in default to pay the amount thereof to the plaintiff. From this judgment the plaintiff has appealed, and the defendants have entered their cross-appeal.

As to the principal appeal which is that of the plaintiff and relates to the $2,998 realized by the defendants from the sale of the 200 barrels of oil hypothecated by Elliott, Finlayson & Co. as collateral security for their note for $3,500 discounted for them on the 16th of August, there cannot in my opinion be entertained a doubt that the judgment of the Court of Queen's Bench at Montreal in appeal is well founded and cannot therefore be disturbed.

That the defendants and their manager Mr. Crombie, when upon the 8th July, 1887, they discounted for Elliott, Finlayson & Co. the note for $5,087.50, did so upon the faith of their having the 292 barrels of oil then hypothecated by Elliott, Finlayson & Co. as collateral security for the advances made to them upon that note, and that they had reason to believe and did believe Elliott and Finlayson to have full power to hypothecate the oil as they did as their own property, the evidence does not warrant a doubt and the *bonâ fides* of the defendants in that transaction is not now a matter in dispute.

Upon the receipt by the defendants on the 9th of August, 1887, of the sum of $3,528.30, the proceeds of the 146 barrels of oil sold to R. C. Jamieson & Co., the amount becoming due upon the above note was reduced to the sum of $1,559.20 for which the defendants

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held the remaining 146 barrels of oil as collateral and they continued to hold those 146 barrels as the property of Elliott, Finlayson & Co. and as security for the said sum of $1,559.20 in virtue of the arrangement made on the 10th August until the 16th of August when Elliott, Finlayson & Co. hypothecated the same 146 barrels together with the other 54 barrels the receipts for which represented that oil also to be the property of Elliott, Finlayson & Co., as collateral security for Elliott, Finlayson & Co.'s note for $3,500 discounted by the defendants on the said 16th of August.

Now as to this hypothecation of these 200 barrels of oil on the 16th of August there does not appear to be a particle of evidence which would justify a judicial tribunal in adjudging that Mr. Crombie the defendant's manager knew or had reason to believe that in truh Elliott, Finlayson & Co. had no right to deal with or to hypothecate as they did the oil in question. It is to my mind inconceivable that Mr. Crombie would have sacrificed the favourable position which upon the 10th of August, 1887, the defendant held in relation to the 146 barrels of oil then held by them under hypothecation and have authorized the discount for them of their note for $3,500 on the 16th of August if he had not thoroughly believed that the right of Elliott, Finlayson & Co. to hypothecate the said 200 barrels of oil as security for that note as they did was indisputable beyond all doubt and question, and the judgment of the Court of Queen's Bench in appeal that there is no evidence justifying an adjudication that the defendants or their manager knew or had reason to know or believe that Elliott, Finlayson & Co. had no such right is in my judgment unimpeachable. The appeal therefore of the plaintiff must, in my opinion, be dismissed with costs.

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Now as to the cross-appeal which affects the notes handed over to Mr. Crombie by Mr. Finlayson as agent for W. E. Elliott on the 16th of July, 1887, as collateral security for the two notes amounting together to $2,983.36 made by McDougall, Logie & Co., and which by the failure of that firm had become due. This transaction is only disputed upon the contention that at the time when it took place the defendants through their manager Mr. Crombie knew that W. E. Elliott was insolvent, and that the object of the defendants' manager was thereby to obtain for them a fraudulent preference over W. E. Elliott's other creditors and that therefore the transaction was void under art. 1036 of the Civil Code. The pivotal point in the transaction is the knowledge of Mr. Crombie on the 16th July, 1887, that W. E. Elliott was then insolvent. It is not suggested that there is any direct evidence that Mr. Crombie had such knowledge. The direct evidence is altogether to the contrary effect. He himself was the only witness examined upon the point and he most positively denies upon oath that he had any such knowledge then or at any time prior to his return to Montreal from his vacation on or about the 3rd of September, and he swears that when he left Montreal on the 15th August, after having made arrangements with Elliott, Finlayson & Company for the discounting of the two notes for $2,500 and $7,263.36 respectively, he did not entertain the slightest doubt of Mr. W. E. Elliott's solvency. The evidence, therefore, in order to be sufficient to justify the imputing to Mr. Crombie the knowledge required by the terms of art. 1,036 so as to avoid the transaction, must be sufficient to displace wholly this peremptory denial by Mr. Crombie of all knowledge of W. E. Elliott's insolvency. Now what the Court of Queen's Bench, in that part of their judgment which is the subject of this cross-appeal, proceed

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upon, is not that any direct evidence of knowledge of W. E. Elliott's insolvency has been brought home to Mr. Crombie, but upon this that in their opinion and judgment the insolvency of W. E. Elliott became notorious on about the 13th July (although there was no evidence given of the fact of such imputed notoriety) when it then became known at a meeting of the creditors of the firm of McDougall, Logie & Co., which had suspended payment, that Elliott was involved to the extent of $17,000 for accommodation endorsements of the paper of that insolvent firm which the defendants held to the amount of $7,559.30, and that therefore the defendants by their manager, Mr. Crombie, had reason to know that the said W. E. Elliott was insolvent when he received the promissory notes for $2,768.78 on the 16th July, 1887, at a time when Elliott's insolvency had become notorious, and they therefore concluded that the transfer of these notes to the defendants was in effect a payment by an insolvent to a creditor knowing his insolvency, and that therefore it must, under art. 1036, be deemed to have been made with intent to defraud. This language, while it seems to relieve Mr. Crombie, the defendants' manager, from any imputation of a positive intent to defraud and from any imputation of falsely denying that he had knowledge of W. E. Elliott's insolvency when the transaction of the 16th July, 1887, took place, rests the judgment of the court upon the foundation that, as alleged in the judgment, the insolvency of Elliott was then notorious, and that, therefore, because of the imputed notoriety of such insolvency, Mr. Crombie had reason to know that W. E. Elliott was then insolvent, whether in point of fact he did know it or not. The judgment thus seems to introduce into the art. 1036 language not to be found in it, but which was in the repealed Insolvent Act of 1875, whereby

contracts made by a creditor with a debtor (whom the creditor not only knew to be insolvent, but whom he had probable cause for believing to be insolvent) or after his inability to meet his engagements had become public and notorious, were avoided. But in the present case, as already observed, it is not suggested that there was any direct or positive evidence that upon the 16th July, 1887, it was a notorious fact that W. E. Elliott was insolvent; not a witness was called to testify to such a fact, and there was no direct or positive evidence whatever offered to that effect. That he was then notoriously insolvent is a conclusion drawn by the court from the single fact that at a meeting of the creditors of the insolvent firm of McDougall, Logie & Co., held on or about the 13th July, 1887, Mr. Elliott appeared to be an accommodation endorser upon their paper to the amount of about $17,000, of which the defendants held paper to the amount of $7,559.30. The question therefore is reduced to this: Did that fact, so appearing, constitute in law or in fact such notoriety of the fact that W. E. Elliott was then insolvent as to justify the imputation of knowledge that Elliott was in point of fact then insolvent to Mr. Crombie, against his positive denial upon oath of any such knowledge and against his oath that Elliott had impressed him with such a belief in his solvency that his being involved as accommodation endorser on McDougall, Logie & Co.'s paper to the amount of $17,000 did not shake his confidence in Elliott's solvency?

If Elliott's insolvency was so notorious a fact upon the 16th July as to justify the imputation of the knowledge of the fact then to Mr. Crombie, of course Elliott could not have taken up any of the notes of McDougall, Logie & Co. upon which he was endorser, nor could any other creditor of Elliott's have then or at any time since accepted payment from him of any debt whatever

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due by him. In my judgment the fact that Elliott appeared to be a creditor of McDougall, Logie & Co., as accommodation endorser of their paper to the amount of $17,000, afforded no evidence of Elliott himself being then insolvent, and as there was no other evidence whatever from which it has been suggested that upon the 16th of July, 1887, Mr. Crombie had reason to know or believe and should have known or believed Elliott to be then insolvent, the transaction of that day stands unimpeached. The case of *Allen* v. *The Quebec Warehouse Company* (1) was appealed to by the learned counsel for the plaintiff, and the rule there recognized that the Judicial Committee of the Privy Council will not interfere with the judgment of two courts concurring upon a question of fact unless the finding be clearly erroneous, but neither that case nor the rule therein recognized can apply to a case where the conclusion upon the question of fact involved is drawn from premises which afford no warrant for the conclusions, and the rule moreover is expressly qualified by the condition that the conclusion is not clearly erroneous, and with great deference I must say that it appears to me it would be as reasonable to hold upon the evidence in the case that upon the 15th of August, 1887, when Mr. Crombie agreed to discount the notes for $3,500, and $7,263.86, he knew or had reason to know that Elliott intended to execute upon the 18th August a judicial abandonment of his estate, as to hold that upon the 16th July he must have known or had reason to know that Elliott was then insolvent from the circumstance that upon the 13th July the insolvent firm of McDougall, Logie & Co. appeared to be indebted to him as accommodation endorser upon their paper to the amount of $17,000 for so much of which as the assets of the insolvent firm should be insufficient to pay he

(1) 12 App. Cas. 101.

would be liable. In my opinion, therefore, the cross appeal should be allowed with costs and the action in the court below be ordered to be dismissed with costs.

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PATTERSON J.—We have an appeal by Stevenson, the plaintiff in the action, and a cross-appeal by the bank.

The cross-appeal cannot, in my opinion, succeed.

There is no room to question the fact that William E. Elliott was insolvent, whether he or any one else knew that he was, early in July, 1887. On the 13th of that month the fact transpired at a meeting of the creditors of the insolvent firm of McDougall, Logie & Co. that Elliott was liable for $17,000 of the debts of that firm. From that time the courts below, that is to say, the Superior Court and the Court of Queen's Bench, agree in holding that his insolvency was notorious and that the Bank of Commerce knew of it. There was ample evidence to sustain that conclusion, and although it may be that evidence would also have warranted the finding that knowledge of Elliott's insolvency was not brought home to Mr. Crombie, the bank manager, until a later date, yet we must, as I apprehend, take the fact to be as found by the courts below.

Elliott had discounted with the Bank of Commerce paper of McDougall, Logie & Co. to the amount of $2,983, and he was further liable on two other notes of that insolvent firm held by the Bank of Commerce, the whole amount being more than $7,500.

On the 16th of July, Elliott being then absent from Canada, Mr. Crombie asked Mr. Finlayson, who was acting for Elliott, for collateral security, and obtained customers' notes to the amount of $2,768.78. These were expressed in the receipt given for them as being security for the general liability of Elliott, although the security seems to have been asked for with particular reference to the item of $2,983.

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The bank has been held liable, under article 1036 of the Civil Code, to account for these assets to the plaintiff as curator of the property and effects of W. E. Elliott.

The cross-appeal is against that decision. The complaint I understand to be rather against the finding of the fact that the bank had knowledge of Elliott's insolvency on the 16th of July than against the view of the law on which the court acted.

I think we must dismiss the cross-appeal.

In the direct appeal the curator seeks to recover from the bank the value of 200 barrels of oil, as assets of the insolvent W. E. Elliott in the business of dealer in oil which he carried on under the name of W. E. Elliott & Co., and which oil was pledged to the bank by the wine house of Elliott, Finlayson & Co. of which W. E. Elliott was a member.

In the court of first instance the plaintiff sued for 346 barrels of oil and he recovered for part, viz., 200 barrels and failed as to 146 barrels. The defendants appealed from that decision to the Court of Queen's Bench and there the decision was against the plaintiff as to the whole of the oil.

On the 8th of July, 1887, the bank discounted for Elliott, Finlayson & Co. a note for $5,087.50, made by John Elliott & Co. and endorsed by W. E. Elliott & Co. and by Elliott, Finlayson & Co. To secure that note Elliott, Finlayson & Co. transferred to the bank several warehouse receipts for oil, covering in all 292 barrels, which had been endorsed to that firm by the oil firm of W. E. Elliott & Co.

That transaction was, in both of the courts below, held to be unimpeachable.

The note was dated the 28th of June and was due on the first of October, 1887. It was negotiated with the bank on the 8th of July.

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Familiar as the provisions of the Bank Act (1) respecting warehouse receipts may be we may usefully refer to one or two of them. Section 53 subsection 2 authorizes a bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour in the course of its banking business; but, by subsection 4, the bank shall not acquire or hold any warehouse receipt or bill of lading to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank.

In connection with this, and in anticipation of what is to follow, we may note that the customer of the bank was here Elliott, Finlayson & Co. The advance of money was to that firm, and, in the essence of the transaction, the other parties to the note were sureties to the bank for the debt incurred by the firm, although of course they became themselves directly liable under the law merchant. The warehouse receipts were security for the debt so incurred by Elliott, Finlayson & Co.

It became convenient at a later date, in connection with the business of the Elliott firms, to relieve the firm of John Elliott & Co. from liability on the note. That was effected by substituting for the note, with the consent of the bank, another note similar in date, amount and tenor, except that it was made by Elliott, Finlayson & Co. and payable to the bank.

I do not see that that substitution affected in any way the security of the bank under the warehouse receipts. The debt was still the debt of Elliott, Finlayson & Co. contracted on the 8th of July, in security for which the receipts had been endorsed to and received by the bank.

That change in the form of the obligation was made on the 10th of August, 1887. Part of the oil, viz., 146

(1) R. S. C. ch. 120.

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barrels, had been sold before that date by the bank at the request of Elliott, Finlayson & Co., and had realized $3,528.30. The date of the sale is not proved. The warehouse attendant says the oil was transferred to the purchaser on the 12th of July, and it seems that one of the warehouse receipts produced in evidence bore date the 13th of July, while there is very direct evidence that receipts for 292 barrels were in the hands of the bank manager on the 5th of July, and were formally pledged on the 8th. These apparent discrepancies are scarcely for this court to investigate with a view to find conspiracy and fraud which the courts below have not found.

The purchase money of $3,528.30 was received by the bank on the 9th of August leaving $1,559.20 of the original amount of $5,087.50 unpaid, and as security for that balance the bank continued to hold the remaining 146 barrels of oil.

Then another change of scene takes place.

Elliott, Finlayson & Co. paid off the balance of $1,559.20 on the 16th of August and thereby redeemed the pledge of the oil.

On the same day, however, or the day before, they procured from the bank the discount of a note made by John Elliott & Co. for $3,500, and secured that advance by warehouse receipts for 200 barrels of oil. Where did they get that oil? For 146 barrels they had the old receipts, and for 54 barrels there was a warehouse receipt made, like all the rest, to W. E. Elliott & Co. which W. E. Elliott had himself, a few days before, left with the bank in anticipation of advances being made upon it.

It is not made clear, either by the evidence or by any express finding of fact, how the ownership of the oil, or at all events of the original 292 barrels, really stood as between the oil firm of W. E. Elliott & Co., or

more properly Elliott himself, and the wine firm of Elliott, Finlayson & Co. Elliott, as it would appear from evidence given by Finlayson, had not put into the wine business the agreed amount of capital. His transfers of oil may have been payments on account of his capital. Apart from the imputation of fraud as against Elliott's creditors there is no reason why the transfer of the receipts by Finlayson should not convey a good title to the bank.

In the Superior Court it was held that the original transaction of the 8th of July was valid because the bank did not, at that date, know of the insolvency of Elliott, and therefore the bank was entitled to retain the proceeds of the sale of the 146 barrels in July, but that the pledge of the 200 barrels in August after the insolvency was known was invalid.

This reasoning seems to have regarded the transactions as if between Elliott and the bank, not laying stress on the intervention of Elliott, Finlayson & Co.

The Court of Appeal looked at the matter from a different standpoint, and (referring to the articles 1488 and 1966*a* of the Civil Code) held that it was not established that the bank when it took the sureties from Elliott, Finlayson & Co., to whom they had been duly endorsed by Elliott, knew that they did not belong to the wine firm.

On that ground the bank was held to be entitled to retain the whole 346 barrels of oil.

I am not prepared to differ upon the question of fact from the court below, at least so far as the original 292 barrels are concerned.

The 146 sold in July are out of the question. The other 146, which were released on the 16th August by the payment of the debt of $5,087, were pledged again on the same day, and whatever the bank may have

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known at that time of the circumstances of W. E. Elliott it had acquired no new information, as far as disclosed by the evidence, respecting the title to the 146 barrels which up to that date it had held as pledgee of Finlayson. Treating the transaction, as the Court of Appeal treated it, as between the bank and Finlayson, and not as between the bank and Elliott, I do not see sufficient grounds for interfering with the decision as far as the 146 barrels of oil are concerned.

The other 54 barrels do not stand in quite the same position. The warehouse receipt for the 54 barrels, which was dated the 30th of June, does not appear to have been endorsed to Elliott, Finlayson & Co. On the 8th of August, after the bank knew, as the fact is found to be, of Elliott's insolvency, Elliott himself brought that receipt to the bank and left it for the purpose of an advance to be afterwards made. The advance was made to Elliott, Finlayson & Co. on the 16th, and the receipt then for the first time endorsed over by Elliott.

Under these circumstances the reasoning of the Court of Appeal does not seem to apply to the lot of 54 barrels, and as to that lot I think the judgment of the Superior Court should be restored.

The 200 barrels sold for $2,998. The proportion for 54 barrels is $809.46.

I think the appeal should be allowed to that extent, and I suppose with costs.

Appeal allowed and cross-appeal dismissed with costs.

Solicitors for appellants: *Macmaster & McGibbon.*

Solicitors for respondents: *Morris & Holt.*