1900

*Oct. 8,9,10.

*Nov. 12.

THOMAS MIGNER (DEFENDANT).....APPELLANT;

AND

ONEZIME GOULET (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Répétition de l'indu—Actio condictio indebiti — Duress — Transaction— Payment under threat of criminal prosecution — Error—Ratification.— Arts. 1047, 1049, 1140 *C. C.*

About the time a dissolution of partnership was imminent one of the partners was accused of embezzlement of funds and, supposing that he was liable for an alleged shortage and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm He was denied access to the books and vouchers and, some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly and had not appropriated any part of the missing funds.

Held, that he was entitled to recover back the amount so paid in an action *condictio indebiti* as both the consent and the payment had been made under duress and in error and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place, and, further, that, even if the consent given could be regarded as amounting to transaction, it would be voidable on account of error as to fact.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the plaintiff's action with costs.

The plaintiff, the defendant and another person carried on business together in partnership as manu-

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

facturers in the City of Quebec and, shortly before dissolution of the firm, the other partners became suspicious in respect to the plaintiff's method of paying the factory hands and accused him of having appropriated about $9,000 of the partnership funds to his own use; criminal proceedings were threatened and the plaintiff was prevented by the other partners from making an examination of the books or vouchers. Under fear of this prosecution and its consequences to himself and family and erroneously supposing that shortages were chargeable to him, the plaintiff consented that $6,000 should be deducted from his share in the firm's property and, upon the division of the assets, a short time afterwards, the money was deducted from his account and $3,000 credited and paid to each of his partners.

Upon subsequent examination of the books and vouchers the plaintiff discovered that he was not indebted, and, upon being convinced of the mistake which had been made, one of the partners returned the $3,000 he so received from the plaintiff, but defendant insisted upon retaining the $3,000 which had been paid to him. In an action, *condictio indebiti*, to recover the latter amount as having been paid in error and under duress the trial court judge dismissed the plaintiff's *demande* on the grounds that there had been no duress, and that there was consideration for the payment as a shortage had not been accounted for. On appeal this judgment was reversed and judgment ordered to be entered for the plaintiff, the Court of Queen's Bench considering that he had proved that his consent to the payment had been given under duress and through threats and artifice. The defendant now appeals.

Fitzpatrick Q.C. (Solicitor-General), and *L. A. Cannon* for the appellant. The payment was upon trans-

1900

MIGNER v. GOULET.

action and to avoid a lawsuit which was good and sufficient consideration. Admitting (what appellant denies) that the agreement constituted "compounding of felony," money paid under such an illegal contract cannot be recovered back. There was no duress, or error and, even admitting that the contract was entered into through threats and compulsion, it was ratified by the respondent consenting, some months afterwards, that the amount charged against him should be paid to the appellant on the settlement of the partnership affairs. Arts. 1012, 1918 C. C.; *Fisher & Co.* v. *Apollinaris Co.* (1); *Ward* v. *Lloyd* (2). But even if the transaction was really stifling a prosecution, neither of the parties has any *locus standi* and the action must be dismissed. He who has paid the price of an illegal convention has no right to "*condictio indebiti*." *McKibbin* v. *McCone* (3); *Wilson* v. *Strugnell* (4); *Herman* v. *Jeuchner* (5); *Munt* v. *Stokes* (6); *Collins* v. *Blantern* (7), per Wilmot L. C. J. at page 360; *Scott* v. *Brown* (8); *Taylor* v. *Bowers* (9); *Goodall* v. *Lowndes* (10). Plaintiff could not have had any reasonable fear, under the circumstances; arts. 994-1000 C.C.; *Hilborn* v. *Bucknam* (11); *Schultz* v. *Culbertson* (12); 4 Aubry & Rau pp. 299-300; Pothier, Obligations, no. 26; 10 Duranton, nos. 144-145; 15 Laurent, no. 517; *Miguet* v. *Guyon* (13); 9 Rep. Gen. J. du P. *vo.* "Obligation," no. 144; *Gassiot* v. *Courrége* (14); *Pissard* v. *Maury* (15); *Boddy* v. *Finley* (16).

Goulet assisted in keeping the books and was in the best position to know exactly how the matter stood.

(1) 10 Ch. App. 297.
(2) 6 M. & Gr. 785.
(3) Q. R. 16 S. C. 126.
(4) 7 Q. B. D. 548.
(5) 15 Q. B. D. 561.
(6) 4 T. R. 561.
(7) 1 Sm. L. C. (10 ed.) 355.
(8) [1892] 2 Q. B. 724.
(9) 1 Q. B. D. 291.
(10) 6 Q. B. 464.
(11) 78 Me. 482.
(12) 49 Wis. 122.
(13) [1854] 1 J. du P. 512.
(14) S. V. 36, 1, 948.
(15) Dal. 79, 1, 158.
(16) 9 Gr. 162.

His assent to the correctness of the charge of wrongfully dealing with the moneys of the partnership must be implied from his voluntary offer to compromise: *Clarke* v. *Dutcher* (1). Error of law is not a cause for annulling transaction; art. 1921 C. C. As to ratification and acquiescence see Addison Contracts (9 ed.) p. 118; *Ormes* v. *Beadel* (2); *Petit* v. *Martin* (3). In August he voluntarily executed the undertaking made in May; *Ewing* v. *Hogue* (4); *Piper* v. *Harris Mfg. Co.* (5).

As to the *onus probandi*, see Dal. Rep. Supp. v. Obligation no. 2325; *Leclerc* v. *Leclerc* (6); *McClatchie* v. *Haslam* (7); *Jones* v. *Merionethshire P. B. Building Society* (8). Money stolen is a good consideration. *Thorn* v. *Pinkham* (9). See also *North British and Mercantile Insurance Co.* v. *Tourville* (10); *Colonial Securities Trust Co.* v. *Massey* (11), as to the weight to be given to the decision at the trial.

L. P. Pelletier Q.C. for the respondent. The appellant extorted this money by threats and the *onus probandi* is upon him to show reasons for retaining it. Against the suspicions which at first existed the fuller investigation has cleared the respondent from fault of any kind; he has been honourably acquitted. He is in the position of a surety entitled to a full and final discharge; *Paquette* v. *Bruneau* (12); *Peoples Bank of Halifax* v. *Johnson* (13). The obligation supposed to exist when he bound himself has been shewn to have been null and void and non-existent. The duress was of continuing character for he

(1) 9 Cowen (N.Y.) 673.
(2) 30 L. J. Ch. 1.
(3) Q. R. 14 S. C. 128.
(4) Q. R. 4 S. C. 494.
(5) 15 Ont. App. R. 642.
(6) Q. R. 6 Q. B. 325.
(7) 65 L. T. N. S. 691.
(8) 65 L. T. N. S. 685.
(9) 84 Maine 101.
(10) 25 Can. S. C. R. 177.
(11) [1896] 1 Q. B. 38.
(12) M. L. R. 6 S. C. 96.
(13) 20 Can. S. C. R. 541.

1900

MIGNER v. GOULET

was kept in jeopardy all the time and forcibly prevented from making an examination of the books and vouchers.

We cite as authorities in support of the judgment appealed from, Arts. 982, 988, 991, 994, 995, 996, 1047, 1048, 1140, 1921-1925 C. C.; *Dugrenier* v. *Dugrenier* (1); *City of Quebec* v. *Caron* (2); 10 Duranton, p. 140; *Banque de St. Hyacinthe* v *Sarrazin* (3); *Kerr* v. *Davis* (4); *Ewing* v. *Hogue* (5); 16 Laurent, Nos. 112, 116. Larombière, Art. 1376 C. N. par. 13. *Couture* v. *Marois* (6); *Macfarlane* v. *Dewey* (7), and authorities cited. Marbeau, "Transactions," *nn.* 162, 168; Fuzier-Herman, Codes ann, Art 2053, *nn.* 1, 3, 4; Art. 2055, *nn.* 1, 3. Dal. Sup. Vo. Transaction, *nn.* 93, 97, 99-102, 106, 109 *et seq.*; Dal. Rep. Vo. Transaction, *nn.* 148, 162 *et seq.*; Vo. Obligation, *nn.* 152 *et seq.*, 528 *et seq.*; Dal. Dict. Dr. 1897. Tables Vo. Transaction, col. 576, No. 3. Dal. 95-2-423; Baudry-Lacantinerie "Transactions," No. 1262.

The judgment of the court was delivered by:

TASCHEREAU J.—Si les faits de cette cause sont nombreux, comme le démontre la revue approfondie qu'en a faite Monsieur le Juge Ouimet en Cour d'Appel, les questions de droit qu'ils soulèvent ne me paraissent ni compliquées ni difficiles à résoudre

D'abord, comme fait principal et sur lequel suivant moi dépend toute la cause, l'intimé, Goulet, a-t-il prouvé qu'il ne devait pas les trois mille piastres en question, lorsqu'il a signé le document par lequel il promit les payer?

Toute ardue que soit toujours la tâche de celui sur qui, par exception, la loi met en certains cas le fardeau

(1) 6 Legal News, 234.
(2) 10 L. C. Jur. 317.
(3) Q. R. 2 S. C. 96.
(4) 18 R. L. 194: M. L. R. 5 Q. B. 156; 17 Can. S. C. R. 235.
(5) Q. R. 4 S. C. 494.
(6) 5 Q. L. R. 96.
(7) 15 L. C. Jur. 85.

d'une preuve négative, il est rare de rencontrer un litige où elle puisse l'être plus qu'elle l'a été pour l'intimé dans l'espèce. Et cependant, il a réussi.

Je vois au dossier la preuve convaincante qu'il ne devait rien à l'appelant lors de la dissolution de leur société, pas même d'après son témoignage auquel je donne croyance, les quelques piastres que le comptable Blouin aurait crû être *primâ facie* dues d'après un examen, *ex parte*, des livres et des documents produits. Il n'y avait donc pas, à la date du document en question, de dette pré-existante, que l'intimé était obligé de payer, Arts. 1047, 1140 C C., et l'appelant a par conséquent reçu ce qui ne lui était pas dû. Ceci étant résolu comme question de fait, l'obligation de prouver qu'il a fait ce paiement par erreur devenait pour l'intimé aussi facile que la preuve négative, sur laquelle repose la base de son action, lui avait été difficile. Car ici, tout était à présumer en sa faveur. Il répugnerait au bon sens de supposer, sous les circonstances de la cause, qu'il ait voulu, dans l'occasion en question, faire de plein gré un cadeau de trois mille piastres à l'appelant. Il n'a consenti à payer que parce qu'il croyait devoir ; et il ne devait pas. Il a donc droit de répéter ce quil a payé.

Que l'appelant ait été de bonne foi ou non, qu'il ait cru lui-même ou non, que l'intimé était réellement son débiteur, ne peut affecter en rien l'obligation que la loi lui impose de restituer intégralement à l'intimé ce qu'il en a indûment reçu. Art. 1049 C. C.

La prétension de l'appelant que l'intimé aurait ratifié sa promesse de payer, en payant de fait quelques semaines plus tard ne peut prévaloir. Ce paiement est entaché du même vice que la promesse de payer elle-même, l'erreur où était l'intimé qu'il était le débiteur de l'appelant, et l'impossibilité où l'appelant lui-même l'avait mis de pouvoir s'assurer du contraire en lui

1900

MIGNER v. GOULET.

Taschereau J.

refusant arbitrairement tout accès aux livres de leur société. Ce n'est que quand il a pu voir ces livres, et constater la fausseté des prétensions de l'appelant, qu'il a été en état de faire sa réclamation. Et si cet écrit pouvait être envisagé comme comportant une transaction tel que l'a soutenu l'appelant, alors cette transaction serait nulle pour la même cause, parce que l'intimé n'y a consenti que par erreur de fait.

Ce point de vue du litige diffère un peu de celui de la Cour d'Appel, mais pour les motifs ci-dessus, nous sommes d'avis que la conclusion à laquelle elle en est venue, de maintenir l'action de l'intimé, est inattaquable, et nous renvoyons l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitzpatrick, Parent, Taschereau & Roy.*

Solicitors for the respondent: *Drouin, Pelletier & Fiset.*