THE CORPORATION OF THE COUNTY OF OTTAWA..... } APPELLANTS;

AND

THE MONTREAL, OTTAWA AND WESTERN RAILWAY CO..... } RESPONDENTS.

1885
*Oct. 30.

1886
*Mar. 8.

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

Capital stock—Damages—Covenant—Breach of—Debentures—Arts. 1065, 1070, 1073,1077, 1840 *&* 1841, *C. C.* (*P. Q.*)

The Corporation of the County of Ottawa under the authority of a by-law undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of $100 each, payable twenty-five years from date and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation solely for damages for their neglect and refusal to issue said debentures,—

Held, affirming the judgment of the court below, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under arts. 1065, 1073, 1840 and 1841, C. C. for damages for breach of the covenant. (Ritchie C.J. and Gwynne J. dissenting.)

APPEAL from the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the judgment of the the Superior Court (2).

The respondents were formerly styled the Montreal Northern Colonization Railway Co., and while so styled the corporation of the County of Ottawa passed a by-law entitled, "by-law to authorize the corporation of the County of Ottawa, in the Province of Quebec, to take stock in the capital stock of the Montreal Northern

*PRESENT.—Sir J. W. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

(1) M. L. R. 1 Q. B. 46. (2) 26 L. C. Jur. 143.

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Colonization Co. to the extent of $200,000, and to pay the same in bonds or debentures, and to impose a yearly rate to pay interest and provide for a sinking fund."

This by-law was submitted to the electors of the county and approved; and it was subsequently incorporated in the statute 36 Vic. ch. 49 of the Province of Quebec.

The Préfet du Conseil of the county duly subscribed for 20,000 shares in the stock of the said company of the par value of ten dollars per share, on certain conditions referred to at length in the judgments hereinafter given.

The Company commenced work on their road in the fall of 1873 and in March, 1875, had expended $300,000. They then demanded the debentures from the County of Ottawa, which the latter refused to deliver. The Company claimed that there was due from the appellants, at the time of the said demand, $112,096.70. This action was then brought, the respondent alleging that by the refusal of the Corporation to deliver the debentures according to agreement they had lost credit and were obliged to abandon work on their road. They claimed $500,000 damages. The defendants demurred to the declaration alleging as grounds of demurrer that the only legal claim that could be made was one for the issue of the debentures or their value in money and no claim for damage for injury to credit of Company could be sustained.

That plaintiff could only claim a specific sum and interest thereon, which they do not claim.

That if this action could be maintained defendants would still be liable for the amount of their obligation with interest thereon.

The defendants also pleaded a number of pleas, the principal being:

That the debentures were only to be issued on con-

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dition of the road being completed before December, 1875; and that plaintiff had declared that they could not do so, and defendants alleged that is was impossible for them to do so.

That plaintiffs were utterly insolvent and unable to meet their liabilities.

That they had not paid for the land over which their road was being built and had no title to the same.

And several pleas alleging fraud on the part of the company in issuing bogus stock and colluding with contractors.

They also pleaded that they never consented to the substitution of the name of the present company and that their subscription was therefore void.

The Attorney General for Quebec intervened, claiming that the railway and the rights of the company had been transferred to the Government of Quebec by a conveyance executed November 2nd, 1875.

The intervention was contested and finally discontinued, but the appellants contend that the company have parted with all their interest in the contract to the government.

The demurrer was over ruled by the court of first instance, and the judgment of that court was sustained by the Court of Appeal—Dorion and Cross JJ. dissenting.

The principal question to be decided was, whether any damages, except interest, can be recovered. The appellants relied on art. 1077 of the Civil Code, which reads as follows:—

> The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.

The respondents contended that they were entitled to other damages than those resulting from the mere delay, which fall under the general rule, allowing the

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court to assess damages according to the loss really sustained.

Laflamme Q.C. for appellants.

DeBellefeuille for respondents.

The authorities and cases cited are referred to in the judgments hereinafter given and in the reports of the case in the courts below.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—I have been unable to bring my mind to the conclusion at which my brothers have arrived. I think it right to express, but with great hesitancy, the doubts I entertain. If this case had been brought for the delivery of the debentures, the correct measure of damages in the case, it appears to me, would be to recover the debentures, or the amount of the debentures and interest. But, as I understand the judgment, this is not the nature of the action, no such claim being put forward. On the contrary, the claim is to recover damages, apart from the amount of the debentures and interest, for which, it is stated, an action has been brought and is pending.

I am unable to discover anything in this case other than simple delay in not paying in the manner agreed on, for which the only claim I can conceive the plaintiffs would have against the defendants would be for the delivery of the debentures, or their value in money, and interest. This delay, the plaintiffs allege, caused the damage complained of, but such damages I think the article of the Civil Code of Lower Canada 1077 clearly declares shall consist only of interest. The agreement to take stock and pay for it by debentures, was no more than an agreement to take stock securing the payment of the money therefor by debentures, and therefore an obligation to pay money, which, in the words of the respondents factum, "the corporation purely and simply refuse to pay," and to which,

it seems to me, article 1077 applies. That article reads thus:—

The damages resulting from delay in the payment of money to which the debtor is liable, consists only of interest, at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law. These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where, by law, they are due from the nature of the obligation. This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.

There does not appear to have been any interest due on the subscription of appellants, or on the debentures had they been issued at the time the action was instituted, in which, however, neither debentures nor interest were claimed. My mind inclines strongly with that of the learned Chief Justice of the court below, that the plaintiffs' action should be dismissed on the two-fold ground, that the declaration discloses no right of action, and that the respondents have not proved that they had suffered any loss or damage for which the appellants could be held liable. Therefore I am inclined to think this appeal should be allowed, and the judgments of the courts below should be reversed.

FOURNIER J.—L'action de l'Intimée réclame de l'Appelante des dommages résultant de l'inexécution d'un contrat par lequel cette dernière, dûment autorisée à cet effet par un règlement spécial, confirmé par les électeurs du comté d'Ottawa, avait souscrit 20000, parts dans le capital de la compagnie de l'Intimée. La souscription contenait les réserves suivantes, entre autres :

Subject however to such conditions as are appended to their signatures and not otherwise, and also subject to such allotment of the shares hereinafter subscribed for by them, as shall be made by the Board of Directors of the said Company.

Date. Name. Residence. Occupation.

December, 4th 1872 (Signed) Alexander Bourgeau, Aylmer, Gentleman.

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number of shares Total
twenty thousand ; (20,000) $200,000

Warden of the County of Ottawa and acting for the Corporation of the County of Ottawa, under and in virtue of the authority of the By-law No. 2, (two) authorizing the said Corporation to take stock in the Montreal Northern Colonization Railway Company, to the amount of two hundred thousand dollars ($200,000), passed the said By-law by the Municipal Council of the said County of Ottawa on the twelfth day of June one thousand eight hundred and seventy-two and approved of by a majority of the votes polled and registered in the manner provided by law, subject the said subscription to all the stipulations contained in the said By-law, a copy of which is annexed to this signature for the purpose of defining the nature and extent of the said stipulations.

(A true extract from the subscription book).

Montreal, 19th June 1875.

Cette souscription fut ensuite régulièrement acceptée par le bureau des directeurs de la compagnie avec les conditions et stipulations contenues dans le règlement qui l'autorisait.

D'après ce règlement l'Appelante devait remettre en acquit des 20,000 actions souscrites des bons ou débentures du comté au montant de $200,000 remboursables dans 25 ans. Cent cinquante mille piastres devaient être émis à mesure que l'ouvrage avancerait, mais sans dépasser cependant la moitié du coût des ouvrages faits dans le comté d'Ottawa, et la balance de ces débentures devait être livrée lorsque les travaux seraient terminés.

L'Intimée prétendant avoir exécuté les conditions de la souscription et du règlement, réclama, le 19 janvier 1877, la somme de $112,096, de débentures pour moitié des ouvrages qu'elle avait faite dans le comté d'Ottawa. Le 19 juin suivant, l'Intimée après avoir préalablement mis l'Appelante en demeure de lui livrer les débentures tel que convenu, porta sa présente action pour dommages-intérêts, lui résultant du refus de l'Appelante de livrer les dites débentures. Ce refus, ainsi que l'allègue l'Intimée, l'aurait mis dans l'impossibilité

de compléter le chemin de fer, et exposé par là à la perte des $80,000 de débentures payables à la terminaison des ouvrages du chemin de fer, et lui aurait aussi fait perdre les subsides considérables qu'elle avait droit d'avoir de la cité de Montréal et du gouvernement de la province de Québec. Elle allègue aussi qu'elle avait droit à l'intérêt depuis le 19 janvier 1875 sur le montant pour lequel les débentures auraient dû être émises. Mais la conclusion qui demande $500,000 de dommages-intérêts, causés par le refus en question, omet de demander l'intérêt sur les débentures depuis le 19 janvier, bien que l'action contienne une allégation à cet effet.

Par sa défense en droit à cette action l'Appelante a plaidé que l'Intimée n'avait pas droit à des dommages pour la perte de son crédit et le tort causé par la non-livraison des débentures ; que le seul droit qu'il y avait était de demander l'émission des débentures ou leur valeur en argent,—que l'obligation de l'Appelante étant pour une somme d'argent, la réclamation de l'Intimée devait se borner aux intérêts sur cette somme, mais qu'ils n'étaient pas demandés par l'action, enfin que si l'Intimée avait droit à sa présente action, l'Appelante n'en demeurerait pas moins obligée au paiement des débentures et de l'intérêt. Cette défense était accompagnée d'une exception au sujet de laquelle il ne s'élève maintenant aucune question. La défense en droit fut renvoyée par la Cour Supérieure et l'Appelante condamnée à $100, de dommages-intérêts. Ce jugement a été confirmé en appel.

La question soulevée sur cette contestation est de savoir si l'Intimée ayant exécuté les conditions auxquelles elle avait accepté l'Appelante comme actionnaire, cette dernière n'est point passible des dommages et intérêts autres que l'intérêt légal en conséquence de son refus de livrer au temps convenu les débentures

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promises. L'obligation contractée par l'Appelante n'est pas l'obligation ordinaire de l'actionnaire qui a souscrit des parts conformément au statut organisant une compagnie de chemins de fer, et aux lois concernant les chemins de fer. L'étendue et les conséquences d'une telle obligation sont réglées d'une manière spéciale par ces lois qui devraient être appliquées à l'Appelante, si elle n'était qu'un souscripteur ordinaire. Dans ce cas, il n'est pas douteux que l'obligation de l'Appelante serait limitée au paiement d'une somme d'argent, par versements, tel qu'exigé par la compagnie, et que le défaut de paiement à l'époque fixée entraînerait l'obligation de payer l'intérêt et emporterait même la peine de confiscation, si le paiement n'était pas fait dans les deux mois après que l'actionnaire a été mis en défaut—ces dispositions des lois de chemins de fer n'ont pas d'application au cas actuel. L'Appelante, par suite du contrat spécial qu'elle a fait n'aurait pu être poursuivie pour le paiement de ses parts ; aucune confiscation n'aurait pu être prononcée contre elle—parce que, par leurs conventions les parties avaient dérogé à ces dispositions de la loi pour établir un autre moyen d'acquitter les parts souscrites. Le mode convenu consistait dans la livraison à l'Intimée, par l'Appelante, à l'époque fixée, des bons ou débentures de cette dernière pour la somme de $200,000, montant des parts souscrites. L'Appelante ne s'obligeait par là qu'à livrer ses bons payables dans vingt-cinq ans et non pas à payer de l'argent dans le présent. Son obligation ne consistait qu'à remettre et livrer ses débentures tel que convenu. C'est donc l'obligation de faire une certaine chose—la livraison en question que la compagnie avait le droit d'exiger de l'Appelante et non le paiement d'une somme d'argent qui n'était exigible que dans vingt-cinq ans.

L'intention évidente des deux parties en adoptant ce

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mode d'acquitter les parts, était, sans doute, de mettre de suite la compagnie en état, par la réalisation des débentures, d'exécuter ses travaux. Le refus de les livrer, privait la compagnie du moyen convenu pour se procurer des capitaux nécessaires et compromettait inévitablement le succès de l'entreprise commune. Dans ce cas, la compagnie avait une action pour contraindre l'Appelante à faire la livraison des débentures, mais elle n'en avait pas pour exiger le paiement d'une somme d'argent avant l'expiration des 25 ans. Quelle doit être la conséquence de l'inexécution d'une telle obligation ? La réponse dépend du caractère que l'on attribue à cette obligation ; si c'est simplement une obligation de payer une certaine somme d'argent, nul doute que l'on doit alors faire application de l'article 1077, C. C., et que dans ce cas, les dommages ne peuvent pas dépasser l'intérêt légal. Mais si l'on considère que le véritable caractère de l'obligation contractée consistait uniquement à faire, au temps convenu, la tradition des débentures promises, n'est-ce pas alors une de ces obligations dont l'inexécution soumet la partie qui l'a contractée aux conséquences des articles 1065 et 1073 C. C. ? Il me semble qu'il est clair que ce sont là les articles du Code Civil qui devraient, plutôt que l'art. 1077, être appliqués au cas actuel.

Bien que les opinions aient été partagées dans la cour du Banc de la Reine, que la majorité de la cour ait adopté le principe que l'art. 1077 ne s'appliquait qu'aux intérêts moratoires et qu'il pouvait y avoir d'autres dommages pour le défaut de paiement d'une somme d'argent, tandis que cette doctrine a été combattue par la minorité, tous les honorables juges ont cependant été d'avis que c'est le Code civil, et non les lois de chemins de fer qui doivent déterminer les conséquences de l'obligation en question. Sans entrer dans le mérite des savantes dissertations qui ont été faites de

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part et d'autres, je crois que du moment qu'il est admis que l'on doit chercher la solution dans le Code civil, la question, cesse de faire difficulté, car le Code contient des exceptions à l'article 1077 qui sont d'une évidente application à cette cause.

Quelle est en réalité la position de l'Appelante vis-à-vis de l'Intimée,—n'est-ce pas celle d'un associé, plutôt que d'un actionnaire ordinaire ?—Au lieu de prendre cette dernière position qui ne l'aurait soumise qu'aux conséquences déterminées par les Statuts, elle a jugé à propos de faire un contrat spécial qui n'est nullement affecté par le Statut et qui doit nécessairement tomber sous l'effet du Code civil. Par ce contrat elle s'est assurée d'un mode plus avantageux pour elle que celui fixé par le Statut, pour faire le paiement de sa mise dans le fonds social. Les véritables relations qui existent entre les parties étant celles d'associés,—c'est alors dans les articles du Code civil, concernant les obligations des associés entre eux que l'on doit chercher la solution de la question qui nous occupe. Si, comme je le crois,—ils doivent s'appliquer à la position particulière que se sont faite les parties en cette cause, il n'est plus douteux que l'Intimée a droit en conséquence du refus de livrer les débentures à des dommages en outre de l'intérêt, ainsi que le disent les articles 1840 et 1841. L'associé qui manque de verser dans la société une somme qu'il a promis d'y apporter devient débiteur des intérêts sur cette somme à compter du jour qu'elle devait être payée.

Il est également débiteur des intérêts sur toutes les sommes prises dans la caisse de la société pour son profit particulier, à compter du jour où il les en a tirées.

ART. 1841.—" Les dispositions contenues dans les deux articles qui précèdent sont sans préjudice au recours des autres associés pour dommages contre l'associé en défaut, et pour obtenir la dissolution de la société suivant les règles énoncées au titre Des Obligations et dans l'article 1896."

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L'article 1846 du Code Napoléon correspondant aux articles 1840 et 1841 de notre Code contient les mêmes dispositions, et tous les commentateurs qui ont écrit sur cet article se sont accordés sur son évidente signification. Je me bornerai à n'en citer que quelques-uns :

Laurent (1).

L'article 1846, (C. C. P. Q, articles 1840, 1841) contient une seconde dérogation au droit commun. D'après l'article 1153, les dommages-intérêts résultant du retard dans l'exécution d'une obligation ayant pour objet une somme d'argent ne consistent jamais que dans la condamnation aux intérêts fixés par la loi. L'article 1846, après avoir dit que l'associé doit les intérêts de plein droit, ajoute : "Le tout sans préjudice a de plus amples dommages-intérêts, s'il y a lieu." Cette exception résulte aussi de la nature du contrat de société. On ne s'associe point pour retirer l'intérêt légal des mises sociales, on s'associe pour faire des bénéfices qui excèdent le profit que l'on retire d'ordinaire de ses capitaux ; le dommage étant supérieur à l'intérêt légal, la loi a dû donner aux associés une action en dommages-intérêts. S'il n'en est pas de même dans les contrats en général, alors qu'ils ont pour objet une somme d'argent, c'est qu'il eût été impossible d'évaluer le montant du dommage souffert par le retard dans le paiement. Ce motif n'existe point dans la société, puisque l'objet de la société indique l'emploi que les parties auraient fait des fonds ; il est donc facile de calculer le dommage que la société souffre quand elle ne peut pas faire cet emploi.

Aubry et Rau, Droit civil français (2). Des obligations des associés entre eux.

1° Chaque associé est tenu d'effectuer sa mise au temps convenu, art. 1845, al. 1.

L'associé qui ne satisfait pas à cette obligation au terme fixé pour son exécution est de plein droit constitué en demeure, et doit, à partir de cette époque, faire état à ses associés des fruits ou revenus des objets composant sa mise, des intérêts des sommes qu'il avait à verser et des profits par lui retirés de l'industrie qu'il devait pour le compte commun. Il est en outre dans toutes ces hypothèses, passible de plus amples dommages-intérêts, s'il y a lieu. Arts. 1846, 1847.

Massé, Droit commercial (3).

N° 270. Il y a encore, en matière de cautionnement et de société, exception à la règle qui défend aux juges d'accorder des dommages-intérêts excédant le taux de l'intérêt légal. La caution qui a payé

(1) T. 26 No. 249 p. 263. (2) 4 vol., p. 554, §380.
(3) 4 T. p. 325.

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pour le débiteur principal, a un recours contre ce dernier, non seulement pour le capital, mais en outre pour des dommages-intérêts proprement dit, s'il y a lieu.

En matière de société, l'associé qui devait apporter une somme dans la société et qui ne l'a pas fait, ou qui a pris des sommes dans la caisse sociale pour les employer à son profit particulier, doit non seulement les intérêts de ces sommes, soit à compter du jour où elles devaient être payées, soit à compter de celui où il les a tirées de la caisse, mais encore de plus amples dommages intérêts, s'il y a lieu.

Demante. Code Civil (1).

Si l'apport consiste en argent, la loi, toujours eu égard à la nature de ce contrat, essentiellement commutatif, consacre ici deux dérogations aux règles ordinaires ; 1o. les intérêts courent de plein droit, par conséquent sans demande, ajoutons et sans sommation, du jour de l'échéance ; 2o. leur prestation ne dispense pas de plus amples dommages-intérêts, s'il y a lieu.

Duranton. Cours de droit Français (2).

Ainsi, dans le cas où un associé, en n'effectuant pas sa mise au jour convenu, ou en tirant de la caisse sociale une somme pour son avantage particulier, aurait empêché la société de faire une opération avantageuse, ou lui aurait occasionné des frais de la part de ses créanciers, qu'elle n'a pu payer faute de cette somme, l'associé outre l'intérêt légal, devrait être condamné à des dommages-intérêts envers la société.

Troplong. Contrat de Société (3).

Il y a plus ; il ne doit pas seulement les intérêts de plein droit ; il peut même être condamné à des réparations plus considérables, si son retard a fait manquer quelque bonne opération à la société, ou l'a empêché de remplir ses obligations envers des tiers qui ont obtenu contre elle des indemnités. L'article 1153 du Code civil est ici sans autorité. La disposition finale de notre article place, avec raison, l'associé sous des règles plus rigoureuses, qui ne sont que des règles de justice.

Si l'on fait application des articles 1840 et 1841 aux faits de cette cause, le sort du présent appel n'est pas douteux. Le savant conseil de l'Appelante s'étant, lors de l'argument, désisté de la prétention que l'Intimée n'avait pas exécuté ses engagements, il s'en suit qu'en vertu des articles ci-dessus,—aussi bien qu'en vertu des articles 1065 et 1073 l'Intimée a droit à des dommages-

(1) P. 15. (2) 423, titre IX.
(3) 22, 542.

intérêts, autres que ceux mentionnés dans l'article 1077 qui ne consisteraient que dans l'intérêt légal. En vertu de l'article 1841, elle avait droit de réclamer et l'intérêt et des dommages spéciaux, s'il en existait. Dans ses conclusions n'ayant pas demandé l'intérêt, il ne peut être accordé, mais les dommages estimés à $100, doivent lui être accordés, l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the opinion that the appeal here should be dismissed. This is not an action brought to recover money; it is brought on the failure on the part of the defendants to perform a contract they had entered into. That contract was, that in consideration of certain work to be done on the road, they would give the company debentures to the extent of $200,000, as assistance to build the railway, and the county to take stock in the company to that extent, said debentures to be delivered in the proportions in which such work proceeded. Up to a certain time the work had proceeded, and, by the terms of the agreement, the company became entitled to receive a certain portion of these bonds. They were not furnished, and the matter remained over, nothing being done. This action was brought for the damage sustained in consequence of non-delivery of said bonds at the time and in the manner pointed out by the agreement. There was a failure then to comply with the terms of the agreement and the failure is admitted. But it is alleged that this company cannot recover damages in any case. If they were entitled to anything, it could only be in the shape of interest, and they are not entitled to interest because the bonds or debentures had never been delivered. That being the case, this cannot be an action for interest, and it is not an action, in my view, for the bonds them-

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selves, or for the value of the bonds, but it is an action founded solely on the failure of the parties to deliver the bonds at the particular time in which they agreed to deliver them.

The question first arises: Can the parties succeed, under the code in force in the Province of Quebec, in an action for damages in a case of this kind? In the next place: What are the damages, and have they shown any in this action?

Under the articles referred to by my brother Fournier, viz., 1065, 1073, the obligations referred to there are the common obligations between men. But under the provisions of another chapter, title 11, under the head of partnership, we find there is a different provision, and one which does not apply to common business between one man and another.

The provision is in art. 1840 as to the liability for interest due by a partner who fails to pay a sum which he has agreed to pay the partnership. But there is another one following it, art. 1841, and it enacts that the provisions contained in the last two preceeding articles are without prejudice to the rights of partners to damages.

In the first place, I cannot bring myself to the conclusion that this is an action at all for the non-payment of money. It is an action for the non-delivery of bonds, and these bonds, when delivered, were to be placed on the market for what they were worth.

But the company say "in consequence of your failure, other parties who intended to take stock have failed to do so, you having refused to carry out your agreement." The plaintiffs contend that they undertook the work and entered into engagements on the condition that these bonds were to be given, and that they have therefore sustained damages, and substantial damages, independent of the money altogether.

I think there might, under the Quebec code, be a good cause of action independent of the question of time or of interest, and although they were not entitled to the amount of the bonds, I can see my way clear to say that they were entitled to damages.

There is another point, that when a party has suffered wrong, and is unable to prove the damages sustained by that wrong (as is the case here) the court should not dismiss his action, but give him reasonable damages. Here the plaintiffs did not prove the exact amount of their damages, yet as the defendants caused the loss which plaintiffs had incurred, it appears to me, that in a case of this kind the court, as a court and jury, are entitled to say that although plaintiff has not proved the amount, we will award him, under the circumstances, $100. Now as to the position taken by my brother Fournier, it is clearly laid down by Laurent (1), commenting on art. 1846, when dealing with the question of partnership, that besides interest the parties have the right to recover substantial damages, and he says that the article in the code referring to mere interest, has no effect whatever upon the defendants.

I think, therefore, referring to the Civil Code of Quebec, and the code from which it is taken, and the decision of the court below, and the opinion of Laurent, that the respondents are entitled to have their judgment sustained.

TASCHEREAU J.—This is not an action for damages resulting from delay in the payment of money. The obligation of this municipality did not consist in the payment of money. It had not to pay any money on the capital till twenty-five years after the issue of the debentures. And the railway company had not the right to ask any cash payment on their shares All that it could ask were the debentures. But these de-

(1) T. 26, No. 249.

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bentures, the municipality did not hand over, as they were obliged to do under their covenant, though they were regularly put *en demeure*. Are they not responsible for the non-execution of their obligation? Arts. 1065-1073 C. C. To say that here the municipality's obligation was nothing but an obligation to pay money, and that consequently the only damages for non-execution of that obligation is the interest, would be, it seems to me, to concede that for 25 years they might refuse to issue these debentures, and that, during all that time, all that the railway company would have the right to claim would be the interest. Can it be so? Surely not.

This railway company were not capitalists who desired to invest $200,000 at 6 per cent. for 25 years. Not at all. They were a company who wanted $200,000 to build a railway, not in twenty-five years, but then and there, and as this municipality was not able to pay its $200,000 of shares in cash, it was agreed that it should give its debentures, or promissory notes as it were, for the amount, said notes payable in 25 years. So that by negotiating these notes or these debentures either at par, at a discount, or at a premium, the railway compay might procure the funds required for the construction of the road.

Upon the faith of that agreement, the railway company proceeded to build the railway, and when they demand the issue of the debentures according to the agreement, the municipality says: never mind we will pay you the interest during 25 years, and you must be satisfied. Is that the contract? Are the company to build the railway with the interest?

The appellants' contentions are untenable.

The interest specified was for the delay given to the municipality in the payment of the money. The damages asked are for the delay in the issue of the

debentures, and do not fall under art. 1077 of the code.

To extend this article in the sense that the appellants ask the court to do so would lead to grave consequences.

Suppose a man engaged in mercantile pursuits, having a note for $10,000 due to-morrow at the bank in Montreal, goes to the telegraph office in Ottawa, pays them $10,000, with commission, charges, &c., for the consideration of which the telegraph company covenant to pay his note by telegraph, through their Montreal office. Through the negligence or embezzlement of their officers, the note is not paid, it is protested, this man's financial standing is gone, the bank immediately calls upon him or his firm in Montreal for an assignment. He suffers heavy damages, it is clear. But, say the appellants, the telegraph company are not responsible for these damages, beyond the interest of the money, and if the day after to-morrow they pay his note or refund him his $10,000, all the damages they will have to pay him will be one day's interest, and with that he must rest satisfied.

So if a man, for instance, going to New York to make purchases, goes to the Express Company's offices here, and hands them over $10,000 to be transmitted to him at New York. This man arrives in New York but the Express Company fails or delays to pay him the money. He suffers damages, but, say the appellants, the company was responsible only for the amount of the interest of the money. If that were so it must be conceded that they might keep the money for years, and all they would have to pay would be the interest. Can that be so? Was it an investment that this man intended to make in the Express Company? So, in the present case, was it an investment of $200,000 payable in twenty-five years that this railway company intended to make?

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It could not be contended that in these two instances these companies would not be liable in damages. Yet their obligations were to pay money, nothing else. The present case is still clearer. Here, as I have said, no money was due, no money could be asked, there was consequently no delay in the payment of money, and the damages are not claimed for any such delay. The payment of the shares is to be in debentures. Art. 1139-1148 C. C. The municipality's obligation was to make, sign and deliver them to the company.

As to the point taken at the bar, on the part of the appellants, that the railway company's action does not lie because they have transferred all their rights to the Quebec government, it has not even been noticed in the judgments of the two courts below, though also raised there, and for very good reasons.

1st. There is no issue on that point raised in the pleas to the action;

2nd. It is *exciper du droit d'autrui* (*jus tertii*);

3rd. The damages claimed were never assigned;

4th. Had they been assigned, the assignee could have sued in the name of the assignor;

5th. The Attorney General who had intervened in the case as assignee under the assignment referred to has withdraw his intervention;

6th. This assignment took place since the institution of the present action.

As to there being another action pending, no proof, no plea, that there is an action pending for the debentures. Then, the demand for the debentures and the demand for damages could not have been joined in one action.

As to the amount of the damages, it is self-evident that they must have been very large, and they are proved to have been so. Only a small and nominal sum was given; owing, I presume, to the fact that the

company has virtually ceased to exist. The amount was evidently not pressed, a verdict sufficient to carry costs only being required.

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That the amount is too small does not lie in the defendants' mouth. There was sufficient evidence to justify the verdict. In the case of non-execution of a contract, says the Court of Appeal of Rouen, reversing the judgment of the original court, in *Re Marie* v. *Grenet* (1), if it is evident that the plaintiff must have suffered some damages, the court will not dismiss his claim altogether on the ground that it is difficult to precisely determine the extent of the loss he has suffered, or that he has not established any substantial basis upon which an amount may be arrived at, but, in such a case, the court will establish the amount according to the rules of equity. The court of first instance had dismissed the claim for damages on the ground that the plaintiff had not proved a clear pecuniary loss. I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—The appellants in pursuance of the terms of a by-law of the corporation of the County of Ottawa became subscribers for 200,000 shares of ten dollars each amounting to $200,000 of the capital stock of the Montreal, Ottawa and Western Railway upon and subject to the following conditions, namely: that the said subscription should be payable in debentures of the corporation of the county of the sum of one hundred dollars each payable in 25 years from date bearing interest at six per cent. per annum payable half yearly on the first days of January and July of every year, at the office of the Merchants Bank, Ottawa, such debentures to be accepted at par in payment of such subscription.

2. That out of such subscription a sum of one hun-

(1) S. V. 44. 2. 550.

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dred and fifty thousand dollars should be paid in monthly instalments as the work should progress so as, however, not to pay more than one half of the value of the work done within the limits of the county of Ottawa, or $3,000 per mile on the certificate of the engineer of the company which might be verified by an engineer selected by the corporation.

3. That the said railway should be completed and put in operation on or before the first day of December, one thousand eight hundred and seventy-five.

4. That the bridges should be constructed with stone piers and that the rails, if of iron, should be of the weight of sixty pounds per yard and, if of steel, of forty-eight pounds per yard and that the road and its appurtenances should be built of materials equal in quality to those of the Saint Lawrence and Ottawa Railway.

The plaintiffs allege in their declaration that on the 19th January, 1875, they had fulfilled all conditions precedent necessary to be fulfilled to entitle them to receive from the defendants their debentures for the principal sum of $112,096.70 bearing interest from that date at six per centum, payable on the first days of July and January in each year in pursuance of the terms of their subscription agreement and the by-law in that behalf and that upon that day the plaintiffs duly demanded of the defendants the delivery of the said debentures which they refused to give and so that upon the said 19th day of January, 1875, the defendants were put in default for non delivery of the debentures.

Now, assuming all conditions to have been fulfilled, to have entitled the plaintiffs to receive the above amount of debentures from the defendants, the plaintiffs under article 1065 of the Civil Code had two remedies. They might have instituted a suit to enforce specific performance of the defendants obliga-

tion, by delivery of the debentures, or they might have instituted an action once for all to recover all damages consequential upon the breach of their obligation in not delivering them, but in such an action they must, as it appears to me, allege and prove all the damages which they are entitled to recover. They cannot split the one cause of action up into several actions, in one of which claiming damages for one loss alleged to have been sustained; in another, or others for other and different losses alleged to have been sustained, or profits of which they had been deprived; and in another claiming nominal damages only, shewing a breach of the obligation, but not alleging and proving any loss or deprivation of gain necessarily and directly consequential thereon.

Under the provisions of articles 1073-4 and 5 of the Civil Code, the damages recoverable for the non-execution of an obligation are the amount of such loss or deprivation of gain as, being the foreseen, necessary, immediate and direct consequences of the non-execution of the obligation of the defendants, the plaintiffs had sustained. That loss or deprivation of profit, in a case like the present, appears to me to be readily ascertainable, for the debentures which the plaintiffs should have received, upon the assumption of their having become entitled to receive them, being negotiable instruments for the payment of money at a future time and transferable by delivery had a money value, of a varying character, it is true, according as the credit of the corporation was good or bad, and as the demand for such securities in the market was great or small, but still they had an ascertainable money value, which money value constituted, in my opinion, the precise measure of the damages which the plaintiffs had sustained, and which they were entitled to recover for the non-delivery to them of the debentures in question

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assuming them to have been entitled to demand and receive them. The plaintiffs, however, instead of instituting an action in which they claimed such damages instituted an action, in which, after averring their right to receive the debentures, and the default of the defendants, they alleged that they had sustained the damages following, namely, the putting in peril the sum of $50,000 part of the $200,000 subscription, the debentures for which were issuable only on condition of the road being completed on the 1st day of December, 1875; the injury to the credit of the plaintiffs and the depriving them of considerable sums that the respondents would have had the right to receive, and would have got and received as well from the City of Montreal under and in virtue of by-law No. 59, Schedule A, of the Act 36 Vic. ch. 49, as from the government of Quebec from and out of the subsidy voted to the plaintiffs by and in virtue of the act of Quebec 37 Vic. ch. 2, and that besides these damages the plaintiffs had the right to claim from the appellants interest on the amount of the debentures due to the company upon and from the date of the protest and notification of the 19th January, 1875, which said damages and interest so composed amount, as the plaintiffs allege, to the sum of $500,000, wherefore the plaintiffs concludes by praying that the defendants be condemned to pay the plaintiff the said sum of $500,000 so made up with interest, expenses, &c.; the whole under the express reservation of the plaintiffs' right to demand and recover all damages to accrue subsequently to the date of the present action, namely, the 19th of June, 1875.

Now, as to the putting in peril the sum of fifty thousand dollars, or as to the alleged loss of credit of the plaintiffs, or as to the alleged deprivation caused to them, by the non-delivery of the defendants debentures,

of considerable sums accruing to them from the city of Montreal under the by-law of that corporation and from the Government of the Province of Quebec under the act of the Legislature of that Province, it is very clear, I think, that none of these apprehended or alleged losses can be recovered in this action as having any natural or necessary connection with, or as being directly or at all attributable to, the non-delivery by the defendants of their debentures. Such alleged losses cannot be held to be either the foreseen, or necessary, or natural, or immediate, or direct consequences of the non-delivery by the defendants of their debentures. None of these alleged losses, if at all suffered, can be said to have been suffered in respect of the particular thing which was the subject of the defendants obligation which was to deliver their debentures when earned, and no damages can be recovered in this action except such as necessarily and directly arise in respect of the particular thing which was the subject of the defendants' obligation and as are necessarily and directly consequential upon the non-performance of that obligation.

Then as to the interest which is claimed on the amount of the debentures, which, as is alleged, should have been delivered to the plaintiffs on the 19th day of January, 1875, from that day until the commencement of this action on the 19th June, 1875, this interest accrues and becomes payable only under the terms of the defendants' subscription contract and the by-law in that behalf and can only be claimed in right of such contract, which contract is that the interest shall be payable half yearly on the first days of July and January, and as this action was commenced on the 19th day of June, 1875, before the day appointed for the accruing due of any of such interest, no interest in respect of that sum can be recovered in this action

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The learned judge of the Superior Court before whom this action was tried has awarded the plaintiffs one hundred dollars damages, but this amount, which is neither substantial nor nominal, is plainly not given in full satisfaction of all damage incident upon the non-execution of the defendant's obligation in respect of the particular breach of that obligation which is complained of; and no part of the amount so awarded can be attributed to or allowed upon any of the items of damage especially enumerated in the declaration, none of these items being necessarily and directly consequential upon the breach complained of. The one hundred dollars have been, in fact, arbitrarily awarded without reference to any allegation made or proof offered of any actionable loss or deprivation of profit sustained, and the plaintiffs' right of action, in respect of what they are entitled to recover, if they are entitled to recover anything, is left open and undisposed of by this action, and is, as was said in the argument before us, now the subject of another action. There has been no precedent cited, nor do I think there can be any, establishing a right in the plaintiffs to recover the $100 awarded to them in this action which can be recovered only as damages awarded in the absence of any actionable loss alleged and proved: and also the right to recover in another action substantial damages which, if entitled to recover anything, the plaintiffs are entitled to recover in respect of the one breach of the same obligation. As judgment for the plaintiffs in the present action cannot be treated as a complete adjudication in respect of the breach of obligation which is the cause of action stated in the declaration; and as the substantial damages which are recoverable, if the plaintiffs are entitled to recover anything, are not sought to be recovered in the present action but are made the subject of another action; and as the losses which are speci-

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fically enumerated in respect of which indemnity is sought by this action are not actionable, or directly consequential upon the breach of obligation stated; the judgment of the Superior Court cannot, in my opinion, be sustained; this appeal therefore should be allowed with costs and the action in the court below dismissed with costs. With the greatest deference to my learned brother Fournier I am unable to concur in regarding the county of Ottawa; by reason of their being shareholders in the railway company, as partners with the company who can therefore sue the county for damages within article 1840 C. C. Nor if they can be so regarded does that, as it appears to me, get over the difficulty that the damages specially sought to be recovered are not recoverable, being altogether too remote, and, in fact, not consequential on the non-execution of the obligation declared upon nor, as it appears to me, is there any loss alleged and proved to support a judgment for the $100 given and what it has been given for it is impossible to say.

Appeal dismissed with costs.

Solicitors for appellants: *Laflamme, Laflamme & Richard.*

Solicitors for respondents: *DeBellefeuille & Bonin.*

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*Nov. 16.

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*March 14.

HORACE FAIRBANKS *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

BRADLEY BARLOW *et al.* (DEFENDANTS) ..... ;

AND

JAMES O'HALLORAN (INTERVENANT) RESPONDENTS.

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

Pledge without delivery—Possession—Rights of creditors—Art. 1970 *C. C.*

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company

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