

*Judgment of the Lords of the Judicial Committee of
the Privy Council on the Appeal of Ryland v.
Delisle from Canada; delivered 6th July, 1869.*

Present:

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE GIFFARD.

THE Appeal in this case is from a Judgment of the Court of Queen's Bench in Lower Canada, reversing a Judgment of the Superior Court of the District of Montreal, with Costs.

The Judgment in the Montreal Court, which was delivered on the 31st of March, 1866, found the Respondent to be Debtor to the Montreal and Bytown Railway Company in £900 on the stock held by him, and approved the Appellant's claim as a Judgment creditor of a Company, having execution against the Company unsatisfied, and condemned the Respondent accordingly, as prayed for by the Appellant.

The action in which that Judgment was given was an action brought by the Appellant as a Creditor of the Company against the Respondent a Shareholder as a Defendant, and in that action it was proved that there had been a return by the Sheriff of "*nulla bona*" to an execution against the Company. The action was founded on the Section of the General Railways Act, which is under the head of "Shareholders," and is the first paragraph of Section 19. By that Section and paragraph it is enacted that "Each Shareholder shall be individually liable to the Creditors of the Company to an amount equal to the amount unpaid on the Stock held by him for the debts and liabilities thereof, and until the whole amount of his Stock shall have been paid up, but shall not

“be liable to an action therefor, before an execution against the Company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against such Shareholders.”

The Defendant referred to the code, and the case made by him was, that there was due to him from the Company for salary a sum very far exceeding anything that he was or could be made liable to the Company for in respect of calls; that the sums due to him from the Company, in point of fact, extinguished his liability to the Company, and that inasmuch as the Company never could have maintained proceedings against him in respect of any calls that they might make, the Creditor was in no better position than the Company. We assume that no calls beyond calls for a sum of £100 had been made on the part of the Company; if any such calls had been made, it was the business of the Defendant both to have alleged and proved that they had been made; there is neither allegation nor proof to this effect; the Courts below proceeded on the assumption that no calls beyond £100 had been made; and there can be no doubt but that they were right upon the pleadings and facts before them in making that assumption.

What then are the provisions of the code which were relied on? They were these: first of all, it is said in the 1187th Clause:—“When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared;” and then in the 1188th Clause, “Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality.” As calls had not been made, there could have been no compensation as between this Shareholder and the Company at the time of the action being brought by the Creditor, for when we turn to the Railways Act we see that before any action could have been maintained by the Company as against the Shareholder, there must have been calls made by the Directors, and thirty days must have elapsed from the date of the calls. More-

over, at the time when the Appellant brought his action as creditor, the respondent, if he had any claim at all, had a right to proceed against the Company and recover payment from the Company of the £2000, or whatever sum was due to him, and the Company could not have set up as against that action any counter-claim which they might have had in respect of his being a Shareholder; it follows, therefore, that the amount payable on the stock held by the Defendant was not actually paid, discharged, and extinguished, and that the Clauses in the code which have been relied on do not apply to a state of circumstances in which, although there was a claim by the Defendant against the Company, there was no counter-right on the part of the Company, and no compensation as between him and them, and consequently no extinguishment of the debt. The Creditor under the Act is in a different position to that of the Company, and can recover so long as anything remains *unpaid* on the stock held by the Shareholder.

This being so, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench should be reversed.

The result, therefore, will be to restore the Judgment of the Superior Court in Montreal; and their Lordships are of opinion that the Appellant should have the costs in both the Courts below, and also the costs of this Appeal.

