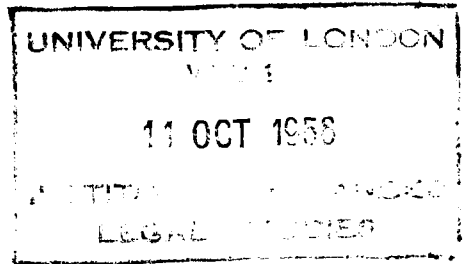


16,1895

29401



In the Privy Council.

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

---



---

BETWEEN

L. J. FORGET - - - - - *Appellant*

AND

J. H. OSTIGNY - - - - - *Respondent.*

---



---

CASE OF THE ABOVE-NAMED APPELLANT,  
L. J. FORGET.

---



---

1. This is an appeal of Louis Joseph Forget from a decision of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), sitting at Montreal, pronounced on the 27th September, 1893, in a suit in which the above-named appellant, Louis Joseph Forget, was plaintiff and the above-named respondent, Joseph Henri Ostigny, was defendant, by which it was ordered, *dissentiente* the Honourable Mr. Justice Hall, that a judgment of the Honourable Mr. Justice Pagnuelo in favour of the respondent should be affirmed, and the appeal of the appellant therefrom should be dismissed.

RECORD.

p. 157.

p. 5.

2. The circumstances under which the said suit and this appeal arose were  
10 as follows :—

3. The appellant was a stockbroker carrying on business in the City of Montreal, and was a member of the Stock Exchange of Montreal. During the  
[71274]

RECORD.  
 pp. 11, 62. years 1882, 1883 and 1884 the respondent instructed him to carry out certain  
 l. 5; 64, transactions in stocks and shares, and, in accordance with the instructions so  
 l. 10, given, the appellant effected certain purchases and sales of stocks and shares for  
 pp. 40 to 45. and on account of the respondent on the said Stock Exchange. On the 22nd of  
 p. 188. February, 1884, the respondent was, in respect of the said transactions, indebted  
 to the appellant in the sum of \$1,307.40. The appellant further, upon the  
 p. 45, ls. 14 respondent's instructions, on 29th October, 1885, purchased ten shares of the  
 to 36. Bank of Montreal for the respondent; and, upon the respondent's instructions, on  
 the 10th February, 1886, he sold the said shares of the Bank of Montreal. This  
 transaction resulted in a profit of about \$150, which the appellant duly credited 10  
 to the respondent in the account between them. After giving credit to the  
 respondent for this profit, and including interest and commission in respect of  
 p. 13, l. 7. the above transactions, there was on the 3rd June, 1890, a sum of \$1,926.87 due  
 and payable to the appellant by the respondent upon the balance of the said  
 p. 9. account. The action was commenced on 17th July, 1890, by the appellant  
 against the respondent to recover the above balance.

pp. 14, 15. 4. The respondent pleaded—first, that this last transaction of 1886, having  
 resulted in a profit, did not give rise to any portion of the appellant's alleged  
 claim, and that all the other transactions took place more than five years before  
 the commencement of the action, and were therefore prescribed; secondly, that 20  
 the transactions in question were not serious ones, but were fictitious, and in the  
 nature of gambling transactions upon the rise and fall of stocks made upon margin,  
 and without any intention of the real purchase of the stocks, and were there-  
 fore illegal, and could not form the basis of an action.

p. 188, l. 23. 5. As regards the plea of prescription, the appellant's case was that it  
 p. 46, l. 20. had been interrupted by payment on account, and by recognition by  
 p. 63, l. 34. compensation, and he proved that a statement of each transaction was  
 p. 71, l. 3. rendered by the appellant to the respondent, so that the latter was aware  
 in February, 1884, of the balance standing against him in the account  
 p. 40, l. 5. books of the appellant, and that in October, 1885, the respondent sent to the 30  
 p. 46, l. 34. appellant a sum of \$100 as margin for a purchase of the shares in the Bank  
 p. 47, l. 29. of Montreal, which shares were sold at a profit in February, 1886; and the  
 p. 67, l. 44. respondent admitted in his evidence that he had never made any application or  
 demand to or upon the appellant either for the profit made or for the return of  
 p. 69, l. 35. the deposit, and when asked why he had not made such application or demand  
 he replied: "Parce que M. Forget l'a appliqué sur ce qui était dû antérieurement.  
 p. 69, l. 45. Question: Vous le saviez cela, et vous y avez acquiescé? Response: Je ne lui ai  
 pas demandé de remboursement." The Honourable Mr. Justice Pagnuelo held,  
 p. 168, l. 20. and the Court of Queen's Bench unanimously affirmed his judgment upon this  
 p. 188, l. 44. point, that prescription had been interrupted by the respondent's tacit acquiescence 40  
 p. 188, l. 25. in the evident application both of this deposit and of the profit on the trans-  
 action on the shares of the Bank of Montreal to the credit of the general account  
 of the respondent.

6. The case was tried before the Honourable Mr. Justice Pagnuelo, on the 16th October, 1891, and following days, when the appellant gave evidence to prove that by order of the respondent he purchased and sold the following stocks and shares :—

RECORD.  
—  
p. 62, l. 5.  
p. 63, l. 4.  
p. 64, l. 10.

		\$
	1882.	
	December 19. Bought 25 shares Montreal Street Railway Company at $130\frac{1}{4} + \frac{1}{4}$ Com. ... ..	1631.25
	December 22. Bought 75 shares Montreal Street Railway Company at $130\frac{1}{4} + \frac{1}{4}$ Com. ... ..	4893.75
10	1883.	
	January 16. Bought 50 shares Montreal City Passenger Railway Company $\left\{ \begin{matrix} 25 - 30\frac{1}{4} \\ 25 - 30 \end{matrix} \right\} + \frac{1}{4}$ Com. ... ..	3259.37
	January 26. Sale 25 City Passenger Railway Company at $142 - \frac{1}{4}$ Com. ... ..	1771.87
	January 29. Sale of 50 City Passenger Railway Company at $142 - \frac{1}{4}$ Com. ... ..	3543.75
	January 29. Bought 125 ditto at $143\frac{1}{2} + \frac{1}{4}$ Com. ... ..	8984.38
20	March 6. Bought 100 shares Montreal Gas Company at $\left\{ \begin{matrix} 50 - 191\frac{3}{4} \\ 50 - 192 \end{matrix} \right\} + \frac{1}{4}$ Com. ... ..	7685
	March 9. Bought 100 shares Gas Company at $192\frac{1}{2} + \frac{1}{4}$ Com. ... ..	7710
	March 12. Sale of 200 ditto at $188 - \frac{1}{4}$ Com. ... ..	15020
	„ 27. Bought 50 ditto at $182 + \frac{1}{4}$ Com. ... ..	3645
	April 17. Sale 50 Montreal Gas Company at $170\frac{1}{2} - \frac{1}{4}$ Com. ... ..	3405
	1884.	
30	February 22. Sale 200 shares Montreal City Passenger Railway Company at $118\frac{1}{2} - \frac{1}{4}$ Com. ... ..	11825
	1885.	
	December 1. Bought 10 shares Bank of Montreal at $201\frac{1}{4} + \frac{1}{4}$ Com. ... ..	4030
	1886.	
	February 11. Sale ditto at $207\frac{3}{4} - \frac{1}{4}$ Com. ... ..	4150

These purchases and sales were proved by Rodolphe Forget, who proved that written notes of each purchase and sale were sent to the respondent, and he produced and proved copies thereof.

p. 39.  
p. 46.  
p. 62.  
p. 63.  
pp. 32 to 36.

7. The appellant further proved that the respondent paid to the appellant sums on account of the shares bought.

p. 11.  
p. 12.  
p. 41, l. 20.

8. The brokers from whom the appellant bought the shares mentioned in the account were called as witnesses. They confirmed the evidence of [71274]

pp. 79, 80.  
82, 83, 91.  
92, 95, 97.

- RECORD.  
 pp. 27 to 31. Roldophe Forget, and proved that the shares bought by the appellant for the  
 p. 93. respondent were actually delivered to the appellant, and that he paid for them.  
 p. 94. The cheques by which such payments were made were produced. The brokers  
 p. 96. to whom the shares were sold by the appellant for the respondent were called.  
 They confirmed the evidence of Rodolphe Forget, and proved that the shares  
 were delivered by them to the appellant and paid for by him.
- p. 88. 9. The secretary of the Montreal Stock Exchange was called, and proved  
 p. 89, ls. 1. that when a transaction in stocks is made, the names of the buyer and seller,  
 and 19. with the amount of the stock and price paid, are entered in the Registry from day  
 to day. He also proved that no fictitious sale is allowed, and that if a broker made 10  
 a fictitious sale he would lose his seat in the Stock Exchange. The books of  
 Ex.A. 28, the Stock Exchange were produced by him.  
 p. 38.
- p. 49. 10. It was further proved that the appellant, in order to pay the residue  
 p. 50. of the purchase money which was not provided by the respondent, borrowed,  
 p. 52. pursuant to the usage or custom of the Stock Exchange of Montreal, from  
 various banking companies, bankers, or other persons, such amount at interest,  
 and that the shares were pledged by the appellant with such banking company,  
 banker, or other person from whom such moneys were borrowed, as security.  
 That when the appellant was instructed by the respondent to sell the shares, as  
 p. 70. hereinbefore mentioned, the sale was effected, and the amount proved to have 20  
 p. 46, l. 9. been received by the appellant was duly credited to the account of the  
 p. 64, l. 42. respondent. That the appellant charged a uniform commission of  $\frac{1}{4}$  per cent.,  
 making no charge or profit upon the banking part of the transaction, although  
 that involved his personal responsibility for any loss that might arise from a fall  
 in the value of the shares below the price advanced upon the shares. Evidence  
 was also given that upon the purchaser of stocks or shares receiving an account  
 p. 71. similar to the accounts sent by the appellant to the respondent according to  
 the custom of the Stock Exchange, the price of the stock was payable on the  
 following day, and that the purchaser had the option of declaring immediately  
 p. 76, l. 39. whether he would pay immediately for the whole amount of the stock or simply 30  
 a portion on account, and that after paying a portion of the amount on account  
 the broker obtained the money to pay the residue of the purchase money, and  
 p. 77, l. 1. charged the purchaser, according to the rules of the Stock Exchange of  
 Montreal, interest, and that continued as long as it suited the will of both  
 p. 77, l. 21. parties, and that the purchaser could come in at any time and pay the balance,  
 giving the broker one day's notice, and that the broker must be prepared to  
 hand over the stock when the purchaser paid him the price. This custom or  
 usage was notorious, and it was not suggested that the respondent was unacquainted  
 p. 72, l. 9. with it.
11. As to the plea of the respondent that the transactions were fictitious and 40  
 not real transactions, and were gaming and wagering transactions, the only text

of law applicable to the matter is to be found in Apt. 1,927 C. It is as follows:—"There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet."

RECORD.

12. The Honourable Mr. Justice Pagnuelo, on the 19th day of December, 1891, gave judgment in favour of the respondent, holding upon the facts above stated that the purchases and sales were fictitious and not real, and were gaming and wagering transactions.

p. 5, l. 30.  
p. 12.

p. 167.

13. The appellant appealed from the judgment of the Honourable Mr. Justice Pagnuelo to the Court of Queen's Bench, and the appeal was heard on 27th day of May, 1893. The Court reserved judgment. On 27th September, 1893 (the Honourable Mr. Justice Hall *dissentiente*) affirmed the judgment of the Honourable Mr. Justice Pagnuelo in favour of the respondent, and dismissed the action. The reasons of the majority of the Court were given by the Honourable Sir Alexander Lacoste, C.J., and will be found at page 185. The reasons of the Honourable Mr. Justice Hall in favour of the appellant are set forth at page 188.

p. 156.  
p. 157.

14. The appellant was and is aggrieved by the judgments hereinbefore mentioned, and on the 23rd day of November, 1893, Her Most Excellent Majesty in Council ordered that the appellant should have special leave to appeal therefrom, as in the said Order is set forth.

15. The appellant submits that the said judgments are wrong and ought to be reversed, and that judgment should be entered in his favour for \$1,926.87, with costs, for the following among other reasons:—

1. Because actual purchases and sales of shares were in every case effected by the appellant pursuant to the instructions of the respondent.
2. Because in every case the shares bought or sold were in fact transferred or delivered.
3. Because the appellant did not gain nor stand to gain anything, and did not lose nor stand to lose anything, by the rise or fall in the price of the shares.
4. Because the appellant charged a commission of  $\frac{1}{4}$  per cent. only, and no more and no less, whether the price of the shares rose or fell.
5. Because the purchases and sales were real and not fictitious, and were not by way of gaming or wagering.
6. Because there was no evidence that the transactions between the appellant and respondent were transactions by way of gaming and wagering.

30

R. W. MAC LEOD FULLARTON.

W. ENGLISH HARRISON.

In the Privy Council.

ON APPEAL FROM THE COURT OF QUEEN  
BENCH FOR LOWER CANADA IN THE  
PROVINCE OF QUEBEC.

(APPEAL SIDE.)

---

*Between*

L. J. FORGET - - - - *Appella*

AND

J. H. OSTIGNY - - - - *Responde*

---

CASE OF APPELLANT.

---

BUDD, JOHNSONS & JECKS,  
24, Austin Friars, E.C.