Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forget and Another v. *Baxter, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 2nd May* 1900.

Present at the Hearing:

LORD WATSON.
LORD HOBHOUSE.
SIR EDWARD FRY.
SIR HENRY STRONG.

[*Delivered by Sir Henry Strong.*]

The Appeal is from a judgment of the Court of Queen's Bench in the Province of Quebec affirming a judgment of the Court of Review which reversed a judgment of the Superior Court in an action brought by the Appellants against the Respondent. The action was instituted to recover the sum of $7,491.88 alleged to be due to the Appellants who are stock-brokers in Montreal by the Respondent in respect of certain stock transactions in which the Respondent had employed the Appellants as his brokers to buy and sell shares in certain railway and joint stock companies in Canada and the United States. The Respondent pleaded several defences by some of which he denied the allegations of the Appellants in their declaration. By another plea the Respondent set up the defence that the transactions in question were gaming contracts and as such illegal under Article 1927 of the Civil Code of Quebec. This

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defence however failed and was not insisted upon either in the Court of Queen's Bench or on the present Appeal.

The particulars of the Appellants' demand are stated in an account produced as an exhibit in the action. It is a summary of 22 detailed statements of transactions in the purchase and sale of shares alleged to have been carried out by the Appellants on account of the Respondent, between the 1st of June 1891, and the 3rd of October 1894. Three only of these transactions have been made the subject of controversy on this Appeal. On the 22nd of September 1891 the Appellants purchased on behalf of the Respondent one hundred shares of the stock of the Atchison Topeka and Santa Fe Railway Company which were sold on the 3rd October 1894, at a loss of $4,125 and interest. Another hundred shares of the same railway stock were bought 25th September 1891, and in the first instance debited to an account "In Trust" which the Appellants had opened with the Respondent distinct from his personal account. These shares were on the 14th September 1892 transferred by the Respondent's directions to the personal account, and on the 3rd October 1894 were sold at a loss of $4,034.55 and interest. One hundred shares of the stock of the Canada Cotton Company sold by the Appellants for the Respondent on the 8th December 1891, and a like number of shares bought on the 28th 29th and 31st December 1891, and the 5th January 1892, at a resulting loss of $1,150 form the third disputed item in the account.

Mr. Rodolphe Forget, one of the Appellants, was the principal witness on their behalf. He proved the mandate from the Respondent to make the sales and purchases in question, that express authority was given for each separate transaction, that in every case the shares were

actually purchased and the scrip delivered, and that, so soon as a transaction was completed, bought and sold notes, in which the terms of the purchase or sale were fully set forth, were made out, signed by the Appellants, and after press copies had been made in a book kept by them for that purpose at once forwarded to the Respondent.

The same witness also deposed that on the 15th September 1892, there being then the hundred shares of Atchison Stock included in the "Trust" account, the Respondent ordered these shares to be transferred to his personal account and charged accordingly, which was done. The witness also stated that on the 13th December 1893, and 16th February 1894, after all transactions of purchase and sale except the sales in October 1894 had been closed, the Respondent gave the Appellants on account of his liability to them four promissory notes dated the 10th October 1893, 4th November 1893, 13th December 1893, and 16th February 1894, for the several amounts of $1,200, $1,200, $1,100, $1,100 respectively, and that the two latest of these notes, which were given in renewal of the earlier ones, remained at the date of the action in the Appellants' hands unpaid and were never discounted or made use of by them. Further it is shown by the accounts which are proved in detail by Rodolphe Forget that at various times from the 3rd February 1892 to the 4th November 1893 cash payments were made by the Respondents to the Appellants. These payments as well as the promissory notes can only have been on account of the transactions now in dispute. For if those transactions were thrown out of the account the Respondent would have been creditor, not debtor, of the Appellants. The witness also stated that after the sale of the two hundred shares of Atchison Stock the Respondent upon

being told on the same day that the Appellants had sold it expressed no disapproval, but on the contrary said "I will pay you the balance." It is also proved by the same witness that since the last account was rendered to him on the 12th September 1895, the Respondent "a good many "times" acknowledged his indebtedness to the Appellants and promised to pay it, that on the last occasion of his doing so he came to the Appellants' office and wanted them to accept a settlement of $1,000 every three months; and generally the witness stated that the Respondent never complained that his instructions had not been followed but that he was always satisfied. In conclusion Mr. R. Forget swore that after having taken communication of the Exhibit 1 he persisted in saying that the account was correct and that there was due by the Respondent $7,491.88, the balance there shown.

The evidence of the Appellants' book-keeper confirmed that already stated so far as it related to the delivery to the Respondent of the bought and sold notes and of the general statement of accounts.

The Appellants also called the brokers in Montreal from whom they had purchased the Canadian shares included in the account and who proved the correctness of these transactions, and also a member of the firm of Lounsbery & Co. of New York, the brokers through whom they had purchased the American shares included in the statement, on account of the Respondent. This witness in particular proved the purchase of the Atchison Railway shares in September 1891, and verified an extract from the books of his firm which was put in as evidence by consent.

Mr. Justice Pelletier before whom the cause was heard in first instance, gave judgment for the Appellants holding that the transactions

between the parties were "operations of com-"merce," that there was a sufficient commence-ment of proof in writing, and that therefore the oral evidence verifying the details of the account and proving the admissions of the Respondent was good legal proof. This judgment was reversed by the Court of Review one Judge (Mr. Justice Davidson) dissenting to this extent, that he thought the Appellants were entitled to recover 2,200 dollars, the amount of the current promissory notes. An appeal from this latter judgment was dismissed by the Court of Queen's Bench Mr. Justice Blanchet dissenting: except as to the lot of 100 Atchison shares bought in September 1891, he thinking the evidence insufficient to prove that these shares were bought by the Appellants on behalf of the Respondent.

The points argued on the hearing of the Appeal before their Lordships may be classed under two distinct heads. The first question was whether oral evidence could be admitted, and the second whether, if properly admitted, it was sufficient to prove the Appellants' demand. Article 1233 of the Civil Code of the Province of Quebec is as follows:—

"Proof may be made by testimony (1) of all facts con-"cerning commercial matters."

(And, omitting the intermediate paragraphs)—

"(6) In cases in which the proof in writing has been "lost by unforeseen accident or is in the possession of "the adverse party or of a third person without collusion "of the party claiming and cannot be produced; (7) In cases "in which there is a commencement of proof in writing. In "all other matters proof must be made by writing or by the "oath of the adverse party."

The admissibility of a party to an action to give evidence on his own behalf depended at the time the *enquête* in this cause was taken on the Provincial Act 54 Vict. cap 45, the second section of which enacts as follows:—

"The following clauses are added to Article 251 of the "Code of Civil Procedure 'Any party to a suit may give "'testimony in his own behalf in every matter of a commercial

" ' nature and in such case be examined cross-examined and
" ' treated as any other witness. He may also be subpœnaed
" ' and treated as a witness by the opposite party and in such
" ' latter case his answers may be used as a commencement of
" ' proof in writing. The default by a party to tender his own
" ' evidence cannot be construed against him '."

The onus was upon the Appellants to prove first a mandate from the Respondent to act for him in the several transactions which they claim to have carried out on his behalf, and secondly the due execution of that mandate. It appears to their Lordships that they have discharged this onus. If it be necessary to show commencement of proof in writing so as to satisfy paragraph (7) of Article 1233, that is to be found in the deposition of the Respondent in which when called on behalf of the Appellants, he admits that the Appellants were stockbrokers and that he employed them as his agents to transact his business; that they bought and sold " something " for him and that he gave them instructions to do " some- " thing " for him on the markets in New York, Montreal, and other places. This is sufficient as a commencement of proof to entitle the Appellants to show by oral evidence, or to use the language of the Code by testimony, what the particular transactions were which the Respondent commissioned the Appellants to carry out on his behalf. But there is a broader ground for admitting proof by testimony in this case, viz., that the transactions in question are commercial matters within the provision contained in paragraph 1 of Article 1233. Neither in this nor in any other article of the Code is there to be found any definition of the meaning of the term " commercial matters." It cannot be doubted that the business carried on by the Appellants as stockbrokers was of a commercial nature nor that the purchases and sales of shares by the Appellants for the behoof of the Respondent in the ordinary course of that business were operations of com-

merce. It does not appear to their Lordships that the fact that the Respondent was not himself a dealer trading in shares but that his object in buying and selling through the agency of the Appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the Appellants. Unless such a construction is adopted very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are therefore of opinion that the execution by the Appellants of the Respondent's commissions constituted "commercial matters" within Article 1233 which it was open to them to prove by oral evidence.

For the same reasons namely the commercial character of these transactions, Mr. Rodolphe Forget was a competent witness for the Appellants under Section 2 of the Act 54 Vict. cap. 45.

That the evidence was sufficient to establish a *primâ facie* case their Lordships can have no doubt. The learned Judge before whom the witnesses were examined accepted and acted upon their testimony, and there is no ground for supposing that they were not in all respects trustworthy. As regards the three transactions in question, authority to purchase the Canada Cotton Company's shares is proved beyond doubt.

Some questions have been raised as to the two purchases of one hundred shares each of the Atchison Railway Stock. One of these purchases is entered in the account as having been made on the 22nd September 1891. Rodolphe Forget says that on the 21st September 1891 the Appellants were ordered by the Respondent to

purchase these shares, which they did through their New York brokers Lounsbery & Co. Mr. Lounsbery, one of the firm who was examined as a witness for the Appellants, produced an extract from the books of his firm which shows that there was a purchase for the Appellants' account of one hundred shares of this stock on the 18th September at the same price as that charged in the Appellants' account. Some difficulty has been raised upon this discrepancy in dates. Even if the case had depended altogether as to this item on the evidence of the witnesses Forget and Lounsbery their Lordships do not think this inconsistency in the dates would create any serious difficulty. It is clear that one and only one lot of 100 Atchison shares was purchased by the Appellants through Lounsbery & Co. in September 1891 at the price of $46\frac{3}{8}$ (Rec., *p.* 32). This was ascribed to the Respondent at the same price according to the notice given by the Appellants on the 22nd September (Rec., *p.* 26). The explanation given in para. 28 of the Appellant's Case is a possible one; but whatever may be the true explanation, it is impossible to doubt that as between the Appellants and the Respondent, the latter had ordered 100 shares to be bought before the 22nd of September and became entitled to these shares on the 22nd September and was justly debited with the price. Even if the difficulty were more substantial it would be countervailed by the accounts delivered to and never disputed by the Respondent, and his payments and other admissions of liability. The item relating to the one hundred shares charged as having been transferred from the trust account to the Respondent's personal account on the 15th September, 1892, has also been objected to as insufficiently proved. Mr. R. Forget deposes that the account in this respect is correct; that on the date in question

the Appellants held one hundred Atchison shares in the Respondent's trust account which on that day "per his order" were transferred to the personal account. By this he plainly means that these shares, with the amount due in respect of the price paid for them and the commission, were simply transferred from one account to the other. This without further particulars was amply sufficient as *prima facie* proof.

Then there is very full evidence of the Respondent's admissions that the account Exhibit No. 1, comprising a detailed statement of all the transactions and bringing down the balance to the 25th September 1895 was correct. Mr. Forget says the Respondent admitted its correctness "a good many times" and that after all the Atchison shares had been sold he promised to pay the balance. It is also in proof that after receiving the account showing the balance claimed the Respondent went to the Appellants' office and proposed a settlement by the payment of one thousand dollars every three months. Further the giving of the promissory notes and the payment of the two sums of one hundred dollars though of an earlier date than the rendering of the account of the 25th of September 1895, were all on account of the balance due by the Respondent, which was due only by introducing into it these disputed transactions. In their Lordships' view these admissions proved by a witness who was considered worthy of credit by the Judge in whose presence he was examined were amply sufficient to make out a *primâ facie* case which was not in any way displaced by the Respondent. It was contended on behalf of the Respondent that secondary evidence of the bought and sold notes and of the final account delivered to the Respondent was not admissible inasmuch as no notice to produce was given. This objection does not seem to have been made at the trial

when if it was sustainable the omissions might have been remedied, and their Lordships are of opinion that it cannot be maintained, not only for that reason, but also for the reason that Article 1233 paragraph 6 authorises the reception of oral proof in cases where the written proof is " in the possession of the adverse party " without adding any requirement of a notice to produce or a subpœna *duces tecum* in such a case. It was asserted by Counsel for the Appellants in answer to the objection, that it was not the practice in the Quebec Courts to give such notices and as no text of either the Civil Code or the Code of Procedure establishing such a procedure could be referred to nor any authority produced upon the point, their Lordships are of opinion that they cannot give effect to such an objection derived from the practice of the English Courts not shown to be applicable in the Province of Quebec.

The objection based on the sale of the two hundred Atchison shares which were sold by the Appellants on the 3rd October 1894, and the proceeds carried to the Respondent's credit in account entirely fails.

It is not suggested that the shares have at any time afterwards commanded a higher price, or that the Respondent has suffered loss in any way by the sale. The absence of right to sell can only be made of avail to the Respondent by treating the sale as a departure from and a destruction of the contract *in toto ;* thereby relieving the Respondent from his liability to pay the purchase money. What has been argued at the Bar is that the Appellants were pledgees of the shares and could only make them available for their debt by following the procedure prescribed by Articles 1971, 1972 of the Civil Code. The answer of the Appellants is that the Respondent has employed them as brokers to

operate on the Stock Exchanges, and that the rules of the Exchanges are imported into the contracts, and that one such rule is that if the employer fails to supply his brokers with the requisite funds they may sell the shares purchased for him and reimburse themselves. That is the view taken by the dissentient Judge, Mr. Justice Blanchet.

The same learned Judge adds that the Appellants could not have been in the position of pledgees because at the time of the purchases they were not creditors but debtors of the Respondent. That view was not examined during the argument, and the decision may be more safely rested on the wider ground.

It is true, as observed by the learned Judges of the Court of Review and by Mr. Justice Ouimet in the Queen's Bench, that no special usage of the Stock Exchange of New York was alleged in the pleadings or proved in evidence. But that the practice is as stated by the Appellants seems to have been taken as undisputed. Mr. Justice Ouimet himself states it, and treats it as having no legal effect unless specially imported into the contract between employer and broker. Their Lordships think it a sounder principle to hold that when one employs a broker to do business on a Stock Exchange, he should, in the absence of anything to show the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

Any doubt which might arise from the circumstance that the practice of the New York Stock Exchange was not put in issue, is removed by the Respondent's own mode of treating the sale. Rodolph Forget states first in chief (Rec., p. 62) and afterwards in cross-examination (p. 70) what happened. The Appellants asked the Respondent for money many times; they kept a man running to his office nearly every day for it; failing to

get it, they sold the shares and advised him the same day; he was pleased and said, "I will pay "you the balance."

The Respondent gave evidence afterwards, and took no notice of Forget's statement, which stands uncontradicted. The inference must be that the Respondent knew that the Appellants had acted within the terms of their employment.

Their Lordships will humbly advise Her Majesty to reverse the judgments of the Court of Queen's Bench and the Court of Review with costs in both Courts and to restore the judgment pronounced by Mr. Justice Pelletier in the Superior Court.

The Respondent must pay the costs of this Appeal.