

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the appeal of
John Porteous, James Gibb Ross, and Pierre
Lafrance v. Joseph Reynar from the Court of
Queen's Bench for the Province of Quebec,
Canada ; delivered November 15th, 1887.*

Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

THIS Appeal comes before their Lordships *ex parte*. The Plaintiffs below are the Appellants, and are represented here by solicitor and counsel. The Defendant, who obtained the decision of the Supreme Court of Canada in his favour, does not appear.

In this particular case, which is one of considerable importance, though it does not present much difficulty, it was specially desirable that the Respondent should have been represented by counsel to assist their Lordships by his arguments, and to lay before them the reasons for the decision of the Supreme Court. Mr. Bompas, Q.C., for the Appellants, has fully and candidly opened the case on both sides, and has laid before their Lordships the authorities on which the Supreme Court acted. But though that is so, it is incumbent on their Lordships, in a case heard *ex parte*, to examine it more minutely, and to give their reasons more at large than would otherwise be necessary or desirable. Two leading authorities, decisions of the same Supremé

Court, on appeal, have been principally discussed, viz. : *Brown v. Pinsonnault* and *Moffatt v. Burland*, and as there was no appeal in either of those cases to this tribunal, the decisions are binding and conclusive in Canada. But nevertheless it became obvious, in the course of this hearing, that it would be necessary for their Lordships to review these previous decisions as to one question affecting this appeal. The facts of the present case are conveniently and accurately stated in the Appellants' case. The action was brought by the Appellants against the Respondent on the 19th May 1884, to recover 4,281 dollars, being the price of certain land sold by the Appellants to the Respondent under an act of sale in December 1882. The notarial act was made between the Appellants and Respondent, and the Respondent's contract to pay the price was with the Appellants in their own names. The defence of the Respondent, while not disputing the title of the Appellants to the lands in question, or their right to sell, or the Respondent's liability to pay for them, denied the right of the Appellants to bring an action for the recovery of the price in their own names. In 1876, the firm of Benson, Bennett, and Co., in which Alfred Frederick Augustus Knight was a partner, became insolvent, and made an assignment under the Insolvent Act of 1875 to William Walker, as official assignee, for the benefit of their creditors. By a deed of composition and discharge, made under the provisions of the same Act on the 16th of June 1876, and a deed supplementary thereto made on the 19th of June 1877, Knight undertook to pay a composition to the creditors of Benson, Bennett, and Co., on condition that all the assets of the firm were transferred to him, with the exception of the real property, and the timber limits which were to be transferred by the official assignee, in whose possession they were by law, to the

Appellants, Ross and Porteous, and one Francis Vezina (since deceased) as trustees appointed by all the parties concerned, to hold the said real estate and timber limits for the benefit of the creditors and of Knight, until Knight had paid all the instalments of the composition, when the real estate and the timber limits would be conveyed to him by the said trustees. Knight was unable to pay the composition, and thereupon, on the 24th of January 1879, by an agreement made by the creditors of the firm of Benson, Bennett, and Co., and Knight, it was agreed that Knight should transfer all the assets of Benson, Bennett, and Co. in his hands, and all his interest in the real property of the firm to the Appellants, Porteous and Ross, and the said Vezina, for the creditors. By a deed made on the 9th of June 1880, the official assignee transferred to the Appellants, Porteous and Ross, and the said Vezina, the said real property and timber limits, and all his rights therein, Knight consenting and releasing all his rights. On the 16th May 1882, by a deed between the creditors of Benson, Bennett, and Co., and the Appellants, Porteous and Ross and Pierre Lafrance, after reciting that Vezina died on the 25th January 1882, and it was desirable that a formal deed should be executed to carry out the provisions of the agreement of the 24th January 1879, it was provided that the Appellant, Pierre Lafrance, should be appointed in the place of Vezina; and that after the execution of the deed the Appellants should have actual and exclusive possession of all the real and personal property of Benson, Bennett, and Co., with power (Article 18) to sell the same or any part thereof, and (Article 19) to prosecute any actions necessary in the interest of the estate. All proceeds (Article 22) of the estate, after payment of the trustees' expenses, to

be divided amongst the creditors. It was stated (Article 26) that the powers and authority given to the trustees were given with the intent that the trustees should have the power of granting as good and valid a conveyance of any part of the estate as if every creditor signed the deeds. In accordance with the provisions of the deed of the 16th May 1882, the Appellants took possession of the real property of the firm of Benson, Bennett, and Co., and in December 1882, by the act of sale, sold part thereof to the Respondent. The title of the Appellants, and their right to sell the property, as arising under the conveyance of William Walker, the official assignee, and dated 9th of June 1880, and the deed of the 16th of May 1882, was stated on the face of the act of sale. The Respondent took possession of the land so sold to him, and cut down timber thereon. The whole case of the Respondent rests on the contention that the Appellants were agents of the creditors, and as such were not entitled to bring an action for the price of the land sold to him in their own names. It was not contested, but that by the insolvency of Benson and Co., and by force of the provisions of the Insolvency Act, their whole estate vested in the official assignee, and that if the sale to the Defendant had been by the official assignee, that officer, and he alone, could have sued in his own name as such to enforce payment of the purchase money. Their Lordships refer to sections 16, 39, 75, and 76 of the Canada Insolvent Statute. The three original trustees had been appointed by the creditors' inspectors with the powers and duties expressed by section 49 of the same statute. The several deeds or agreements by which the trustees became trustees of the estates were all duly made under the insolvency and in accordance with the provisions of the Insolvent Statutes, and

by the deed of the 9th June 1880, to which the official assignee was a party, and made also in pursuance of the same statutes, the said official assignee did, "for the advantage of the creditors and of the estate," transfer and assign to the trustees all the whole real estate of the insolvents to hold for the purposes of the deed, and it contains the following provision: "And for the effect
 " of the present assignment the said William
 " Walker, official assignee, did hereby put,
 " substitute, and subrogate the said John
 " Porteous, James Gibb Ross, and Francois
 " Vezina, in their capacities of trustees and
 " inspectors as aforesaid, in the place and stead
 " of him, the said William Walker, in his
 " capacity aforesaid, and in all his rights,
 " title, interest, and demand, privileges and
 " hypothecs, in, to, upon, or respecting the
 " premises. And the above named Alfred
 " Frederick Augustus Knight doth, both indi-
 " vidualy and as having been such co-partner,
 " ratify and confirm the same in all respects,
 " and doth consent and agree that the said
 " parties of the second part shall receive and
 " dispose of all the real estate herein above
 " mentioned for the purposes herein-before set
 " forth, hereby relinquishing, in favour of the
 " said parties of the second part, all and any
 " rights of any kind that he the said Alfred
 " Frederick Augustus Knight may or can have
 " in, to, or upon the above-mentioned real estate
 " and premises."

By the deed of the 16th May 1882, to which the creditors were parties, and by which Lafrance was appointed trustee in place of Vezina deceased, after reciting that the whole property had come into the possession of the trustees, the confirmation of prior deeds and an agreement to discharge Knight from his liabilities under the composition arrangement, by the 18th

Article of the deed, it is declared "that the
" trustees shall have actual and exclusive pos-
" session of the whole of the said estate, real
" and personal, and are authorised to sell and
" dispose of it in such wise and upon such terms
" and conditions, either by private sale or by
" auction, and either for ready money or on
" credit, as to them, in their own discretion,
" shall appear most advantageous to the said
" creditors, with power to the said trustees in
" their discretion to contract from time to time
" any loans that they, in their discretion, may
" deem necessary for the advantageous carrying
" out of the trusts hereby reposed in them, as
" well as for the better conservation of the
" property hereby entrusted to them, and also
" for the execution of any incumbrances thereon;
" also to lease the said real estate or any part
" thereof until it can advantageously be sold;
" and also until the said timber limits can be
" sold, to allow timber to be cut thereon upon
" such terms as the said trustees may deem
" reasonable." And by 19th, "That the said
" trustees shall and may, by all such lawful
" ways and means as they may think proper,
" collect and get in all sums of money belonging
" to the said estate; and dispose of, and convert
" into money all other the property and effects
" belonging to the said estate, the whole as to
" them in their discretion shall seem best; also
" to commence and prosecute any action or
" actions, suit or suits, as well real as personal,
" in any courts of law or equity for the recovery
" of any sum or sums of money, goods, chattels,
" or other property of any kind that now
" is or may hereafter become due or pay-
" able or belonging to the said estate or
" for any other purpose that the said trustees
" may consider necessary in the interest of the
" said estate to commence and prosecute, and

“ the same action or actions, suit or suits, to
 “ prosecute and follow until final judgement.”
 “ And by 22nd, “ That all moneys which shall
 “ be got in and received by the said trustees
 “ after the payment of all costs and charges of
 “ winding up the said estate, shall be applied
 “ in the first place to the payment of the
 “ advances heretofore obtained by the said
 “ trustees to enable them to meet the expenses
 “ incident to the discharge of their duties as
 “ such trustees, and more particularly to pay
 “ the sum of 6,170 dollars and 15 cents (with
 “ interest at 7 per cent.) advanced by the Bank
 “ of Montreal to pay the Crown Lands Depart-
 “ ment the transfer dues owing on said timber
 “ limits so belonging to the said estate, as
 “ appears by a certain deed bearing date the
 “ 30th day of June 1877, executed before the
 “ undersigned notary, to which William Walker,
 “ of the said city of Quebec, in his capacity as
 “ assignee as aforesaid, was party of the first
 “ part, and the said the Bank of Montreal was
 “ party of the second part, and the said Alfred
 “ Frederick Augustus Knight was party of the
 “ third part, and by a certain deed bearing date
 “ at Quebec aforesaid, on the 4th of July of
 “ the same year. passed before the same notary
 “ between the said parties.” The estates being
 thus vested in the trustees they proceeded to sell
 and make sale of a portion to the Defendant,
 and by the conveyance dated 13th December
 1882, in which their position as vendors, and
 their title to the lands is fully recited, they
 conveyed to the Defendant, “ for ever, with
 “ promise of warranty against all gifts, dowers,
 “ mortgages, substitutions, alienations, and other
 “ hindrances whatsoever, the lands so sold; of
 “ all of which the said purchaser declares to
 “ have a perfect knowledge, as having viewed
 “ and examined the said property and the titles

“ thereto, and therewith is content and satisfied.
 “ Which said vendors are lawfully seised thereof
 “ under and by virtue of a certain deed of
 “ transfer consented to by the said William
 “ Walker, of the said city of Quebec, Esquire,
 “ official assignee, in his capacity as assignee
 “ duly appointed to the insolvent estate of
 “ Benson, Bennett, and Co.” The deed then
 recites “ The present bargain and sale is thus
 “ made for and in consideration of the price or
 “ sum of 11,014 dollars and 64 cents, on account
 “ of which the said vendors do hereby acknow-
 “ ledge to have received from the said purchaser,
 “ at the time of the execution thereof, the sum
 “ of 3,671 dollars and 54 cents, *dont quittance*
 “ *d'autant*. And as to the balance of the said
 “ purchase price, to wit, the sum 7,343 dollars
 “ and 10 cents, the said purchaser doth hereby
 “ bind and oblige himself, his heirs, and assigns,
 “ to pay the same to the said vendors at the
 “ said city of Quebec,” by instalments as pro-
 vided for in the deed. The action was instituted
 by the trustees’ vendors to recover the residue of
 the purchase money, all the instalments being
 overdue. All the averments in the Plaintiff’s
 declaration have been sustained in evidence.

The defence, whilst it puts the Plaintiff on
 proof, amounts to what we would call a demurrer
 in law, and concludes thus :—“ Qu’à tout événe-
 “ ment la demande en cette cause devait être par les
 “ dits John Porteous, James Gibbs Ross, et Pierre
 “ Lafrance en leur qualité de mandataires, mais
 “ non leur propre et privé nom. Pourquoi le dit
 “ Defendeur conclut à ce que l’action des dits
 “ Demandeurs soit deboutée avec depens distraits
 “ aux sous-signés.” The Superior Court of the
 Province of Quebec, in which this suit was in-
 stituted (Cour Supérieure District des Trois
 Rivières), pronounced its decision on the 8th
 November 1884, holding that the Plaintiffs had

proved their allegations and were entitled under the act of sale to recover from the Defendant the balance of the purchase money. There is no allusion in that Judgement to the 19th Article of the Code of Civil Procedure, or to the exception now founded on it, and therefore it would seem not to have been brought under the notice of that tribunal.

From that decision an appeal was taken to the Court of Queen's Bench for the Province of Canada; but there is nothing in the reasons of appeal to indicate that any question on the 19th Article of the Code was to be raised. The 19th Article is in these words:—"No person can use the name " of another to plead, except the Crown through " its recognised officers." That article is intended to express the rule of procedure previously existing in Lower Canada, and which, subject to numerous exceptions, represents in some respects the rule of procedure in this country, *e.g.* the Queen never sues in her Royal name alone. Her suit is by her Attorney-General on her behalf, or by some other public officer who has authority by Act of Parliament to enforce the rights of the Crown. Again, by the law of England a mere agent who contracts as such cannot generally sue in his own name; but he may do so, and sometimes is the proper person to sue on contracts entered into with him directly in his own name. He may be personally held liable on such contracts, and generally with us, trustees of real or personal estate, who have in them the title and possession, though but in trust for others, can sue to enforce their rights as such, and are the proper parties to enforce the contracts entered into with them in respect of the trust property, and a trustee is not regarded in the light of a mere agent "*mandataire*," or as a "*Procureur qui a pouvoir d'ager pur un autre*." But their Lordships do not deem it

necessary to pursue this further, as they have to give effect to Canadian, and not to English law.

This case came before the Canadian Court of Queen's Bench, Province of Quebec, and that court reversed the decision of the Primary Court:—"Considering that the Supreme Court
 " has already decided in the cases of *Brown et al*
 " and *Pinsonnault*, and of *Burland and Moffatt*,
 " that a voluntary assignment by an insolvent
 " debtor of his estate and property for the benefit
 " of his creditors did not confer upon the assign-
 " nees the right to sue or defend in their own
 " name the actions accruing with regard to the
 " estates and property assigned. And, con-
 " sidering that the present case does not consti-
 " tute an exception to the ruling of the Supreme
 " Court." Mr. Justice Ramsay concurred, but not in the reasons of the Judgement; and after stating that the reversal by the Supreme Court of the decision of the Queen's Bench in *Burland v. Moffatt* was a calamitous mistake, and a double error, he adds:—"But the deed in this case is of
 " a totally different character. It carefully
 " avoids giving Respondents any title but that of
 " trustees; and this Respondents perfectly under-
 " stood. They sold as trustees, and now they
 " bring the action as principals. I do not see how
 " this action could be maintained. If they are
 " principals they show no title; if they are trus-
 " tees they cannot sue as such; for no one but the
 " Crown can use the name of another to sue.
 " Art 19. C.C.P." The reasons of Mr. Justice Ramsay, so far as they are reported, do not appear to their Lordships to be satisfactory; but in truth the majority of the court seem to have merely followed the two prior decisions of the Supreme Court at Ottawa. Their attention does not appear to have been directed to the totally different circumstances of the present case.

Their Lordships have now to consider these two decisions, of which the earliest was *Brown v.*

Pinsonnault, reported in 3, Supreme Court of Canada Reports, p. 102, on appeal from the Court of Queen's Bench. There were two questions. The first was whether a particular contract was terminated by *force majeure*. The court so held, and that formed a decision on the merits terminating the action. The second was whether the Appellants as trustees for the creditors of Steele had a right to sustain the action for Steele's creditors though the contract was with them, the action, if any, belonging to the creditors under Article 19, and not to them. Mr. Justice Taschereau delivered the judgement of the court on both points; but the second, or technical question, receives the first attention. He says:—

“ The Plaintiffs sue in their quality of trustees
 “ duly named of the creditors of Steele. The rule
 “ with us, contained in Article 19 of the Code
 “ of Civil Procedure, is that no one can sue ‘ par
 “ procureur.’ Of course in certain cases, when
 “ specially authorised by law to do so, certain
 “ trustees may sue and appear before the courts
 “ as such; so can assignees under the Insolvency
 “ Acts; but here the Plaintiffs have no such
 “ standing—they are merely the attorneys of Steele's
 “ creditors. It is true that Pinsonnault passed
 “ the deed of April 1879 with them, acting in
 “ their quality of such trustees, but this does not
 “ give them any right to appear as such before a
 “ court of justice.”

Moffatt v. Burland, which was the other case, appears to have been decided on the 27th of May 1884. It is reported in fourth Dorion's cases, p. 59. It came before the Court of Queen's Bench at Montreal, and the head note is this: “ (1) A sale of a chattel may be con-
 “ sidered as a mere pledge instead of an actual
 “ sale, and invalid as a pledge for want of
 “ delivery and possession. (2) The assignee under
 “ a voluntary deed of assignment by a debtor

“ for the benefit of his creditors, can as such
 “ assignee sue and be sued in reference to the
 “ estate and property assigned to him.” With
 the decision of that court on the main question
 their Lordships have now no concern, but the
 judgement of Chief Justice Dorion on the
 second question is remarkable, and deserves the
 closest consideration. The very learned Chief
 Justice points out that the question was whether
 the Appellant as cessionnaire from the debtor for
 the benefit of creditors, was entitled to resist the
 action in his own name. He was not Plaintiff
 in the suit, but was sued as Defendant in respect
 of the trust property in his possession. The
 Chief Justice observes:—“But it is contended
 “ that the Defendant, as the assignee of
 “ Gebhart and Co., being a mere agent or
 “ attorney, has no quality and no interest as
 “ such to appear in a court of justice and urge
 “ any objection against the title of the Respon-
 “ dent. Now is this a transaction in which
 “ the old rule ‘Personne ne plaide par pro-
 “ cureur,’ embodied in Article 19, does apply?
 “ We have no hesitation in saying it is not.”
 His Lordship, in a most able, elaborate, and
 learned judgement, considers the authorities,
 both French and French-Canadian, that bore on
 the question, and observes: “As far as we can
 “ refer back for precedents in the courts of
 “ Lower Canada we find that assignees or
 “ trustees vested by voluntary agreements with
 “ the estate of insolvent debtors for the benefit
 “ of their creditors have invariably, with one
 “ or two exceptional cases, been admitted to
 “ urge before courts of justice the claims and
 “ rights of the estates which they represented
 “ as such assignees or trustees.” Dealing with
 the Canadian authorities, which he describes as
 an unbroken chain of precedents going as far
 back as 1811, he adds:—“that the jurisprudence

“ of a country on any given case when certain
 “ is not only the best, but the sole authentic
 “ of what the law is now on the subject.” We
 gather also from his Lordship’s judgement that
 the rule of procedure in Article 19 is applicable
 only to a mere agent.

Burland v. Moffatt is reported on appeal from
 the Court of Queen’s Bench to the Supreme
 Court of Canada in the 11th Supreme Court
 Reports, p. 76. The judgement of the Supreme
 Court is the judgement of Mr. Justice Taschereau.
 He says that “ *Nul ne peut plaider par procureur* ”
 is, and always has been, the law of Lower
 Canada.

The case on the merits is so mixed up with
 the question of procedure that it is difficult to
 disentangle them ; but undoubtedly the decision
 of the court on the technical question of proce-
 dure rests on the supposed rule that a voluntary
 assignee in trust for creditors comes within the
 article “ *Nul ne peut plaider par procureur*,” and
 adopts the decision of Mr. Justice Badgley that
 the assignees of an insolvent cannot “ enter on
 justice ” for the creditors.

Their Lordships cannot interfere authorita-
 tively with either of those decisions, but they
 may express their opinion on them for future
 guidance ; and their Lordships have no hesitation
 in saying that the reasoning and the decisions
 of the Supreme Court in relation to the exception
 founded on Article 19 of the Code of Civil
 Procedure are not satisfactory, and that on the
 contrary they adopt the reasoning and decision
 of Dorion, C.J., in *Burland v. Moffatt*, as con-
 sistent with reason and law.

Their Lordships having so disposed of the two
 decisions of the Supreme Court, which governed
 the Court of Queen’s Bench, proceed to deal
 with the present case.

On this appeal they entertain not a shade of
 doubt that the decision of the Court of Queen’s

Bench was erroneous, and that the decision of the Superior Court was correct in fact and in law, and ought to be restored; and their Lordships would have come to the same conclusion if the facts of this case were in effect similar to and had not gone beyond both *Brown v. Pinsonnault* and *Moffatt v. Burland*. Their Lordships entertain the view that Article 19 is applicable to mere agents or mandataries who are authorised to act for another or others, and who have no estate or interest in the subject of the trusts, but is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realisation of the trust estate. The case before their Lordships is so different that even if the two preceding decisions were untouched they would not necessarily affect the decision of their Lordships on the present appeal. This is not a case of a mere voluntary cession to a trustee for the benefit of creditors, but of an assignment under the Insolvent Acts to the official assignee for the purpose of realisation. That officer could sue and must sue in his own name, though he has no beneficial interest. The present Plaintiffs derive their title from him with the assent of all the creditors, and they are the assignees of all his rights, so far as he could transfer those rights. In addition, by the composition arrangement entered into under the provisions of the 49th section of the Insolvent Act, and the subsequent acts springing from that composition, the estates moveable and immoveable have been vested in the Plaintiffs in possession and in property under a mandate, to preserve, to manage, to realise, to pay off charges, and distribute the surplus. The trustees, too, are empowered to act independently of the creditors in performance of their obligations and duties, and are specially authorised to enter into contracts

and to enforce them. The act of sale in the present case was regular and lawful. The Plaintiffs as trustees, sold property to the Defendant, of which they were lawfully possessed, and to which they had title. He received that title and that possession from them. They were to receive the purchase money, and he covenanted to pay the balance of that purchase money to them. The action is brought by the trustees on that covenant, and if they cannot enforce it in the present action there is some difficulty in defining what the remedy, if any, may be.

Their Lordships are of opinion that to hold that the present suit could not be maintained, and in the present form, would do considerable mischief, and practically defeat those compromises which constantly take place in carrying into operation the provisions of the Insolvent Act, and which can rarely be made effective without the introduction of trustees. They do not forget that in ordinary trust cases the estate is vested in the person of the trustee to accomplish the ends and purposes of the trust. In order to create an effectual trust the subject is usually vested in the trustee to preserve it, and deal with it for the objects contemplated, and whatever is essential to the purposes of the trust, if not expressed, is usually implied: thus, for instance, if trustees are to recover and distribute funds, they may institute and carry on actions, recover payment, and discharge the debtors.

Upon the whole their Lordships are clearly of opinion that the judgement of the Court of Queen's Bench should be reversed, the judgement of the Superior Court re-instated, and the appeal to the Court of Queen's Bench dismissed with costs, and their Lordships will so humbly advise Her Majesty. The costs of this appeal will be paid by the Respondent.

