

CHARLES H. LÉTOURNEUX (DE-  
FENDANT) .....

APPELLANT ;

1886

AND

\* Mar. 13.

\* May 17.

CLÉMENT DANSEREAU (PLAINTIFF)...RESPONDENT.

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

*Insolvent Act 1875—Secs. 28, 29, 30—Sureties, liability of.*

*Held*, Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, that the creditors have recourse upon the bond given for the due performance of his duties as official assignee.

APPEAL and cross appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court in favor of the appellant.

This was a proceeding instituted by respondent *es qualité*, 30th September, 1879, under sec. 69; Insolvent Act of 1875, which provides that any one may obtain an order of a judge authorizing him to take proceedings when assignee refuses.

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

(1) 4 Dorion's Q. B. R. 220.

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One Felix Rieutord is the creditor in this case, suing in the name of the present assignee.

In the year 1875 one Olivier Lecours was appointed official assignee under Insolvent Act, 1875.

On 26th August, 1875, the appellant and one Joseph Brunet became sureties to Her Majesty for the benefit of all interested to the extent of \$6,000 for due performance of Lecours in the duties of his office as official assignee as required by 28th section of this Act. That section is as follows :—

28. Each person so appointed assignee or joint assignee, shall hold office during pleasure, and before acting as such shall give security for the due fulfilment and discharge of his duties in a sum of two thousand dollars, if the population of the county or district for which he is appointed does not exceed one hundred thousand inhabitants, and in the sum of six thousand dollars if the population exceeds one hundred thousand—such security to be given to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into his possession under this Act; and in case any such assignee fails to pay over the moneys received by him or to account for the estate, or any part thereof, the amount for which such assignee may be in default, may be recovered from his sureties, by Her Majesty or by the creditors or subsequent assignee entitled to the same, by adopting in the several provinces, such proceedings as are required to recover from the sureties of a sheriff or other public officer.

a. The official assignee may also be required to give in any case of insolvency such further security as, on petition of a creditor, the court or judge may order, such additional security being for the special benefit of the creditors of the estate for which the same shall have been given.

b. The official assignee shall be an officer of the court, having jurisdiction in the county or district for which he is appointed; he shall as such be subject to its summary jurisdiction and to the summary jurisdiction of a judge thereof, and be accountable for the moneys, property and estates coming into his possession as such assignee, in the same manner as sheriffs and other officers of the court are.

c. If it appears to the court or judge that an official assignee has been guilty of any fraud, breach of duty, or wilful violation of any of the provisions of the Insolvent Act of 1875 or the amending Acts, or

has inserted any improper charge in any account or claim preferred by him against the estate, the court or judge shall forthwith make a report of the facts to the Secretary of State of Canada, for the information of the Governor.

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The bond is as follows :—

EXHIBIT No. 2.

No. 1501.

Know all men by these presents, that we, Olivier Lecours, trader of the city of Montreal, in the District of Montreal, in the Province of Quebec, in the Dominion of Canada (hereinafter called the principal), Joseph Brunet, trader, of the city of Montreal, in the District of Montreal, in the Province of Quebec, and Charles Henri Létourneux, merchant, of the city of Montreal, in the District of Montreal, in the Province of Quebec, (hereinafter called "the sureties,") are held, and firmly bound unto our Sovereign Lady the Queen, her heirs and successors, in the sum of six thousand dollars of lawful money of Canada, to be paid to our Sovereign Lady the Queen, her heirs and successors, for which payment, well and faithfully to be made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and each of us, jointly and severally, firmly by these presents, sealed with our respective seals.

Dated this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas "the principal" having been appointed to the office or employment of an official assignee in and for the city and district of Montreal, in the Province of Quebec, is required by the law to give security to the Crown for the performance, fulfilment and discharge of the duties appertaining thereto; and "the sureties," Joseph Brunet and Charles Henri Létourneux, have consented to become his sureties for such performance of the said duties, and this bond is given in pursuance of "An Act further to amend an Act respecting the security to be given by the officers of Canada."

And whereas this bond is also given in pursuance of "The Insolvent Act of 1875" to Her Majesty, for her benefit and for the benefit of the creditors of any estate which may come into the possession of the principal under the last mentioned Act.

Now the condition of this obligation is such that if "the principal" faithfully discharges the duties of the said office and duly accounts for all moneys and property which may come into his custody by virtue of the said office, this obligation shall be void.

And also that in case "the principal" as such assignee, fails to pay over the moneys received by him or to account for the estate or any part thereof, the amount for which "the principal" as such

1886 assignee may be in default may be recovered from the sureties by  
 Her Majesty or by the creditor or subsequent assignee entitled to the  
 LÉTOURNEUX same, by adopting in the said province such proceedings as are  
 v. same, by adopting in the said province such proceedings as are  
 DANSEREAU. required to recover from the sureties of a sheriff or other public  
 officer.

(Signed) OLIVIER LECOURS, [L.S.]

" JOSEPH BRUNET, [L.S.]

" CHARLES HENRI LÉTOURNEUX, [L.S.]

Signed, sealed and delivered }  
 in presence or }

(Signed) H. F. RAINVILLE,

" WILLIAM F. BROWN.

(True copy.) HUBERT, HONEY & GENDRON,  
 P.S.C.

On 26th February, 1876, Lecours as official assignee received from Houle & Co., of Montreal, insolvents, and came into possession of, immovable properties belonging to said firm.

On 22nd March, 1876, at a meeting of creditors of insolvents Lecours was, appellant alleges, appointed by them assignee to the estate under section 29 of Insolvent Act.

29. The creditors at their first meeting or at any subsequent meeting called for that purpose, may appoint an assignee who shall give security to Her Majesty in manner, form and effect, as provided in the next preceeding section, for the due performance of his duties to such an amount as may be fixed by the creditors at such meeting. In default of such appointment the official assignee shall remain the assignee of the estate, and shall have and exercise all the powers vested by this Act in the assignee.

30. As soon as the security required from the assignee appointed by the creditors shall have been furnished by him, it shall be the duty of the official assignee to account to him for all the estate and property of the insolvent which has come into his possession, and to pay over and deliver to him all such estate and property, including all sums of money, books, bills, notes and documents whatsoever, belonging to the estate, and to execute in his favor a deed of assignment in the form H.

Subsequently Lecours sold by adjudication to Augustin Robert a certain real estate part of the insolvent estate.

On 11th June, 1876, by a deed, Lecours to Robert, 1885  
Lecours acknowledged to have received purchase price, LÉTOURNEUX  
\$8,355. v.  
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On 29th March, 1879, Rieutord attained from court an order commanding Lecours, the assignee, to deposit with a chartered bank the said purchase price.

Lecours did not obey this order and on 10th April, 1879, respondent Dansereau was appointed assignee to the estate of Houle & Co., in place of Lecours.

On 16th September, 1879, Rieutord obtained from the court permission to institute this action against the appellant for the whole amount of his suretyship, \$6,000, which he alleged to be due to the creditors on account of Lecours' embezzlement. Action was taken in name of the newly appointed assignee.

Rieutord became a creditor of the insolvent firm of Houle & Co. in the following manner: Phileas Racette was a creditor of said estate for \$4,500 secured by builder's privilege. This claim was first transferred to one Joseph Brunet, and the latter having become insolvent, it was sold by his assignee to L. W. Sicotte, who in his turn transferred it to said Rieutord on the 29th October, 1878, who paid \$1,000 for it.

The defendant (now appellant) pleaded by demurrer that the facts alleged in the declaration were insufficient in law to justify his conclusions, inasmuch as it did not appear that the claims against the insolvent's estate amounted to \$6,000, nor that Rieutord was a creditor for that sum; and also because it did not appear that Rieutord had the right to make use of the assignee's name to take the action

The defendant also pleaded six exceptions seeking the dismissal of plaintiff's action, and on the present appeal relied on the

1st Exception.—That Lecours, when he made the sale

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 LÉTOURNEUX assignee, but as an assignee named by the creditors, and  
 v. that the security was given only for acts done by  
 DANS REAU. Lecours in his quality of official assignee;

And 2nd Exception.—That Rieutord is not creditor of the insolvent, his claim being only a pretended right of Brunet's, which had been irregularly sold and transferred by the assignee Lajoie to Sicotte, and by the latter to Rieutord.

The plaintiff replied generally to said pleas, denying all the allegations both of the demurrer and of the exceptions. The demurrer was dismissed and judgment was rendered in the Superior Court maintaining defendant's first exception, and dismissing plaintiff's action.

On appeal, the Court of Queen's Bench reversed the judgment of the Superior Court and condemned the appellant to pay the respondent the sum of \$1,000, the amount he had paid for the debt due to Sicotte, Rieutord's claim being for the purchase of a litigious right.

*B. Globensky, Q.C.*, for appellant.

The suretyship upon which this action is based covers only the acts performed by the official assignee, and when Lecours sold the property in question, he was not acting as an official assignee, but as an assignee to the estate appointed by the creditors.

The fact is admitted, but the legal proposition which we uphold is denied by our adversaries.

The jurisprudence upon this point is yet uncertain. In a case of *Delisle et al. v. Letourneux* (1) Mr. Justice Johnson has condemned the surety, and in another of *McNichols, es qualité, v. The Canada Guarantee Company* (2) Mr. Justice Torrance has rendered a judgment in the same sense, but declaring that if this case had come before him previous to the judgment rendered in the

(1) 3 Legal News, p. 207.

(2) 4 Legal News, p. 78.

case of *Delisle et al. v. Letourneau*, he might have come to another conclusion. This last judgment was taken to appeal and confirmed by three judges out of five, who were composing the court.

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In Ontario, Mr. Justice Haggarty has decided the contrary, in the case of *Miller v. The Canada Guarantee Company* (1).

Now, in this case the judge in the Superior Court has maintained our plea, and this judgment has been reversed by four judges of the Court of Appeals, one of whom, Mr. Justice Ramsay, declares that the Chief Justice and himself had dissented from the majority of the court in the case of *The Canada Guarantee Company v. McNichols*, and that, although his opinion was unchanged, he thought it right in a matter of this kind, where the interpretation of a statute only is involved, to adopt the jurisprudence established, leaving to a higher tribunal or to the legislature the responsibility of settling the court right, if it is in error.

Everybody is unanimous as to the rules by which suretyships are governed. Whether it be limited or unlimited, it is always *strictissimi juris* and cannot be extended *de persona ad personam, de tempore ad tempus, de re ad rem*, and its effects must necessarily be restricted to the obligations derived directly therefrom. This is the principle admitted by the honorable judge who rendered judgment in this cause in the Superior Court.

The statute provides for the appointment of provisional assignees who receive the insolvent's properties, who have the safe guard of them and administer them until the creditors have had an opportunity of choosing an administrator themselves. This provisional assignee is called official assignee; that is to say, that he acts of office, by the mere enactment of the law, and by the only duty of his office, but, from the moment that the

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creditors have manifested their will, and have made their choice, if the same person has been selected, he does not act any more of office, nor by the only duty of his office.

In the ordinary sense, it is true that it is the same person, but in the legal sense, we pretend the contrary.

2nd. The transfers by Lajoie to Sicotte, and from the latter to respondent, are null and void, because the sale of the claim therein contained was made by private agreement, while it could only be made by public sale and at auction. Section 67 of the Insolvent Act is perfectly clear upon this point.

The assignee could not dispose of the property of which he was the administrator, in any other manner than by conforming to the conditions exacted by the statute.

The nullity of Lajoie's transfer to Sicotte involves that of the transfer from Sicotte to Rieutord, and consequently Brunet's estate and not Rieutord, are the owners of the claim.

On the cross appeal I submit the *considérant* given by the Court of Queen's Bench, that the respondent cannot be entitled to more than he had paid is unanswerable. It being evident that Rieutord bought what is known in our law as litigious rights.

*Beique* for the respondent :

The bond, as its terms state, was "given in pursuance of the Insolvent Act of 1875 to Her Majesty, for her benefit and for the benefit of the creditors of any estate which may come into the possession of the principal under the last mentioned Act." And the undertaking of the sureties in said bond was that the principal should "account for the estate or any part thereof."

The terms are most general and indicate clearly that the bond given in favor of an official assignee is intended to cover every act of the latter performed at any



state in the insolvency proceedings, whether such act be performed previous or subsequent to his remaining or being continued in office pursuant to section 29 of said act. 1886  
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The act provides for the nomination of a number of official assignees to whom alone assignments can be made or who alone can take possession of the estate of an insolvent under a writ of attachment. It is to these officers, who are constituted officers of the court, that the whole charge of winding up insolvent estates in the ordinary course of proceedings under the act is confided. Provision is made, it is true, by which creditors may, at a meeting called for the purpose, name another assignee, but there is no obligation upon them to do so, and the act expressly states that "in default of such appointment, the official assignee shall remain the assignee of the estate; and shall have and exercise all the powers vested by this act in the assignee." And the official assignee who thus remains assignee of the estate, unless removed by the creditors, is not required by the Act to give any further security, except when ordered by the court or judge, on petition of a creditor, while it is provided that a new assignee, if appointed by the creditors "shall give security," it being then obligatory for him to give such security without the necessity of any order to that effect from the court or judge.

The respondent further submits that an official assignee remaining or being continued in office, pursuant to section 29, retains his character of official assignee. Otherwise, the power given by paragraph *e* of section 28, cited above, to the court or judge to report an assignee to the Secretary of State for dismissal by the Governor, could not be exercised for acts done after such meeting of creditors, the term used in said paragraph being official assignee.

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The interpretation put upon the law by respondent is in conformity to the practice prevailing throughout the entire country during the whole time the law was in force.

Official assignees have never been required to give security in each estate, except as additional security in few instances, when they had already given security as official assignees. And this because it was well understood that the security provided was sufficient for the exigencies of the law. See Clarke, Insolvent Act of 1875 (1).

As to the second exception filed by defendant, now appellant, that the sale of the claim in question by Lajoie, assignee of Brunet's estate, to Sicotte, was not made in accordance with the law inasmuch as it was a private and not a public sale, the appellant has no quality to raise that question. Such an exception would lie only in favor of non-assenting creditors of Brunet's estate, who themselves would not be allowed to question the validity of the transfer after having received their proportion of the price of sale. Moreover, it is of record that the question was raised between creditors of Brunet's estate and respondent, and that the sale was maintained.

On the cross appeal I submit that if the interpretation given to the law on the main question by the judgment of the Court of Queen's Bench is correct, the defendant should have been condemned to pay at least the full amount of Rieutord's claim, to wit, \$4,500 and interest, which together with the \$1,033.24 already paid by him to Delisle *et al.*, is still within the amount of the bond.

The Court of Queen's Bench has treated Rieutord's claim as a purchase of litigious rights, and have granted him only the amount he paid for the claim.

This might have been set up by the defendant as a

ground of defence, but it would then have been incumbent on him, instead of disputing his liability, to offer and pay to Rieutord his purchase price and incidental expense with interest, or made a tender thereof. (See Art. 1582, Civil Code.)

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Pothier, Vente, [par. 507].

Sir W. J. RITCHIE C.J.—The Government by virtue of section 27 may appoint one or more persons to be official assignee, or assignees, or joint official assignees, in each of the judicial districts of Quebec, Montreal and St. Francis, respectively, for the whole district, or for one or more electoral districts in the same. By section 28 security is to be given by the official assignee “for the due fulfilment and discharge of his duties.” Such security to be given to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into his possession under this act, and in case any such assignee fails to pay over the moneys received by him, or to account for the estate, or any part thereof, the amount for which such assignee may be in default may be recovered from his sureties by Her Majesty, or by the creditors, or the subsequent assignee entitled to the same.

By sub-section *a* the official assignee may be required on petition of a creditor to give further security for the benefit of creditors of the estate as the court or judge may order.

By sub-section *b* official assignee is made an officer of the court having jurisdiction in the district for which he is appointed and subject to the summary jurisdiction of the court and judge thereof, and accountable for moneys, property and estates coming into his possession as sheriff and as other officers of the court are.

Then section 29 provides for the appointment of and security to be given by assignees not official as follows (1):

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Under this section it appears to me clearly contemplated that unless another, other than the official assignee, is appointed, the official assignee should continue assignee, and therefore, by the non-appointment of another, or, in the words of the act, in default of such appointment, the official assignee remains the assignee of the estate clothed with all the powers vested in the assignee, and this is very clearly shown by the 30th section which requires a transfer of the estate from the official assignee to the creditors' assignee. The enactment is as follows (1) :—

And that it was so treated and acted on by the creditors is placed beyond all doubt by the action of the creditors. The following certificate clearly showing that so far from appointing a creditor's assignee they refrained from doing so and simply allowed Lecours the official assignee to continue as assignee.

Exhibit No. 1. du demandeur à l'enquête.

*Acte de Faillite de 1875 et ses amendements.*

Province de Québec }  
District de Montréal }

Dans l'affaire de

HOULE & COMPAGNIE, *Faillis.*

OLIVIER LECOIRS, *Ex-Syndic.*

ET

J. C. DANSEREAU, *Syndic.*

Je, soussigné, certifie que :

A l'assemblée des créanciers des dits fallis, tenue par les dits créanciers, le vingt-deux de mars mil huit cent soixante-seize, le dit Olivier Lecours a été dûment continué comme syndic à la dite faillite.

Montréal, le seize de décembre mil huit cent soixante et dix-neuf.

J. C. DANSEREAU, *Syndic.*

Now, what does the bond say? "Lecours having been appointed to the office or employment of an official assignee," and being required by the law to give security to the Crown for the performance, fulfilment and discharge of the duties appertaining thereto and the sure-

(1) *Ubi supra.*

ties, Jos. Brunet and Charles Henry Letourneau, have consented to become his sureties for such performance of the said duties, and that the bond is given in pursuance of an Act further to amend an Act respecting the security to be given by the officers of Canada, and after reciting that the bond is also given in pursuance of the Insolvent Act of 1875 to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into Lecours' possession under the said Act. The condition of the bond is that if Lecours faithfully discharges the duties of the said office, and duly accounts for all money and property which may come into his custody by virtue of the said office, then the obligations shall be void, and in case Lecours, as such assignee, fails to pay over the moneys received by him, or on account, for the estate, or any part thereof, the amount for which he, as such assignee, may be in default, may be recovered from the sureties by Her Majesty or by the creditors or subsequent assignee entitled to the same, by adopting in the said Province such proceedings as are required to recover from the sureties of a sheriff or public officer.

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When did Lecours cease to be official assignee? Having received this property as official assignee, when did he cease to hold it as such? By the title by which he received it, by the same title he disposed of it and never having ceased to be the official assignee, no time ever arrived when his sureties ceased to be liable for his acts as assignee, and his duly accounting for the property which came into his possession as such assignee. There was only one way in which the liability of himself and sureties could cease, and he and they, could be relieved from further liability therefor, and that was on the creditors appointing another assignee, and, upon such assignee giving the security required by the statute, Lecours in accordance with the 30th section

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LÉTOURNEAU should account to him and deliver over the estate. This  
v. DANSEREAU. was never done, and therefore the defendant cannot  
escape liability for the acts of Lecours as assignee.

Ritchie C.J. It seems to me somewhat absurd to suppose that  
— with or without giving any security, in this case  
without giving any security it should be the duty  
of the official assignee, as provided by the 30th  
sec., as soon as the security required from the  
assignee appointed by the creditors shall have been  
furnished by him, to account to himself for all the estate  
and property of the insolvent which has come into his  
possession and to pay over and deliver to himself all such  
estates and property, including all sums of money, bills,  
notes and accounts whatsoever, belonging to the estate,  
and to execute in his own favor a deed of assignment in  
the form H, all entirely inconsistent with the official  
assignee becoming the creditors' assignee, but entirely  
consistent with the creditors neglecting or refusing to  
appoint a creditor's assignee and with their expressing  
a willingness that the official assignee should continue  
and remain official assignee.

We are of opinion that both this appeal and cross-  
appeal should be dismissed with costs.

Fournier, Taschereau and Gwynne JJ. concurred.

HENRY J.—I was inclined to hold, on the first con-  
sideration of this case, that the parties were not liable,  
but after a more careful consideration I think the ap-  
pointment was simply a continuous one. The creditors  
had a right to exact further security; they did not act  
on that right, and no further security was taken. The  
property came into the hands of the assignee subse-  
quently to the meeting of the creditors, and if he was  
appointed by the creditors as a new appointment, I  
would hold at once that he would not be answerable,

but this appointment was a continuous one, and I think the surety is liable.

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*Appeal dismissed with costs.* DANSEREAU.

Solicitors for appellant: *Lacoste, Globensky, Bissailon* Ritchie C.J.  
& *Brosseau.*

Solicitors for respondent: *Beique, McGoun & Emard.*

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