Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kierzkowski v. *Dorion, from Canada; delivered* 23*rd December*, 1868.

Present:

LORD CHANCELLOR HATHERLEY.
LORD CHELMSFORD.
SIR JAMES W. COLVILE.
LORD JUSTICE SELWYN.

THIS is an Appeal from a Judgment of the Court of Queen's Bench of Lower Canada, reversing a Judgment of the Superior Court of that Province, in an action by the Appellant against the Respondent.

The action was brought to recover from the Defendants, jointly and severally, as universal legatees of their mother, Marie Louise Cousineau, a sum of 5,329*l.* 10*s.*, alleged to have been paid to them by the Plaintiff, in excess of the amount of legal interest payable under a contract for the loan of 4,875*l.* by Madame Cousineau to the Plaintiff and his wife, Lewis Thomas Drummond and his wife, Samuel Cornwallis Monk and his wife, and Edward Silvester Count de Rotturmund and his wife.

The Declaration in the action states, that by an obligation dated the 11th November, 1845, the Plaintiff, in his own name, and in the names of the other borrowers, acknowledged to have received, by way of loan, from Madame Cousineau (represented by the Defendant, Jean Baptiste Theophile Dorion), a sum of 4,875*l.*, which they bound themselves to repay to Madame Cousineau in manner mentioned in the obligation. That the Plaintiff received from the Defendant, Jean B. T. Dorion, acting as aforesaid, only 3,325*l.*, and that he retained, the balance of

1,550*l.*, as a bonus or premium, or illegal and usurious interest.

The Declaration states the death of Madame Cousineau, leaving the two Defendants and their brother, Eustache Dorion, her universal legatees, and that the rights of Eustache Dorion having been ceded to Jean B. T. Dorion, the two Defendants are the only representatives of their mother.

It then states various payments made on account of principal and interest due on the obligation of the 11th November, 1845, which, on the 6th March, 1854, left a balance of 2,138*l.* 8*s.* 5*d.*; and that on that day, Mr. and Mrs. Drummond, two of the debtors in the obligation, sold to the Honourable Judge Mondelet, part of the property charged with the payment of the loan; and that on 1st September, 1855, by an arrangement between Judge Mondelet, and the two Defendants, and divers other creditors of the vendors, be paid to the Defendants a sum of 78*l.* 15*s.* 9*d.*, and afterwards another sum of 5,023*l.* 2*s.* 8*d.*, on account of principal and interest upon the obligation.

That as at this time there was due upon the said obligation only the sum of 2,138*l.* 8*s.* 5*d.*, the Defendants received beyond the principal and legal interest at 6 per cent. a sum of 2,963*l.* 10*s* That this sum, with interest, amounts to 5,329*l.* 10*s.*, which the borrowers are entitled to recover from the Defendants, with interest.

The Declaration then states an assignment to the Plaintiff of all the interests and rights of action of the other debtors in the obligation of the 11th of November, 1845, to demand and recover the usurious premium of 1,500*l.*, and interest, and all other illegal and usurious interests paid in respect of the obligation, by which, as the Plaintiff alleges, he is alone entitled to maintain the action.

The plea of the Defendant, Jean B. T. Dorion, alleges that the loan in question was made by Madame Cousineau through his agency, and that she never stipulated for, or required any bonus or usurious interest upon such loan.

That upon his own responsibility and for his own interest, unknown to Madame Cousineau, and to indemnify him for the steps and proceedings taken by him in the interest and for the profit of the borrowers, he entered into an agreement with them,

by which they bound themselves to pay him a bonus of 1,500*l.* And that on the 11th November, 1845, after having made the before-mentioned loan of 4,875*l.* for Madame Cousineau, the borrowers paid him, on his own account, the said sum of 1,500*l.*

The Plaintiff, in his answer to this plea, says that the sum of 1,500*l.* was exacted by Madame Cousineau, acting by the Defendant as her agent, and was retained, not for himself but for and in the name of Madame Cousineau.

The Defendant, Zephir Dorion, put in a separate plea, in which all that it is necessary to notice is that he repudiated all interest in the bonus paid to the other Defendant, and renounced all claim to any part of it.

Upon the issues thus raised between the parties, and after hearing evidence on both sides, the Superior Court was of opinion that the Plaintiff had proved the facts alleged in his Declaration. That the 1,500*l.* was exacted by Madame Cousineau as a bonus upon the loan made by her, and was deducted from the sum of 4,875*l.*, which she agreed to advance, and the Court condemned the Defendants, as her representatives, to pay to the Plaintiff the sum of 3,958*l.* 6*s.*, the amount of excess of interest which they had exacted and received from him, together with interest and the costs of the action.

The Defendants appealed separately to the Court of Queen's Bench from this Judgment.

The principal grounds of Appeal alleged by Jean B. T. Dorion were—

That the Plaintiff had not proved the facts alleged in his Declaration;

That it was proved that if Jean B. T. Dorion received money from the Plaintiff it was paid to him on his own account and for his own benefit, and was not received by Madame Cousineau, and therefore her legatees could not be made liable for it; and

That the Plaintiff and the other borrowers of the moneys confirmed and ratified the obligation of the 11th November, 1845.

The other Defendant, Zephir Dorion, in the *factum* upon his Appeal, said that the only difference which existed between his defence and that of Jean B. T. Dorion was that his mother, Madame Cousineau, never stipulated for the premium of 1,500*l.*, nor authorized her agent, Jean B. T.

Dorion, to require any such premium for himself; that she never received any part of the premium which was taken by Jean B. T. Dorion for his own benefit; that Madame Cousineau incurred no responsibility in respect of it; and that he (Zephir Dorion) repudiated every agreement which might have been made by Jean B. T. Dorion as to the premium of 1,500*l*.

The Court of Queen's Bench gave Judgment for Zephir Dorion, on the ground that the Plaintiff in the Court below had not proved, as to him, the material allegations of his Declaration. And upon the Appeal of Jean B. T. Dorion, they reversed the Judgment of the Superior Court, because (as they held) the evidence established that the money claimed by the Plaintiff, under and by virtue of the transfer of the 18th March, 1862 (the assignment by the other debtors on the obligation of the 11th November, 1845, of all their claims and rights of action in respect of the alleged usury), was paid through and by Lewis T. Drummond and his wife, who alone could claim the amount if usuriously and illegally exacted, and that the other assignors, who had paid no part of the money, had no right of action against the Defendants.

The present Appeal is from both these Judgments. Their Lordships cannot acquiesce in the reasons assigned by the Court of Queen's Bench for reversing the Judgment of the Superior Court in the case of Jean B. T. Dorion.

It seems clear that by the old French law which prevailed in Canada, when, upon an usurious contract, the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount due may be recovered back from him. (4 Pothier, "Traité de l'Usure," p. 114, Art. 113.) A right of action, therefore, is vested in the person so paying such usurious interest; and by the law of Canada, such right of action is assignable. The Civil Code of Lower Canada, which, though not established till 1866, embodies all such provisions relative to civil matters as were in force at the time of the passing of the Act respecting the codification of the laws of that province, may properly be referred to for the law on this point. By Article 1570, "The sale of debts, and rights of action against

third persons is perfected by the seller and buyer by the completion of the title, if authentic, or by the delivery of it, if under private signature." And the only exception to the right of dealing with these subjects is to be found in Article 1,485, which prohibits "judges, advocates, attorneys, clerks, sheriffs, bailiffs, and other officers, from becoming buyers of *litigious rights*, which fall under the jurisdiction of the Court in which they exercise their functions."

Assuming that Mr. and Mrs. Drummond were entitled to recover back what they paid beyond the amount of principal and legal interest, they had by law an assignable right of action. This right of action, by the instrument of the 18th March, 1862, they transferred and made over to the Appellant, in the fullest and amplest manner. The other parties named in the obligation of the 11th November, 1845, joined in this assignment. Whether they were bound to repay to Mr. and Mrs. Drummond their shares of the money so paid is immaterial. The right of action to recover back the money was vested either in Mr. and Mrs. Drummond alone, or in all the parties to the obligation jointly. If all of them were entitled to maintain an action, the Appellant has the assignment of all; and if the sole right of action was in Mr. and Mrs. Drummond, they have transferred that right to the Appellant, and the joinder in the instrument of assignment of any number of persons who had nothing to assign, cannot affect, or in any way prejudice, the validity of the assignment by the persons who alone were interested.

It has, very properly, not been attempted to maintain the Judgment of the Court of Queen's Bench on the ground upon which it was placed in the case of the Defendant, Jean B. T. Dorion.

The questions which their Lordships have been called upon to consider in this Appeal are:—

1st. Whether the Plaintiff has proved the allegation in his Declaration that the contract between him and Madame Cousineau was an usurious contract by reason of her having stipulated for and received a sum of 1,500*l.* as a bonus or premium for the loan of 4,875*l.*, which was to be repaid with full legal interest of 6 per cent. upon the whole sum lent.

2ndly. If the original contract was illegal and void by the usury laws of Lower Canada in force at the time of its being entered into, whether transactions which took place between the parties after a change of those laws either ratified and confirmed the contract itself, or substituted for it another contract founded upon good and valid consideration.

The first question is one entirely of fact. The Plaintiff was bound to prove that the loan upon which the 1,500*l.* was retained was made by Madame Cousineau, and that the retention was for her benefit. If it were not, the Respondents could not be liable in the character in which they were sued, that of her legatees. It was not necessary to show that Madame Cousineau personally received or retained the 1,500*l.* for her own use. If she either authorized her agent, Jean B. T. Dorion, to retain it for himself out of the loan made by her, or, knowing that he had so retained it, ratified what he had done, her contract would have been usurious.

The facts which appear to be clearly established are, that an advance of 10,000*l.* having been originally required, it was arranged that a sum of 1,500*l.* should be given by the borrowers for this advance, and that when it was afterwards found that no more than 7,000*l.* could be lent, no reduction was made in the sum to be paid in respect of the loan. These facts are quite independent of the question to whom and for what the 1,500*l.* was to be paid. The loan of 7,000*l.* was made in two sums, one of 4,875*l.* by Madame Cousineau, the other of 3,626*l.* by Jean B. T. Dorion out of an estate of which he was curator; but the 1,500*l.* was deducted and retained out of the sum advanced by Madame Cousineau. This is proved by the fact that obligations having been entered into for repayment to the lenders respectively of the sums each advanced, both dated on the 11th November, 1845, that which was given to Madame Cousineau states that the 1,500*l.* was paid at the time of the execution of the deed, and received as part of the loan of 4,875*l.*

This statement in the deed is directly opposed to the Appellant's case. He is compelled, therefore, to rely upon witnesses to prove the essential fact upon which alone he can recover in this action, viz., that the usury which he alleges entered into the contract with Madame Cousineau.

The principal witness produced by him to prove his case was the Notary Leblanc, who was employed by the Appellant and the other proposed borrowers to negotiate for the loan. He went with the Appellant to St. Eustache, where Madame Cousineau was residing, and saw her in the presence of her son, Jean B. T. Dorion.

He stated that, as well as he could recollect, the Appellant addressed himself to Madame Cousineau, and that it was perfectly understood that the loan was to be made at a rate above the legal interest and this by the payment of a premium of 1,500*l*. That on occasion of the interview with Madame Cousineau, the Appellant, to the best of the witness's recollection, remarked that the premium demanded was very high; to which either Jean B. T. Dorion, or Madame Cousineau—but he believed it was Jean B. T. Dorion—said they could place out their capital at a more advantageous rate; *but*, the witness added, this was said in the presence of Madame Cousineau. Upon his cross-examination, he said it was M. Kierzkowski who held the conversation about the premium, and with Jean B. T. Dorion, though in the presence of his mother.

M. Leblanc spoke, as he was likely to do at the distance of eighteen years, very uncertainly, as to the particulars of a conversation in which he did not take much part, and to which his attention had probably not been called in the intervening period. He stated that M. Kierzkowski took the principal part in whatever conversation took place, and that it passed between him (the Appellant) and Jean B. T. Dorion. From the Appellant, therefore, we should naturally expect the best information respecting this important interview with Madame Cousineau, but he spoke with even more uncertainty than M. Leblanc. He said, "I only saw Madame Cousineau once upon the subject of the loan in question, and I *believe* I spoke to her about the premium, and told her the premium was too much. I *think* she made the same remark as her son, that they could lay out their capital on more advantageous terms."

This, at best, is but slight evidence to fix Madame Cousineau with the knowledge of, and make her a party to the alleged usurious transaction. But, weak as the evidence is, it is much more weakened by other witnesses produced by the Appellant himself, and especially by the evidence

given by M. Leblanc upon the subject of this loan in a suit of Mitchell *v.* Jean B. T. Dorion, in which he was a witness. Upon this occasion he never mentioned the name of Madame Cousineau in connection with the loan, but stated that all the arrangements for the loan, and all the stipulations as to the premium, passed with Jean B. T. Dorion. Jean B. T. Dorion himself was called as a witness in that suit, and though he alleged that the sum of 1,500*l.* was actually deducted from the money advanced by Madame Cousineau, he admitted that it was retained as a premium in respect of the whole loan.

It must be observed that in this other suit, if M. Leblanc had not kept Madame Cousineau's name out of the transaction, it would have prejudiced the Plaintiff's case for whom he was called; and that if he had not proved in the present action that she took an active part in the negociations for the loan and the premium, the Appellant must have failed.

The whole proof of Madame Cousineau's participation in the usurious agreement rests upon the Appellant and his witness, M. Leblanc. He produced other witnessess, but their evidence either added nothing, or was unfavourable to his case. M. Moreau, an Avocat, stated that the transaction of the loan was conducted by Jean B. T. Dorion, Madame Cousineau not at all interfering in the matter; and Judge Monk, who was one of the borrowers named in the obligation, knew nothing of the transaction except what was reported to him by the Appellant and M. Leblanc, but understood (of course from them) that Jean B. T. Dorion agreed to lend the money, and exacted the bonus of 1,500*l.*

The Appellant examined Jean B. T. Dorion, who swore in the most positive terms that the affair of the premium was his own personal affair. He said he required it to pay him for all the time he had to occupy himself in the matter, and for the loss of his practice as a physician for twelve months while he was ascertaining the value of the property of the borrowers, searching the Registers, remaining a great part of the time at Montreal, travelling a great deal, and incurring an infinite number of other expenses. He also said that his mother never spoke to M. Leblanc about a premium, that all she did was to consent to the loan, and that she died without knowing that he had received the premium.

Of course this evidence (if believed) was fatal to the Appellant's case, but he probably thought that he might safely make Jean B. T. Dorion his witness, as in a former suit brought against him on behalf of the heirs of his brother, Jacques Dorion, in which the question was on whose account he received the 1,500*l.* premium; he swore that it was not retained by him for the heirs of Jacques Dorion, but as agent to his mother, Madame Cousineau. He swore further that the affair was settled between the Notary Leblanc and his mother, and that he remembered many and long conversations between them, which ended in her consenting to a certain loan at a certain premium, and (he added) it was only by the wish of his mother and upon what she told him, that he consented to act in the affair.

Upon comparing the evidence given by Jean B. T. Dorion with that which he gave in the present suit, it is impossible to place the slightest reliance upon his testimony, as he evidently swore just as it suited his interest upon the particular occasion. In the suit with the heirs of Jacques Dorion he could only protect himself from the claim made upon him by swearing that his mother exacted the premium and received it for her own benefit, and he swore accordingly. In the present suit, which alleged that the 1,500*l.* was exacted and retained by him for his mother, Madame Cousineau, if he had repeated this evidence, he would have established his liability as her legatee, and he therefore swore positively the other way.

But by thus proving the contradictory evidence as to the transaction given by Jean B. T. Dorion, the Appellant could not call upon the Court to believe what he had formerly sworn, and to discard his testimony in the present suit as worthless. There were no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit, and to dismiss it without further consideration.

The Defendant, Zephir Dorion, produced two witnesses to prove that, upon the occasion of the Appellant and M. Leblanc going to the residence of Madame Cousineau at St. Eustache, in 1845, she was unwell, and in her bedroom, and never came down stairs or spoke to them while they were there. It

is unnecessary to dwell upon this evidence, which is certainly open to the objection that it refers to events which occurred many years before, and in which one of the witnesses (at least) had no interest to retain it in his memory.

In the opinion of their Lordships the Appellant failed entirely to prove the allegation in his Declaration that the contract with Madame Cousineau was tainted with usury. That she should have taken a prominent, or, indeed, any part in the transaction, after she had entrusted the management of it to Jean B. T. Dorion, and especially when he was present, seems, from the account given of her want of education, and the state of her health, to be highly improbable. There is great reason to believe that Madame Cousineau gave Jean B. T. Dorion the sum she was to advance upon the execution of the deed, and that he either retained it or paid it over and received it back at that time. M. Leblanc, in his evidence in another suit, speaking of the transaction, said, "After the execution of the obligation, I saw Kierzkowski count the money, but I did not count it myself, nor did I know how much money was given upon the occasion."

The only money that could pass at that time is the 1,500*l.* For by the obligation the sum of 1,500*l.* is stated to have been counted and delivered in the presence of the Notaries to Kierzkowski, who thereby acknowledged the same. And the sum of 3,375*l.*, the remainder of the advance by Madame Consineau, was only to be paid when she received it from the Corporation of Montreal, who were indebted to her in that amount.

The Appellant's case might be disposed of upon the ground of its having failed upon the facts, but their Lordships are unwilling to dismiss the Appeal without considering the defence in point of law, which has been argued upon the assumption that the case of usury has been proved against the Defendants.

It was contended on their behalf that the contract was either subsequently ratified, or that a new contract was substituted for it, founded upon a sufficient consideration.

At the time of the agreement for the loan, the Act respecting usury, which was in force in Lower Canada, was that of 1777, which provided that

"all bonds, contracts, and assurances whereupon or whereby a greater interest (than 6 per cent.) should be reserved and taken, should be utterly void; and that every person who should either directly or indirectly take, accept, and receive a higher rate of interest should forfeit and lose treble the value, &c."

There can be no doubt that if the 1,500*l.* had been retained on the loan by Madame Cousineau, that the moment 6 per cent. was paid upon the entire sum, usury would have been committed, for which the lender would have been liable to the penalty; but no excess of interest could have been recovered back till the payments had amounted to a sum exceeding the principal and legal interest.

In this case there was no excess of payment before the 24th March, 1853, when an Act was passed in Lower Canada which altered the law of usury.

That Act enacted "that no contract to be hereafter made in any part of this province, for the loan or forbearance of money at any rate of interest whatsoever, and no payment in pursuance of such contract shall make any party to such contract or payment, liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding. And it provided that every such contract, and every security for the same shall be void so far, and so far only, as relates to any excess of interest, thereby made payable above the rate of 6*l.* for the forbearance of 100*l.* for a year, and the said rate of 6 per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

It was contended on the part of the Respondents that this Act prevented the Plaintiff recovering back any usurious interest which was paid in excess of principal and legal interest under the contract. But an action to recover such excess could not properly be called "a civil proceeding for usury," though it would be brought on account of usury; the words of the Act evidently pointing to a proceeding upon the fact of usury itself, and not upon claims which resulted from it.

On the part of the Appellant it was argued that the Act of 1853 leaves an usurious contract still a void contract, as it was before the passing of the

Act. But the words "such contract or security shall be void so far, and so far only, as relates to any excess of interest, &c.," can only mean that the lender shall not recover more than 6 per cent.; not that the contract itself shall be affected by the stipulation for more than legal interest. The whole effect of this Act is, that an usurious contract shall no longer subject a party to any penalty or forfeiture; but that it shall be invalid so far as it stipulates for more than 6 per cent.

Upon the subject of the alleged ratification of the usurious contract, the Appellant's Counsel cited the authority of many eminent writers upon French law, to show that any number of confirmations, or compromises made while the debtor was under the pressure of the usury, could not be urged as a defence to his action to recover back the money paid by him beyond the legal rate of interest. To which it was answered that the transactions which recognized and ratified the contract, all took place after the Act of 1853, which had made usurious contracts no longer unlawful. And Toulier, under the head of "Contracts et Obligations Conventionelles," vol. iv, Article 561, was cited, where, upon the subject of the ratification of contracts, which are void from regard to public order or the general interests of society, after stating that "la ratification serait elle-même infectée des mêmes vices que l'acte ratifiée," he adds, "Cependant si les choses en étaient venues au point où la Convention cesserait d'être illicite et pourrait prendre naissance, elle pourrait alors être ratifiée, soit expressément soit tacitement."

But the contract of the 11th November, 1845, could not have had a legal existence, nor have been enforced in its entirety after the Act of 1853; it would only have been available to the extent of enabling the lender to recover the legal interest of 6 per cent. Therefore, no subsequent confirmation or ratification of it, supposing it to have been originally usurious and void, could afterwards have given it complete validity.

But the case of the Respondents does not rest upon mere ratification. They assert that the old contract has been entirely done away with, and a new one substituted for it upon a good and sufficient consideration, and that it was under the latter contract the payments sought to be recovered

were made. No payment beyond the amount of principal and legal interest was made until the year 1855. But on the 7th May, 1853, a deed was executed by Mr. Fraser, as agent for Mr. and Mrs. Drummond, and for the Count and Countess Ruttumund, and Jean B. T. Dorion, acting for the legatees of Madame Cousineau, by which the first-named parties became bound to pay the balance of interest due on the 11th November then next, and in consideration of this the Dorions granted a delay of four years to pay the capital of the two obligations of 4,875*l.* and 3,626*l.* 8*s.* 6*d.*, and at the end of that time the capital of the two obligations was to be paid in one payment. And Mr. and Mrs. Drummond gave a new security for the debt by mortgaging to the Dorions property belonging to them in Montreal.

This was not a ratification of the contract of 11th November, 1845, but a new contract made upon totally different terms, and in consideration of forbearance, and with an additional security given for performance.

It is not pretended, however, that there was any actual taking of usurious interest until after the 1st September, 1855, when Judge Mondelet purchased some property of Mr. and Mrs. Drummond, and a deed was executed whereby he agreed to pay the purchase money in satisfaction of debts of the vendors, and amongst them what was due to the Dorions, who were parties to the deed. The transaction was to this effect:—the Drummonds had contracted to sell their property to Judge Mondelet; the Dorions having a charge upon the property intervened with other creditors; the amount then due to them was settled and stated; they agreed to take payment in a certain way from Judge Mondelet out of the purchase-money. The deed expressly states that they entered into this engagement in order to take from Judge Mondelet any reasons he might have for abandoning the contract of purchase. By the deed also the Dorions give up to the Drummonds the additional security for the debt which they had given by the deed of the 7th May, 1853. These are new considerations moving from the Dorions sufficient to support the transaction of the 1st September, 1855, as a new contract. Under that deed the Dorions received a

large sum of money from Judge Mondelet, which made the payments to them greatly exceed the amount of principal and legal interest due upon the loan from Madame Cousineau. But the payment by Judge Mondelet cannot be said to have been in respect of the obligation of the 11th November, 1845, but of the new contract of 1855, to which the Drummonds, on whose account the money was paid, were parties. This being so, there was not even a taking of illegal interest upon the usurious contract itself, and the case of the Appellant must have failed upon this ground.

After the execution of this Deed the amount due to the Dorions which was expressly stated in it, could not fairly be disputed. It is clear that the Drummonds were bound by the arrangement thus entered into, for the Dorions not only forbore to demand immediate payment of what was due to them, but relinguished a security which they held upon the lands of the Drummonds for their debt.

Their Lordships, therefore, are of opinion that if the Appellant had proved a case of usury against the Respondents, there would have been a good defence to the Action upon the grounds stated, and they will, therefore, humbly recommend to Her Majesty to affirm the Judgment of the Court of Queen's Bench, and to dismiss the Appeal with costs.

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