Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Painchaud and others v. *Hudon and others, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered* 1*st March*, 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE suit in which the decree under appeal was made was brought by the Respondents, who are traders in Canada under the firm of Hudon and Company, against the representatives of a M. Laurent. It was brought to recover a balance of $5,159 as the balance due upon four different promissory notes, three of which were made by M. Laurent in his lifetime, and one of which was made by one of his representatives after his death in favour of Hudon and Company. The *primâ facie* liability on those notes does not appear to be disputed, but the defences taken to the suit by the representatives of M. Laurent were, first, that the amount sought to be recovered was more than balanced by a sum of $8,000 which the Defendants were entitled to set off against the Plaintiffs' demand in respect of a bill drawn by M. Laurent in his lifetime upon Hudon and Company, and accepted by them, which was afterwards taken up by Laurent on non-payment by the acceptors; and, secondly, that Hudon and Company had entered into a species of partnership or joint adventure with M. Laurent in his lifetime, the terms of

which were that Hudon and Company were to advance funds to M. Laurent to be employed by him in the purchase of grain in Upper Canada; that those grain transactions on joint account had resulted in a loss, of which the share of Hudon and Company was more than equal to the amount claimed in this action; and that the notes upon which the action had been brought were connected with that joint account, and were in fact part of the means by which funds were placed in the hands of M. Laurent for the purposes of the joint adventure. The first of these defences will be afterwards considered. The second is that on which the litigation in the Canadian Courts has almost entirely turned. To this plea or exception the Respondents put in two replications. By the second they insisted that, even if there had been such a partnership or joint adventure as that alleged, the joint amount in respect of it was still unsettled, and that the alleged loss thereon could not be pleaded by way of compensation or set-off to their liquidated demand. But by the first they contested the fact of the alleged partnership, or, at all events, their liability for any loss on the grain transactions, admitting only that there may have been some understanding between them and Laurent, that in consideration of their large advances for his accommodation, he would give them some share in the profits (if any) of his speculations. The case ultimately made by the Respondents on this point seems to have been that there was an arrangement between M. Hudon, one of the partners in Hudon and Company, and M. Laurent, by which Hudon and Company were to advance funds to M. Laurent for the purposes of some of the grain transactions; that the advance for that purpose was limited to some $15,000, or, at all events, that the participation of Hudon and Company in these transactions of M. Laurent was limited to the purchase of wheat and a thousand quarters of flour; and that the agreement or understanding between them was that, although, in con-

sideration of the accommodation which Hudon and Company made to M. Laurent, Hudon and Company were to share in the profit, if any, of such transactions, they were not to be liable for any share of the loss.

The questions which finally came to be determined by the Court on that defence were, whether the notes upon which the action was brought were in fact connected with the corn transactions at all, or with any partnership account between the parties; and whether, if they were not, the Defendants could claim, by way of set-off or *compensation*, to set the amount of loss upon the joint transactions against the amount sought to be recovered upon those notes. The existence and nature of the partnership became incidentally a question, and a principal question, in the cause.

The Judge who tried the cause as a court of first instance, Mr. Justice Monk, found that the Defendants had failed to prove that the notes were connected with the alleged joint account. He also found that they had failed to prove that there was any joint account or partnership between the parties. Upon those grounds he gave judgment in favour of the Plaintiffs. The cause then went before the Superior Court in revision, and the learned Judges of that Court, on the grounds set forth in the careful judgment of Mr. Justice Loranger, found that there was proof of joint transactions between Hudon and Company and M. Laurent, limited to the purchase of 30,000 *minots* of wheat and 1,000 quarters of flour, and that the judgment of Mr. Justice Monk was in error in not declaring that fact; but that the Defendants had failed to show that the notes sued upon were connected with, or had been given in the course of the joint or partnership transactions; and further that, considering the mode in which the question, and particularly the accounts, had been presented, there was no case for *compensation*. Accordingly the decision of the Superior Court was that the judgment under revision

should be amended by declaring, as one of its *motifs*, that the partnership, to the limited extent above stated, existed, but should not otherwise be disturbed, and accordingly it continued to be a judgment in favour of the Plaintiffs for the amount sued for; the Defendants being left to pursue their remedy in respect of the partnership which had been so declared in another suit.

There were then cross appeals to the Court of Queen's Bench. One learned Judge of that Court, Mr. Justice Drummond, seems to have held that the notes were connected with partnership transactions; but that if there was no joint account, then upon the *primâ facie* liability of Hudon and Company, as acceptors of the bill of exchange for $8,000, there was an answer to the action, and that the suit should be dismissed. That learned Judge, however, stood alone in his judgment. All the other judges of the Court of Queen's Bench concurred in a judgment delivered by Mr. Justice Caron, which found, in accordance with the judgments of the two tribunals before whom the case had previously been, that the notes in question were not connected with any partnership transaction, and that there was no case for *compensation*, but held further that the question of partnership was one which could not be properly determined in the suit; and that the judgment of the Superior Court was erroneous in so far as it made a declaration of the existence of the partnership one of the *motifs*, and so far "*chose jugée*" between the parties. Accordingly the final judgment of the Court of Queen's Bench reversed the judgment of the Superior Court, and affirmed the original judgment of Mr. Justice Monk, but added thereto an express and special reservation to the parties of the rights and remedies which they might have against each other in respect of the alleged partnership, concerning which nothing was to be taken as therein decided.

The case of the Appellants has been very fully

and very ably argued before their Lordships, and various points have been taken; but the first and principal point, as it appears to their Lordships, for their determination, is whether any case has been made upon which they would be justified in disturbing the concurrent finding of the three Canadian Courts in respect of the notes sued upon, viz., that they were not proved to be connected with any joint account between the parties in respect of the alleged partnership transactions. Their Lordships are of opinion that they would be deviating very much from the ordinary course of this tribunal if upon such a pure question of fact they were to disturb those concurrent judgments. No doubt the evidence as to the mode and the circumstances under which the notes were given is not so satisfactory as might have been expected, but their Lordships are of opinion that the courts below were clearly right in holding that the burden of proving that these notes were connected with some such partnership transaction as that alleged, lay upon the Defendants. *Primâ facie* the estate of M. Laurent was liable upon the notes. It was set up as an element in the defence pleaded that they were connected with a particular transaction. It was for those who raised this defence to establish the fact thus pleaded. Their Lordships can find nothing in the evidence upon which they would be justified in holding that the courts below were wrong in saying that that point had not been proved and established against the Plaintiffs.

The next question that arises is, whether the share of loss for which it is sought to make Hudon and Company liable can be successfully pleaded by way of set-off or *compensation* in this action?

For the purpose of considering that question, their Lordships will assume, for the sake of argument, that the partnership was made out, at all events to the extent to which it has been found to have been made out by Mr. Justice Loranger. Of course the question of *compensation*

as between that and a more extensive partnership is simply one of amount, whether the demand to be established by way of compensation wholly covered the amount sued for, or only partially met it. Assuming, then, for the sake of argument, that a partnership to some extent is made out, were the courts below wrong (and it is to be remarked that both courts are agreed in that) in holding that the Defendants' demand in respect of the alleged loss was not a good defence by way of *compensation*?

Their Lordships will first deal with the judgment of the Court of Queen's Bench, which is the one under appeal. In the view of Mr. Justice Caron and the learned judges who concurred with him, the contestation between the parties was both as to the fact of partnership, and as to the amount of loss, if any. They treated the loss alleged as not a proper subject of *compensation*, and therefore thought it immaterial to express upon the record whether the alleged partnership existed or not.

Their Lordships have already remarked that both the Canadian Courts are agreed in holding that the alleged loss on the joint account was not a proper subject of compensation in this suit. Those courts are composed of judges who are in the daily practice of administering the French law in that colony; and unless their Lordships were clearly satisfied upon the authorities that the learned judges had decided erroneously, it would be a strong measure to interfere with the concurrent judgment of those two courts upon that question of procedure.

Upon the authorities, however, which have been cited at their Lordships' bar, their Lordships (exercising their own judgment upon the question) have come to the conclusion that the courts below were right. It is unnecessary to do more than refer to the passage cited by Mr. Pollock from Merlin, which is to be found in paragraph 4, section 2, under the title of "*Compensation.*" It is in these words:—"Ainsi, une

" dette litigieuse, un droit incertain, une préten-
" tion douteuse et non réglée, un compte qui n'est
" pas arrêté, une obligation conditionnelle, n'em-
" pêcheraient pas l'execution et les poursuites
" que ferait le créancier pour une dette claire et
" liquide, et ne pourraient valablement se proposer
" pour compensation ; car si l'une des deux dettes
" seulement est claire et liquide, et que l'autre
" soit sujette à contestation, ce n'est plus alors le
" cas de la compensation, mais simplement de la
" reconvention." From that authority their Lordships would infer that the alleged liability of the Respondents for losses on the joint account is the proper subject, not of compensation or set-off, but of reconvention or cross action; of an action the object of which is to ascertain the liability and measure of it. That seems to have been the view taken by the Court of Queen's Bench, and it is consistent with the view taken by the Superior Court; for the latter Court, though finding, no doubt, the fact of the partnership, also finds that the account could not be properly taken or dealt with in that suit.

If, then, as their Lordships think, it has been correctly decided that the alleged loss is not the proper subject of compensation in this suit, the only remaining question on the appeal is whether the Court of Queen's Bench was right in interfering with the judgment of the Superior Court by striking out the *motif* introduced by the Superior Court and substituting for it the general reservation of the rights of the parties with which the decree under appeal concludes?

Their Lordships are disposed to think that the Court of Queen's Bench took the more accurate view of this subject. It is not in accordance with the ordinary course of courts of justice to bind the rights of the parties in another suit by a mere declaration, not followed by any relief given in the suit, and such would be the character of the declaration, the omission of which the Appellants now complain of. If, indeed, their

Lordships had found that by any law or settled course of practice, it is the duty of the Canadian Courts to do what the Superior Court has done, they would of course respect and give effect to that rule; but the article from the Code of Procedure quoted by Mr. Bompas does not appear to them to support this contention. The only article to which we were referred was Article 472, which requires the cause of action to be mentioned, with a simple statement of the issues at law and the fact raised and decided, the reasons upon which the decision is founded, and the name of the judge by whom it was rendered. It does not appear to their Lordships that, because a question may have been raised the determination of which becomes immaterial to the ultimate decision of the cause, therefore the courts are compelled to make a finding on that question one of the *motifs*, when, though nominally a *motif* or consideration, it is not in fact one of the reasons upon which the decision is founded, and when the decision, in fact, proceeds on grounds which render such a finding wholly unnecessary.

Their Lordships, having now dealt with the questions which arose upon the second defence, will briefly deal with that raised by the first exception or plea. That defence was little pressed in the Courts below. None of the Judges of either Court, except Mr. Justice Drummond, has given any effect to it, and Mr. Justice Drummond seems to have thought it should prevail only in the event of the other defence failing. The only ground on which it can be held that the Respondents were liable to Laurent on the bill for $8,000, is the *primâ facie* liability of the acceptors to the drawer on a bill of exchange. But the Respondents have alleged that it was an accommodation acceptance. All the evidence in the cause goes to support this allegation, and to show that this was one of the bills by which they put Laurent in funds. There is no proof to the contrary. If it enters at all into the partnership

or joint account, any liability of the Respondents upon it must be determined in another suit. It is no defence to this suit.

For these reasons their Lordships are of opinion that it is their duty to advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.