Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Macfarlane v. *Leclaire, from the Court of Queen's Bench of the Province of Lower Canada; delivered 19th July,* 1862.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THIS is an appeal from a Judgment or Decree of the Court of Queen's Bench of Lower Canada, reversing a Judgment or Decree of the Superior Court of the same province. The proceedings out of which this appeal arises had their commencement in an action brought by the Respondents against one John Delesderniers, for the recovery of some debts due from him to them, and to which action the Appellants were made parties as tiers saisis or garnishees, upon allegations that they had in their hands property of John Delesderniers applicable to the payment of his debts. The property thus alleged to belong to John Delesderniers, and to be in the hands of the Appellants, consisted of the stock in trade, debts, and effects of, or belonging to, a trade or business carried on at a place called St. Scholastique, a few miles distant from Montreal; and the Appellants claimed to be entitled to this property under a notarial instrument dated the 6th November, 1855, by which it was purported to be assigned by Melchior Prevost to the Appellant, Andrew Macfarlane; and under another notarial instrument of the same date, by which the Appellant, Andrew Macfarlane, transferred it to a partnership formed by that instrument, between him and the other Appellant, Josephte Normantine Geraldine

Delesderniers, the wife of one Horace Nelson Delesderniers, a brother of John Delesderniers, and who was separated from her husband quant aux biens. The Respondents, however, insist that Melchior Prevost had no title to the property thus purported to have been assigned and transferred, but that it belonged, and was known by the Appellant, Andrew Macfarlane, to belong to John Delesderniers.

It will be necessary, presently, to refer more particularly to these notarial instruments, but what has been stated is sufficient to show the nature of the questions in dispute between the parties to this litigation. The Respondents having obtained, in the action brought by them, a judgment by default against John Delesderniers, went on with the action against the Appellants, the tiers saisis or garnishees; and a mass of evidence was adduced on both sides as to the title to the property in question, the evidence relating mainly to the conduct of the business, with a view to show, on the one side, that it belonged to John Delesderniers; and, on the other, that it belonged to Melchior Prevost. The cause was heard in the Superior Court, in the month of September 1858, and that Court, by its Judgment or Decree, bearing date the 18th October, 1858, declared its opinion to be that the sale to the Appellant, Andrew Macfarlane, could not be set aside in the absence of Melchior Prevost, but that he must be made a party to any action or proceeding for setting aside the sale, and, accordingly, the Court dismissed the action as against the Appellants, with costs.

The Respondents appealed to the Court of Queen's Bench from this Judgment or Decree. That Court differed from the Superior Court on the question of form on which it had decided, and entered fully into the merits of the case, and by its Judgment or Decree, bearing date the 14th February, 1860, reversed the Decree or sentence of the Superior Court, and ordered that the Appellants—who were Respondents in that Court—should make a declaration *de novo* upon oath, of all such goods, wares, and merchandizes mentioned in the schedule to the deed of sale by Melchior Prevost to the Appellant, Andrew Macfarlane, as were in their hands, power, and custody, and remaining unsold on the 16th January, 1856, the day of the service upon them of

the process of attachment in the cause; and also of all such sums of money as they had received from the sale of any of the said goods previously to the said attachment, and from all or any of the debtors mentioned in the said schedule, in order that upon such further declaration of the Appellants such further proceedings might be had as to law and justice might appertain; and further ordered that the Appellants—the Respondents in that Court—should pay to the Respondents—the Appellants in that Court—the costs both in the Superior Court and in that Court.

The Judges of the Court of Queen's Bench, however, were divided in opinion upon the case, three of them being in favour of the Decree pronounced by the Court, and the other two being of opinion that the action ought, as against the Appellants, to be dismissed. The appeal before us is from the above-mentioned Judgment or Decree of the Court of Queen's Bench. It was, in the first place, insisted, on the part of the Respondents, in opposition to this Appeal, that it was premature; that the judgment of the Court of Queen's Bench was not final and conclusive, but left it open to the Court, in the further progress of the cause, to deal with the property in question as justice might require; but their Lordships are satisfied that this Judgment or Decree subjects the property in question, finally and conclusively, to the payment not only of the debts due to the Respondents from John Delesderniers, but of other debts due from him. This was the conclusion at which their Lordships arrived upon the occasion of the petition presented by the Respondents to dismiss this Appeal as incompetent, and the further consideration which they have given to the case confirms them in the opinion which they then expressed. They are of opinion, therefore, that the preliminary objection insisted upon by the Respondents cannot be maintained.

It remains, then, to dispose of the case either upon the point of form which prevailed in the Superior Court, or upon the merits, and their Lordships think it better to dispose of it upon the merits. They therefore give no opinion upon the point of form.

In dealing with the case upon the merits it will be convenient, in the first place, to consider the

operation and effect of the notarial instruments of the 6th of November, 1855; looking at them, first, as they stand independently of the other evidence in the cause; and secondly, as they may be affected by that other evidence.

By the first of these notarial instruments, Melchior Prevost purports to assign, without any warranty whatever, to the Appellant, Andrew Macfarlane, the whole of the stock in trade, animals, and movable property generally, mentioned and detailed in the Schedule annexed to the instrument, and all the debts, also set forth in such Schedule; and all bills or notes, accounts and books of account on which the same are founded, or any wise connected with such debts; and generally all property referred to in such Schedule; and likewise all the right, title, and interest of the said Melchior Prevost in and to certain property leased by him from one Horace Nelson Delesderniers, under and by virtue of two certain deeds of lease, executed the one on the 15th September, 1853, and the other on the 28th October, 1853, and in and to all right, title, and interest of him the said Melchior Prevost, derived or derivable from the said two deeds of lease, in consideration that the Appellant, Andrew Macfarlane, shall, and he thereby agreed to pay in discharge of the said Melchior Prevost certain debts due in respect of the business he carried on in the said premises, which debts are enumerated in the instrument, and mentioned to amount in the whole to the sum of 1,642*l.* 14*s.* 5½*d.*, and which debts the Appellant, Andrew Macfarlane, promised and bound himself to pay to the said creditors as if he was the personal debtor of the said sum, and in a manner that the said Melchior Prevost would not be troubled in any manner whatsoever; and further in consideration that the Appellant, Andrew Macfarlane, should, and he thereby agreed to pay, in discharge of the said Melchior Prevost, any rent that might ever become due, or be claimed or demanded under the said two deeds of lease.

Appended to this notarial instrument there is a Schedule, setting forth in great detail the particulars of the stock-in-trade and debts belonging to the business at St. Scholastique, and purporting to be assigned by the instrument; and by this Schedule it appears that, according to the prices set

upon the goods, and the amounts at which the debts were taken, the total value of the property assigned was 4,061*l.* 14*s.* 5½*d.*, leaving, after deducting the 1,612*l.* 14*s.* 7½*d.*, to be paid by Melchior Prevost, a clear balance of 2,448*l.* 19*s.* 10*d.*

By the other of these notarial instruments, the Appellants agreed to carry on the trade or business of country merchants in partnership at St. Scholastique, for the term of five years, and afterwards from year to year, unless and until notice of dissolution should be given, as therein mentioned. Neither of the partners was to have power to bind the firm by any bill, note, or cheque, without the consent of the other. The Appellant, Andrew Macfarlane, was to have the exclusive right of purchasing goods for the partnership, and to have liberty to furnish the co-partnership with goods from his own store, the goods to be taken by the partnership at the lowest cash prices, and paid for with interest three months after delivery. He was also to have the exclusive nomination of the bookkeeper, and all moneys collected were to be remitted to him every week. A balance-sheet of the affairs of the partnership was to be made out monthly and forwarded to him, and stock was to be taken and the books balanced yearly. Horace Nelson Delesderniers was to be employed by the partnership as salesman, at a salary of 25*l.* per annum. The Appellant, Josephte Normantine Geraldine Delesderniers, was to be allowed 30*l.* annually for each clerk boarded by her, and was not to draw out of the funds of the concern for her own private use more than 100*l.* a-year; and lastly, it was agreed that the Appellant, Andrew Macfarlane, having advanced to the partnership goods, money, and debts, to the extent of 4,061*l.* 14*s.* 5½*d.*, that amount should stand as a debt due by the co-partnership to him, and should bear interest at 6 per cent.; that that sum and interest should be first paid to the Appellant, Andrew Macfarlane, before any profits were struck, and that the profits of the concern, if any, should be divided equally between the partners at the dissolution of the partnership.

These notarial instruments were much commented upon on the part of the Respondents in the course of the argument before us, the Respondents contending that these instruments evidenced that the

sale purported to be made by the first of the instruments to the Appellant, Andrew Macfarlane, was not and could not be a *bonâ fide* sale. It was insisted, on their part, that the first of these instruments operated and was meant to operate only as a transfer of the business to the Appellant, Andrew Macfarlane, subject to the payment by him of the debts which were due from it, and the Respondents relied upon the sale being without warranty—upon the value of the property purported to be assigned, as specified in the Schedule, when compared with the amount of the debts which the Appellant, Andrew Macfarlane, undertook to pay—upon the property purported to be assigned having been carried by the Appellant, Andrew Macfarlane, into the partnership between the Appellants, as being of the value mentioned in the Schedule—and upon the contemporaneous formation of the partnership between the Appellants, and the connection with that partnership of Horace Nelson Delesderniers, the brother of John Delesderniers, and the husband of the Appellant, Josephte Normantine Geraldine Delesderniers.

These, no doubt, are circumstances calculated to excite suspicion; but, on the other hand, the authorities which were referred to on the part of the Appellants, and which were not controverted on the part of the Respondents, seem to prove that, notwithstanding the provision that the sale was without warranty, the vendor would be liable to the purchaser if he sold with knowledge that he had no title; and whatever the law of Lower Canada upon this point may be, on which their Lordships give no opinion, they see no reason to suppose that, because the sale was without warranty, it was therefore fraudulent. It would, they think, be going too far to assume that, because a vendor refuses to warrant, it must therefore be taken that the purchaser knew that there was fraud or that there was no title, although, of course, in such a case a purchaser must take, subject to the risk of a title being proved against him.

Then as to the first of these instruments operating only as such a transfer of the business as contended for by the Respondents, and as to the value of the property transferred, it is true that upon the face of the instrument its operation would appear to be such as the Respondents allege, and the value such as

represented by the Schedule; but, on the other hand, having regard to the nature of this business, it is impossible to suppose that all the goods enumerated in the Schedule could be sold at the prices at which they were valued, or that all the debts which are mentioned in the Schedule were good debts and could be recovered without loss; and the Respondents have given no evidence either as to the value of the goods or the character of the debts. And as to the formation of the partnership between the Appellants and the connection of Horace Nelson Delesderniers with the business to be carried on by it, it was quite competent to the Appellants to come to any agreement which they might think fit as to the terms of the partnership between them; and the other facts relied on by the Respondents are sufficiently accounted for by the circumstances to which we are about to refer, evidencing as they do the importance of the services of Horace Nelson Delesderniers being retained in the business to be carried on. It may be well to add on this part of the case, that it is difficult to suppose that if any fraud had been in contemplation, these notarial instruments would have been prepared in the form in which they are found. Looking, therefore, to these instruments without reference to the other facts which have been proved in the cause, their Lordships have no hesitation in saying that the instruments although they may not be altogether free from suspicion, do not warrant any judicial conclusion unfavourable to the case of the Appellants.

It becomes necessary then to examine the other evidence in the cause, and to consider to whom, according to that evidence, the property in question ought to be held to have belonged; but on this part of the case it will be sufficient for their Lordships to state the conclusions at which they have arrived, without entering into the details of the evidence which their Lordships have fully weighed and considered. It will be convenient, however, before stating those conclusions to point out the position of the different persons whose acts and conduct it is necessary to consider.

Melchior Prevost was, it appears, in and prior to the month of September 1853, and has ever since been a Notary carrying on business at St. Jerome, a place distant about ten or twelve miles from

St. Scholastique. Horace Nelson Delesderniers was up to the month of September, 1853, the undoubted owner of the trade or business in question, carrying on that trade or business at St. Scholastique. John Delesderniers carried on some business at St. Jerome, for some time before and until about the spring of the year 1854, when he sold off his stock at that place, and removed to St. Scholastique, where he remained, living, as it would appear, at least during some part of the time, with his brother Horace Nelson Delesderniers until some time about the spring of the year 1855, when he removed to a place called Vankleek (about fifty miles distant), and established himself in business at that place. The Appellant, Andrew Macfarlane, was previous to the month of September 1853, and has ever since been, a general merchant or trader at Montreal.

Such having been the position of these several persons, we find that in the month of September 1853, this business passed into the hands of Melchior Prevost, who then began to carry it on, Horace Nelson Delesderniers acting as his agent in the conduct of it. It was suggested on the part of the Respondents in the course of the argument on their part, that there never was any *bonâ fide* transfer of the business by Horace Nelson Delesderniers to Melchior Prevost, but that Horace Nelson Delesderniers having become involved in difficulties Melchior Prevost lent him the use of his name for the purpose of protecting the property embarked in the business from the demands of his creditors. Their Lordships, however, can find nothing in the evidence which can justify this conclusion. It was stated at the bar on the part of the Appellants, and not denied on the part of the Respondents, that it is not unusual in Canada for notaries to carry on a business of this description, and the evidence furnishes no ground to suppose that Melchior Prevost's taking up this business was unusual or extraordinary. Leases were granted to Melchior Prevost of the premises on which the business was carried on, and it appears from the evidence that, in and very soon after September 1853, he laid out large sums of money in the purchase of stock for the business. Their Lordships, therefore, feel no doubt that, in September 1853, Melchior Prevost became the owner of this business, and of the stock and effects belong-

ing to it, and they think it equally clear that he continued in such ownership down to the spring of the year 1854, conducting the business by Horace Nelson Delesderniers as his agent.

This is an important point in the case, for it being established that Melchior Prevost was at one time the owner of the business, the onus of proving that he ceased to be so must rest upon the Respondents.

The Respondents have not, in their Lordships' opinion, satisfied the obligation thus resting on them. It is true that they have proved that from the spring of the year 1854 to the spring of the year 1855 John Delesderniers acted and interfered in this business to a great extent, and if the case had rested solely upon his acts and interference, it would, perhaps, have been right to have concluded that he had become the purchaser of the business; but the Respondents have called as their witnesses Melchior Prevost and Horace Nelson Delesderniers, both of whom must have known whether John Delesderniers had purchased the business or not, and the testimony of both those witnesses appears to their Lordships to show that he never did, in fact, become the purchaser of it. There is no proof, on the part of the Respondents, that he paid any consideration for the alleged purchase, and he could not have become the purchaser upon the terms of paying the debts then due from the business, as it appears by the evidence that Melchior Prevost, after the date of the supposed purchase, continued to make payments on account of those debts. Again, there is no proof, on the part of the Respondents, of any assignment having been made to John Delesderniers of the leasehold premises on which the business was carried on, and he can hardly be supposed to have become the purchaser of the business without taking an assignment of those premises. But what has seemed to their Lordships yet more important in its bearing upon this question, is the fact which, in their Lordship's opinion, is conclusively established by the evidence, that from the time when John Delesderniers went to Vankleek, the business, if in fact it had ever been abandoned by Melchior Prevost, was resumed by him, and was continued to be carried on by him until the sale to the Appellant, Andrew Macfarlane, without, so far as appears, any interference on the part of John Delesderniers, who

appears, by the evidence, to have been present when the sale to the Appellant, Andrew Macfarlane, took place.

Their Lordships, therefore, upon the whole of this case, are satisfied that whatever may have been the dealings between John Delesderniers and Melchior Prevost, between the spring of the year 1854 and the spring of the year 1855, there never was any complete sale to John Delesderniers of this business, or the stock, debts, and effects which belonged to it; and further, they think that if there was, in fact, any such sale, there is no sufficient proof of such notice to the Appellant, Andrew Macfarlane, as could entitle the Respondents to follow the goods into his hands.

Their Lordships, therefore, are of opinion that the Judgment or Decree of the Court of Queen's Bench cannot be maintained. It was urged, on the part of the Respondents, that, at all events, it ought to be maintained to the extent of any goods of John Delesderniers which may have been intermixed with the goods of Melchior Prevost, but it does not appear by the evidence, so far as their Lordships can find, that any of such goods were remaining at the time of the purchase by the Appellant, Andrew Macfarlane, and this view of the case, if well founded as to the facts, would be met by the point as to the absence of notice, which has last been adverted to.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the Judgment or Decree complained of by this Appeal, and to direct that the action or suit brought by the Respondents against the Appellants be dismissed as against them with costs, both in the Superior Court, in the Court of Queen's Bench, and in this Court.