CASE AND COMMENT

BANKRUPTCY—TRUSTEE—OFFER OF COMPOSITION BY DEBTOR—STAY OF SALE.—In the case *In re Wall*, an appeal from an order of Fisher, J., which came before the Appellate Division in Ontario recently, the question was raised whether the Judge in Bankruptcy had any jurisdiction to direct the trustee not to submit an offer of composition made by the debtor. The circumstances of the case were somewhat peculiar. The trustee was proposing to sell the debtor's assets to the debtor's wife at a price which certain creditors regarded as inadequate, and they moved to prevent the sale from being carried out; and the learned Judge in Bankruptcy so ordered and directed that the assets be forthwith offered for sale by auction, the applicant undertaking to pay the deficiency, if any. The debtor thereupon presented to the trustee a proposal for a composition and applied to stay the sale which the learned Judge refused to do. The trustee then feeling himself in a dilemma applied to the Judge in Bankruptcy for directions as to whether or not he should submit the proposal for composition to the creditors, seeing that the proposal contemplated the return of the estate to the debtor, and before the proposal could be considered, all of the assets would have been sold. Therefore, as he submitted, the proposal would be incapable of being carried out and all the expense of calling the meeting and making out and sending to each creditor all the particulars required by sec. 13, would be absolutely thrown away and the estate burdened with a lot of costs for doing something which would be absolutely futile. The learned Judge in Bankruptcy being of the opinion that the proposal was made with a view to embarrass the sale which he had ordered, and refused to stay in answer to the trustee's application for directions, directed him not to submit the offer. On the appeal to the Appellate Division the Court held that the debtor had the right to submit the offer and that the trustee was bound to submit it to the creditors, being of the opinion that the word "shall" in sec. 13(3) is imperative, which means that in the opinion of the Appellate Division a trustee is bound to incur a lot of expense when it is reasonably apparent that such expense will be useless; and that the Court has no power to authorize him to refrain therefrom. With the greatest possible respect to the learned Judges of the Appellate Division, we venture to think that the word

"shall" in sec. 13 should have been construed as merely directory—and subject to the control of the Court. The judgment of the Appellate Division on this point was given off-hand and probably without taking into consideration the provisions of sec. 18(*d*). That subsection provides that trustees may apply to the Court for directions in relation to any matter affecting the administration of the estate, and upon such application the Court may give, in writing, such directions as "*may be proper according to the circumstances and not inconsistent with this Act.*" In the present case the trustee was in a dilemma, the Court had ordered a sale of the property of the debtor by auction, and the debtor had presented a proposal of composition, which, as it involved the restoration of the estate to the debtor, would become wholly nugatory, inasmuch as the assets would all be sold before the creditors could consider the proposal. In these circumstances the trustee asks the Court what he ought to do and the learned Judge in Bankruptcy, taking the common-sense view of the situation, and being of the opinion that he is best carrying out the true interest and purpose of the Act by saving the estate from being burdened by the costs of a wholly useless proceeding, authorises the trustee to refrain from taking those proceedings; and the Appellate Division holds that the Judge in Bankruptcy had no jurisdiction to do so, and though it affirmed the order of the learned Judge refusing to stay the sale, it nevertheless rescinded the part of his order directing the trustee not to submit to the creditors the proposal for a composition. So that according to the ruling of the Appellate Division a trustee is compulsorily bound to submit every offer of composition although it is absolutely certain that it could neither be accepted or carried out, and if he does not he is liable for contempt of court under rule 66, and cannot obtain relief from such a situation. Such decisions do not appear to us to facilitate the reasonable administration of the Bankruptcy Act, but rather the reverse.

LEX.

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GUARANTEE—GIVING TIME TO PRINCIPAL DEBTOR.—An illuminating case on the position of the guarantor will be found in *Dunn* v. *Thickett*.[1] Thickett had sold a Manitoba farm to McNicholl on time agreement and had delivered unqualified possession. Then, while some $4,000 odd was still due him, Thickett sold his (Vendor's) contract to Dunn. As usual, Thickett covenanted that his assignee

[1] (1925) 3 W.W.R. 736.

would be paid the instalments as they fell due but seems to have forgotten that clause, for, when Dunn urged him later to take over the land and make it pay, Thickett retorted that he had now no further interest or right in the farm or in the contract.

By 1923 the farm did not look a good risk, and the purchaser fell into despair and the land into weed. So, in 1924 and 1925, Dunn entered the farm, cropped it and extended the time to the original debtor—all without any consultation with Thickett, and without any substantial improvement in the debt. Then, in 1925, Dunn sued the guarantor under his covenant. The allegations that plaintiff had ignored the guarantor, intermeddled with the security, and extended time to the debtor were cast before him. The answer of the trial Judge was—No prejudice, and no violation of the guarantor's contractual rights. Guarantor must pay.

G. C. T.

* * *

Motor Cars—Rights of Pedestrian.—From Alberta have come automobile judgments in crowds, even in clouds, but *Turpie* v. *Oliver*[1] is more cloudy than usual.

Mrs. Turpie was returning home from the theatre one summer evening near midnight. She was walking along a suburban road with a paved surface but no sidewalk, and no reasonable accommodation for pedestrians off the paved surface. Mrs. Turpie and friend kept close to the right edge of this paved road, but soon after they passed a corner a car from behind ran into the ladies. Apparently the driver was driving as any reasonable man would drive, up to the second at which the corner was turned. At that corner an opposite car dazzled him for a moment, and when he had swung round the corner the ladies were only a few feet in front of him.

Should he have stopped, or slowed markedly, on account of the conjunction of the glare and the corner?

Considering how heavy an onus is cast on car drivers by all Western Motor Vehicles Acts, it is not surprising that the trial Judge gave the lady the verdict. Nor is it surprising that on appeal two Judges whose word carries unusual weight (Stuart and Clarke, JJ.A.) should have supported Mr. Justice Walsh on the ground that a real doubt was left in their minds, and that therefore the onus on the driver had not been removed.

[1] (1925) 3 W.W.R. 687.

A bare majority of the Appeal Court decided that this was no more than an accident, so (by 3 Judges to 3,—all Supreme Court), the pedestrian is left with a badly bruised purse as well as a bruised body.

Chief Justice Harvey uttered a telling plea for motorists when he pointed out that if, when car drivers were temporarily blinded by opposing lights, they had both to stop or crawl there would be dislocation of traffic. He also gave impetus to the radical doctrine that a pedestrian's right place at night is on the *opposite* side of the road, and, further, that a pedestrian must look behind him. Life for the pedestrian seems likely to become as complicated as it is hazardous in Alberta. But, onus being as it is, and the automobile being still a dangerous machine, many will regret the seeming discard of Mr. Justice Stuart's comment: "Certainly a higher standard of care should be exacted of a person operating such a machine than from persons who could do no harm to anyone except themselves."

G. C. T.

* * *

LIEN NOTE—TITLE—EQUITIES—PROMISSORY NOTE.—Chief Justice Harvey, speaking for the Appellate Division of the Alberta Supreme Court, in the case of *Canadian Bank of Commerce* v. *Johnson*[1] pronounces: "It is clear that a lien note, as it is commonly called, or, a conditional sale agreement, is not a promissory note . . . ." The headnote of this case reads: "A lien note is not subject to the Bills of Exchange Act, and a holder thereof takes subject to the equities attaching thereto." The question arises whether, having in mind the different forms lien notes may assume, the general principle is so clear.

Some of the Canadian cases, in which it has been decided that a lien note is not within the Bills of Exchange Act, were based on the authority of *Kirkwood* v. *Smith et al.*[2] The Divisional Court in that case held that the following clause: "No time given to, or security taken from, or composition or arrangements entered into with, either party hereto, shall prejudice the rights of the holder to proceed against any other party," invalidated an instrument otherwise valid as a promissory note. The Court was of the opinion that any addition to a promise to pay, other than that provided for in the section in the English Bills of Exchange Act corresponding to section 176, subsection 3, of the Canadian Act was fatal. Section

[1] (1925) 4 D.L.R. 511.
[2] [1896] 1 Q.B. 582.

176, subsection 3, reads: "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." The Court of Appeal overruled *Kirkwood* v. *Smith* in *Kirkwood* v. *Carrol, et al.*,[3] and held that the aforementioned section was not exhaustive. See the Canadian cases.[4]

We are then thrown back on the common law rules insofar as they are not inconsistent with the express provisions of the Act. In Byles on Bills[5] the law is thus stated: "A promissory note is not the less a note . . . because it refers to an agreement, where it does not appear that the agreement qualifies the note." The difficulty is in determining what agreements do qualify notes.

The Ontario Court of Appeal in *Dominion Bank* v. *Wiggins*[6] held that an instrument in the form of a promissory note, given for part of the price of an article with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid," was not a promissory note. It was thought that the promise to pay was not absolute but conditional on the vendors making title when the money was to be paid and *non constat* that the vendor would be able when that time came to do so. The defence of failure of consideration may be set up in an action brought on a promissory note by any person other than a holder in due course or a person claiming through him. When there is a promise to pay, does a statement how that failure of consideration may arise make the promise conditional?[7] There would of course be no doubt of the conditionality of the promise if there were added thereto such words as: "if the vendor can give a good title (to the article for which the note is given) at maturity."

The *Wiggins* case was followed in Alberta in *Douglas Bros.* v. *Auten, et al.*, and recently in Ontario, in *Re Mitchell and Union Bank of Canada.*[9]

In the case of *International Harvester* v. *Grant*,[10] the full Court of Prince Edward Island decided that an instrument in the form of a lien note but containing this clause: "Such sale or right to sell

[3] [1903] 1 K.B. 531.
[4] *Prescott* v. *Garland* (1897), 34 N.B.R. 291; *Bank of Hamilton* v. *Gillies* (1900), 12 Man. L.R. 495; *Frank* v. *Gazelle Live Stock Co.* (1907), 5 W.L.R. 573.
[5] 15th Ed., p. 13.
[6] (1894) 21 O.A.R. 275.
[7] See Russell on Bills, 2nd Ed., p. 69.
[8] (1913) 12 D.L.R. 196.
[9] (1922) 52 O.L.R. 5.
[10] (1907) 4 E.L.R. 1.

shall in no way affect or limit my liability for the amount hereof, and for the full purchase price, or your right to sue for and recover from me the amount hereof and the said full purchase price and interest," was a good promissory note. Clearly the agreement for the vendor to withhold the title and to reserve a right of sale did not qualify the promise in this case.

In the case of *Killoran* v. *The Monticello State Bank*[11] the appellant signed an ordinary promissory note on two different sheets of paper. These notes were followed on the respective sheets by an agreement signed by the maker of the notes, which provided, *inter alia,* that the property in the horse for which the notes were given would not pass until the balance of the purchase price was paid. Three out of five Judges held that these notes were severable from the agreement and constituted in law promissory notes, another case where the agreement did not qualify the note.

From the facts given in the report of *Canadian Bank of Commerce* v. *Johnson,* it is not possible to judge whether the agreement did in fact qualify and render conditional the promise to pay. It was held that the plaintiff as transferee of the instrument took subject to the equities attaching thereto.

S. E. S.

* * *

AUDI ALTERAM PARTEM.—Everyone who may be affected by any judicial decision has a right to be heard—said Chief Justice Meredith in *re Robinson,*[1] in refusing an application by William R. Robinson for an order directing the Master of Titles to accept and register in the Land Titles Office a transfer of land from Thomas Golden to the applicant free from any claim for dower which may be made by the wife of Golden, and without requiring the applicant to serve any notice upon her as required by sections 46 and 47 of the Land Titles Act, where the Master of Titles had obeyed the rule, which, speaking generally, should be an inviolate one—condemn no one unheard. However plain the person desiring to ignore this rule might deem it to be that the person to be condemned had no right—indeed, however probable that might appear to be—all things are not always just what they seem to be. The decision given was rendered necessary by secs. 46 and 47 of the Land Titles Act, R. S. O. (1914) c. 126,[2] but the learned Judge intimates that even if such

[11] (1920) 61 Can. S.C.R. 528.

[1] 29 O.W.N. 246.

[2] Sec. 46.—(1) Where it is claimed that registered land is free from dower on account of the land being held in trust, or for some reason other than the wife's release of her dower by an instrument which can be produced and

sections had not existed he would come to the same decision, because of the general rule. The maxim seems founded upon the lines: —

> Quicunque aliquid statuerit, parte inaudita altera
> Aequum licet statuerit, haud aequus fuerit. Seneca *Med.* 195.
>
> ("Whoever shall decide a question without hearing the other side,
> Even though he decide justly, will not act with justice").

It is gratifying to observe a restatement of an ancient and a fundamental rule of the Common Law. It instils new confidence in our jurisprudence to see that obedience to this old rule of law still remains a rule *sine qua non*. Even Satan had a hearing in the Garden. A.MacM.

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COVENANT—ENFORCEABLE AGAINST PERSON WHO BOUGHT WITH NOTICE THOUGH NOT A PARTY TO COVENANT—BUILDING SCHEME.—The effect of a covenant in a deed of land restricting the grantees to the erecting thereon of one brick, stone or cement building for residential purposes and imposing certain other restrictions, was discussed, Rose, J., in *West* v. *Hughes*,[1] with particular reference to a building scheme.

A subsequent purchaser took a deed which contained no reference to the prior deed nor to the covenant therein contained, but with notice of the covenant.

The terms of the issue are stated as follows: "The plaintiffs affirm and the defendant denies that there is a building scheme affecting and binding the lands of the defendant . . . and the surrounding lands, prohibiting the erection of more than one house on the defendant's . . . property, and that the plaintiffs are entitled to enforce the observance of the said building scheme by the defendant in building upon his said land."

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registered, and evidence to that effect which appears satisfactory is produced before the proper Master of Titles, he may issue a notice requiring the wife to support her right if she claims to be entitled to dower in the land; and if she fails to do so the Master may enter on the register a memorandum that the land is free from dower, and such entry shall, unless reversed on appeal, be a bar to any claim by such wife; and no appeal shall lie, unless the wife claims her right of dower before the Master.

(2) This section shall also apply to the widow of a former owner.

Sec. 47.—Where registered land is transferred subject to a charge, or where the registered owner of land, which is subject to a charge subsequently marries, the wife of the transferee or owner shall have the same rights in respect of dower as she would have had if the legal estate had been transferred by an ordinary mortgage and no others.

[1] 29 O.W.N. 239.

The Court considered whether the covenant was intended to operate for the benefit of lots in the section previously conveyed or thereafter to be conveyed to other persons, and if it could be enforced by those other persons against the defendant, and held, that, while there was no consideration of the question whether one purchaser should have the right to enforce the covenant of another, it was a fair inference that all the purchasers understood the restrictions were to be for the common advantage of all; but it did not appear that the right of the purchasers to insist upon the observance of the restrictions should be enforceable in any particular manner; that where there is a true building scheme, the intent that the benefit of the covenant should pass to purchasers of portions of the land of the covenantee exists and such intent is to be ascertained by applying the words of the deed to the surrounding circumstances; that a building scheme existed and the plaintiffs were entitled to enforce the covenant given by the defendant's predecessors in title. No opinion was expressed as to the detriment or benefit which might result from a 'variation or modification of the restriction." Reference was made to a number of cases, among them being *Nottingham Patent Brick & Tile Co.* v. *Butler*,[2] and *Rogers* v. *Hosegood*.[3]

The wording of a covenant of this nature should be such that the rights of other purchasers to insist upon the observance of the covenant should be clear and unmistakeable.

B. B. J.

* * *

BANKRUPTCY — CONTRACT BETWEEN ONTARIO FIRM AS PURCHASERS AND QUEBEC FIRM AS VENDORS—RIGHTS OF TRUSTEE IN BANKRUPTCY OF ONTARIO FIRM TO HOLD GOODS AGAINST UNPAID QUEBEC VENDORS.—The rights of a Trustee in Bankruptcy of an Ontario firm which had purchased goods from a firm doing business in the Province of Quebec was dealt with in *Re Hudson Fashion Shoppe, Ltd.*[1] The question whether or not the contract was a Quebec contract was the crux of the matter. An order was taken in Ontario for goods at a certain price, deliverable at a time mentioned, on terms f.o.b. at Montreal, price payable at Montreal, and the order subject to the approval of the firm in Montreal. The Court of first instance held that the whole contract was not made in Quebec, and that the Quebec Code (Article 1543) as applied to the facts was not effective or operative in Ontario. The Appellate

[2] [1884-5] 15 Q.B.D. 261; [1885-6] 16 Q.B.D. 778.
[3] [1900] 2 Ch. 388.
[1] 29 O.W.N. 203; (1926) 1 D.L.R. 199.

Court, however, considered that the contract was a Quebec Contract under the authority of the *Dominion Bridge Co.* v. *British American Nickel Corporation.*[2]

The Court referred to the "confusion" which arose from the difference in meaning and effect of the word "sale" or corresponding word in another language at the common law and at the civil law—under the common law a sale vests the property in the purchaser—*ipso facto* the property passes on delivery. Under the Roman law, however, a transfer "was not completed by the sale or even by the delivery without payment or security for the price" except in cases where there was an express or implied general credit.

The goods, when delivered for transmission f.o.b, would have become the property of the purchasers had the transaction occurred in Ontario, but as it took place in Quebec, this was not so as under the civil law rule the arrangement had the effect of passing the possession to the purchasers, with a qualified property only, and did not convey the absolute property as would have been the case under the common law.

Inglis v. *Usherwood*[3] is authority for the principle that the rights of unpaid vendors are not diminished by the transfer of goods from the civil law country to the common law country, and this obtained notwithstanding the bankruptcy of the purchasers.

There was a right *in rem* and this was not disturbed by the change in the local situation of the property.

As the Trustee in Bankruptcy cannot take any more than the debtor can give him he was unable to hold the goods in question for the benefit of the creditors, against the rights of the vendors.

B. B. J.

[2] 1924, 56 D.L.R. 288.
[3] 1801, 1 East. 515.