CASE AND COMMENT

TRUSTEES — POWER TO DELEGATE — DISCRETIONARY AND MINISTERIAL ACTS—EXECUTION OF CONVEYANCE.—The general rule that a trustee must not delegate his duties or powers has been carefully guarded by the courts.[1] This is properly so because the office of trustee is essentially one of personal confidence. The exceptions which the courts have engrafted on the rule are such that, in the absence of an express provision in the trust instrument concerning delegation by the trustee, one may say that the settlor would have approved of them if they had been brought to his attention. In *Green* v. *Whitehead*,[2] Eve, J., held that a statutory trustee under the Law of Property Act, 1925, who contracted to sell land situate in England and to convey it in pursuance of the trust for sale, could not delegate to his attorney the execution of the conveyance. One of the accepted exceptions to the general rule is that a trustee may delegate the performance of an act which is merely ministerial and which involves no discretion. In *Green* v. *Whitehead* the trustee had resolved in his own mind to exercise his discretion and sell the land, for he had entered into a contract of sale. In authorizing an attorney to execute the conveyance on his behalf it would appear that he had not delegated any part of the confidence reposed in him.[3] The decision may, however, be supported on the ground that the power of attorney enabling the donee to sell and dispose of all or any of the donor's property, etc., was invalid. The operation of the power was to commit to the sole and absolute discretion of the grantee all those matters in which the trustee was bound to exercise his own judgment and to use his own discretion. Such a delegation is certainly not permissible.

The law with regard to employment of agents by trustees has been practically revolutionized in England by the Trustee Act, 1925.[4] For example, section 23 gives to trustees power to appoint

[1] *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; *McKelvey* v. *Rourke* (1868), 15 Gr. 380; *Mickleburgh* v. *Parker* (1870), 17 Gr. 503; *City Bank* v. *Maulson* (1871), 3 U.C. Chy. Ch. 334; *Re McM—— Trust* (1892), 28 Can. L.J. 502; *Gibb* v. *McMahon* (1906), 37 Can. S.C.R. 362.

[2] (1929), 45 T.L.R. 602.

[3] See Lewin on Trusts, 13th ed., 231; *Attorney-General* v. *Scott* (1750), 1 Ves. Sen. 413; *Ex parte Rigby* (1815), 19 Ves. 463. In *In re Hetling and Merton's Contract*, [1893] 3 Ch. 269 at p. 280, Lindley, L.J., said: "I have no doubt myself that a trustee can execute a deed by an attorney."

[4] See Underhill: Law of Trusts and Trustees, 8th ed., 305 *et seq.*

any person their agent or attorney for the purpose of selling, converting or otherwise administering any trust property situate outside the United Kingdom. Section 25 enables a trustee, intending to remain out of the United Kingdom for a period exceeding one month, to delegate the execution in his absence of all or any trusts, powers and discretions vested in him as such trustee. It is not suggested that these provisions should be adopted by the provinces in Canada but, at least, the matter should be considered.[5]

S. E. S.

* * *

GIFT TO UNINCORPORATED NON-CHARITABLE ASSOCIATION — RULE AGAINST PERPETUITIES.—The decision in the case of *In re Jones, Public Trustee* v. *Earl of Clarendon*[1] to the effect that a gift by way of trust for an unincorporated, non-charitable association failed, serves to point out a pitfall into which the unwary solicitor may easily stumble. A testatrix, by her will, gave a leasehold house "to the Primrose League of the Conservative cause to be used as a habitation in connection with the league or in a manner which will benefit the cause."

Eve, J., held that the gift was impressed with a trust. It was argued that the gift was charitable, falling within the fourth class of charities defined by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*,[2] "trusts for other purposes beneficial to the community." The learned judge held that the gift was not charitable as it was in furtherance of political objects. That this holding is in line with the English authorities appears from the statement of Lord Parker of Waddington in *Bowman* v. *Secular Society, Ltd.*[3]: "But a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

[5] See recommendations of the Committee on Comparative Provincial Legislation and Law Reform of the Canadian Bar Association, 1926, Proceedings of Canadian Bar Association, vol. 11, pp. 349-350.

[1] (1929), 45 T.L.R. 259.

[2] [1891] A.C. 531 at p. 583.

[3] [1917] A.C. 406 at p. 442. But compare the statement of Boyd C., in *Farewell* v. *Farewell* (1892), 22 O.R. 573 at pp. 580-1, where it was held that a gift in trust to promote the adoption by the Parliament of Canada of a prohibition law was charitable.

As the house was to be used by the successive members of the association and could not be disposed of by the individual members, for the time being, the gift failed because it offended against what has been called a branch of the rule against perpetuities.[4] No question of perpetuity can arise in the case of a trust for an unincorporated, non-charitable association if it is intended to be for the benefit of the individual members of the body at the time when the gift becomes operative, or if the property can be transferred to a common fund held for such a body and when so transferred will not be subject to any trusts which will prevent the existing members from spending it as they please.[5]

S. E. S.

* * *

ACCIDENT INSURANCE—DEATH OF ASSURED CAUSED BY ACCIDENT—NO BENEFICIARY NAMED IN POLICY—ACTION AGAINST ASSURANCE COMPANY BY ONLY CHILD OF DECEASED PREVIOUS TO GRANT OF LETTERS OF ADMINISTRATION BUT GRANT THEREOF ISSUED PREVIOUS TO TRIAL OF ACTION—EFFECT OF—ONTARIO INSURANCE ACT.—The case of *Johnson* v. *General Accident Assurance Co.*,[1] sets out clearly and concisely the principles governing the doctrine of the relation back of a grant of letters of administration.

J. died in September, 1926, as the result of an accident leaving him surviving his son, an only child. He carried accident insurance with the defendant company but no beneficiary was named in the policy. Neither was there any will. The plaintiff (son of the deceased) brought this action in November, 1926, to recover the amount of the insurance, the company having declined to pay the claim. After the commencement of the action, the plaintiff applied for and obtained in May, 1927, a grant of letters of administration and made application at the trial in November, 1928, to amend the proceedings so that he would be described as the administrator of the estate of J. The defendant company set up that the deceased was intoxicated at the time of the accident; that the plaintiff was not the beneficiary named in the policy; and that the action was premature, but abandoned these defences at the trial and opposed

[4] See Halsbury: Laws of England, vol. 22, p. 296 *et seq; Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399; *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Jones, Parker* v. *Lethbridge* (1898), 79 L.T. 154; *Re Hogan* (1916), 10 O.W.N. 118.

[5] See *In re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110; *In re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90; *Re Hogan, supra.*

[1] (1928), 63 O.L.R. 296; [1929] 1 D.L.R. 597.

the amendment by setting up the provisions of the Insurance Act[2] which sets out that: "Any action or proceeding against the insurer for the recovery of any claim under this policy shall be commenced, within one year after the cause of action arose." The amendment was allowed subject to the right of the defendant company to plead the limitation contained in the Insurance Act. Among the cases considered were *Trice* v. *Robinson*,[3] and in view of the reasons for judgment therein given the Court decided that the plaintiff qualified before the trial and the legal title, obtained by virtue of the letters of administration, related back and entitled him to recover from the defendant company.

The doctrine of relation back is of long standing being approved in the case of *Long* v. *Hebb*,[4] and is referred to in Halsbury's Laws of England[5] as follows: "In order to prevent injury from being done to a deceased person's estate without remedy, the courts have adopted the doctrine that upon the grant being made the title of the administrator relates back to the time of death. . . . . Where he (the administrator) is desirous of bringing an action, before grant, in a representative capacity, in the Chancery Division, he may do so, but he must be in a position to produce a grant at the hearing." This rule did not obtain at common law however; *Martin* v. *Fuller*[6] and *Wankford* v. *Wankford*[7] being authority for the rule that an administrator has no legal capacity to commence a suit at law before grant of letters of administration. This rule was followed in *Tattershall* v. *Ashworth*.[8]

Boyd, C., in *Trice* v. *Robinson*,[9] is thus reported: "Now the rule in Chancery proceedings, as opposed to that at law, was, that it was not needful for a plaintiff, if he were the person to take out letters of administration, to clothe himself with the character of administrator before he could file a bill. It was sufficient for all purposes that he should obtain the letters before the case was heard, as they, when obtained, related back to the death . . . . This being the equitable doctrine, as opposed to that at law, the Judicature Act directs the former to be preferred. . . . . So that now the rule in equity prevails for the benefit of this plaintiff." This reasoning

[2] R.S.O. 1927, c. 222, s. 187, condition 21.
[3] (1888), 16 O.R. 433; *Dini* v. *Fauquier* (1904), 8 O.L.R. 712; *Doyle* v. *Callow* (1849), 12 Ir. Ex. R. 241.
[4] (1652), Style's Reports, 341.
[5] Vol. 14, pp. 146-7.
[6] (1696), Comberbach, 371.
[7] (1703), Salkeld, 299.
[8] (1903), (cited only in Yearly Practice of the Supreme Court, 1911, page 9).
[9] (1888), 16 O.R. 433 at p. 436.

is followed in the careful judgment of Street, J., in *Dini* v. *Fauquier,*[10] who held that the doctrine applied whether the administrator appointed was interested in the estate or not, and stated that: "It is treated as a matter of course that the letters of administration have been granted to the person entitled to them, and that person in ordinary cases is one of the next of kin." In his reasons for judgment in the present case the learned judge quoted from the case of *Doyle* v. *Callow*[11]: "There is abundant authority for this general proposition—that where a party files a bill with an equitable title at the time he does so, and afterwards clothes himself with a legal title not inconsistent with that, the latter has relation back and the whole bill can be sustained."

The action was commenced within the time limited by the Insurance Act and the equitable doctrine of the relation back of the grant of letters of administration entitled the plaintiff to succeed.

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* * *

RISK IN CONDITIONAL SALE AGREEMENTS.—The prevalence of instalment buying in our present mercantile system makes it important to have the relative rights of buyer and seller under the instalment contract, clearly established. It is clear, of course, that the parties to such an arrangement can put the risk of loss due to the destruction of the goods upon either party at their option and any well drafted conditional sale agreement makes specific provision for the incidence of the risk.[1] There are, however, frequently recurring cases in which no provision has been made in advance by the parties and it then becomes the duty of the court to settle the matter, after the event, by the application of general legal principles. The case of *Burke* v. *Weir,*[2] is a recent illustration of this type of case. Goods were sold under a conditional sale agreement which was silent on the question of risk. The goods were damaged by the carelessness of a third person before the property had passed but after the buyer had acquired possession. Hyndman, J.A., in giving the judgment of the Court, used the following language: "It seems beyond doubt that, during the continuance of the lien, in the absence of this condition (i.e., one dealing with risk), the risk

[10] (1904), 8 O.L.R. 712 at p. 717.
[11] *Supra.*

[1] For example, see *Holm* v. *Morgan,* [1921] 3 W.W.R. 671.
[2] [1928] 3 W.W.R. 257; [1928] 4 D.L.R. 837. (App. Div. Alberta).

is in the vendor in case the goods are damaged or destroyed.[3] Had an action been brought by the vendors for the balance of the price of the pump, against the purchaser, after the pump was destroyed, it might very well be that they could not recover, on the ground that the agreement was avoided." This statement was not necessary for the decision of the case but it represents the view taken by the Saskatchewan Court of Appeal in *Edgar* v. *Bahrs,* cited by Hyndman, J.A. The same result was reached by Walsh, J., in *Monticello State Bank* v. *Killoran.*[4] In these cases the courts have treated the matter as being concluded by certain sections found in the various Sale of Goods Acts. By section 7 of the Sale of Goods Act (U.K.) it is provided as follows:" Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or the buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."[5] This section is silent on the question *when* the risk passes. It merely fixes the consequences of destruction before the risk passes, assuming it to have been already ascertained in some way or other, that the risk is still in the seller. To determine whether the risk has passed, the courts have resorted to section 20 (U.K.) which, in effect, continues the common law *res perit domino* rule. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer . . . ."[6] Inasmuch as the legal title has not passed from the seller to the buyer under the conditional sale agreement, it is assumed that the risk must be in him too, in the absence of express provision to the contrary.[7]

[3] Sec. 22 of the Sale of Goods Act, R.S.A. 1922, c. 146; *Edgar* v. *Bahrs,* [1918] 3 W.W.R. 817; 11 Sask. L.R. 457. The question is not beyond doubt in the United States whence a great deal of our conditional sale law has come. The weight of authority there seems to be in favour of the view that the risk is in the buyer in the absence of any express provision in the contract otherwise allocating it. See 6 American & English Ency. of Law, 2nd ed., 455; the following cases place the risk in the buyer: *Tufts* v. *Griffin,* 107 N.C. 49; 12 S.E. Rep. 68; 10 L.R.A. 526; *American Soda Fountain, etc.* v. *Vaughn,* 69 N.J.L. 582; 55 Atl. Rep. 54; *Burnley* v. *Tufts,* 66 Miss. 49; 5 So. Rep. 627; *Tufts* v. *Wynne.* 45 Mo. App. 42; *Cooper* v. *Chicago Cottage Organ, etc.,* 8 Ill. App. 248; *Hintermister* v. *Lane,* 27 Hun (N.Y.) 497; *La Valley* v. *Ravenna,* 78 Vt. 152; *Humeston* v. *Cherry, 23* Hun (N.Y.) 141; *Osborne* v. *South Shore, etc.,* 91 Wis. 526; 65 N.W. Rep. 184; *Marion Manufacturing* v. *Buchanan,* 118 Tenn. 238; contra: *Bishop* v. *Minderhout,* 128 Ala. 162; 29 So. Rep. 11; 52 L.R.A. 395; *Cobb* v. *Tufts,* 2 Tex. App. Civ. Cas. 153; *Swallow* v. *Emery,* III Mass. 356; *Randle* v. *Stone,* 77 Ga. 501; *Stone* v. *Waite,* 88 Ala. 599; *Arthur* v. *Blackman,* 63 Fed. Rep. 536. The above list of cases is, of course, not exhaustive either way.

[4] [1920] 3 W.W.R. 17 (reversed on other grounds, [1920] 3 W.W.R. 542; 61 S.C.R. 17). See also *Sadywryk* v. *Achtemyczuk* (1916), 10 W.W.R. 624.

[5] Ont., sec. 8; Man., sec. 9; Alta., sec. 9; N.S., sec. 9; B.C., sec. 15; P.E.I., sec. 14.

[6] Alta., Sask., Man., sec. 22; Ont., sec. 21.

[7] See per Lamont, J.A., in *Edgar* v. *Bahrs, supra,* at p. 820.

The destruction of the goods while that situation continues, brings into play section 7, quoted above, and the buyer is accordingly held not to be liable for the balance of the purchase price. The propriety of this view when applied to conditional sale agreements of the ordinary type is open to question on two grounds. The concurrence of title and risk is not inevitable. It is merely *prima facie* or presumptive. If the legal title which the unpaid seller has is held merely by way of security, it is certainly arguable that the statutory presumptive concurrence has been rebutted. The statute does not require an express agreement to rebut it and it may well be that the essential nature of the transaction itself may be so inconsistent with a literal application of the *res perit domino* rule as to exclude it, without more. A second ground for doubting the strict applicability of these sections to a conditional sale agreement, is found in the Sale of Goods Act itself. Section 61, sub-section 3 (U.K.) provides that the provisions of the Sale of Goods Act are not to apply to security transactions. If, therefore, a conditional sale agreement is, in its essence, a security, the Act has abdicated in advance and the statutory provisions so frequently cited are not really pertinent to the question. This matter is more fully referred to below. In *C. C. Motor Sales Limited* v. *Chan*,[8] Newcombe, J., analyzes the legal effect of the conditional sale agreement used in the case as follows:

> While in the present case the contract does not amount to a bargain and sale of the automobile, and it is executory in the sense that the property is not to pass to the purchaser until payment of the price, it is nevertheless a concluded agreement for sale by which the possession passes to the purchaser, and the property is also to pass upon compliance with the stipulated conditions, the vendor in the meantime, by the express provisions, retaining the property *as security*. The debt is *secured* upon the property, the legal ownership remaining with the creditor, but the equitable ownership being that of the debtor, subject to the security afforded to the creditor for the debt; the vendor is given the right to take possession and sell, if the purchaser fail to make payment; the proceeds of the sale are to be applied to the payment of the indebtedness, and the purchaser is to pay any deficiency which may remain; *therefore the relationship between the parties does not differ essentially from that of mortgagor and mortgagee* with an obligation for payment by the former; and if, as I conclude, that be the meaning and effect of the instrument, there can be no doubt that the surplus proceeds of the sale belong to the purchaser. *It is true that the property was not transferred to the purchaser and reconveyed to the vendor in order to effect the security for the indebtedness which, by the stipulations of the agreement, the latter was to have; but equity looks to the intent of the transaction rather than to the form, and the intent is made clear by the terms of the instrument.*[9]

[8] [1926] S.C.R. 485; [1926] 3 D.L.R. 712.
[9] [1926] S.C.R. 485 at p. 491. Italics added.

The agreement in this case seems to be typical. In *Forsyth* v. *Imperial etc.*,[10] Macdonald, J.A., uses the following language in describing the interest which a purchaser has under a conditional sale agreement before the title has passed:

> Now, here the insured (i.e., the buyer) is the owner, the legal property in the goods being retained by the seller as security for the purchase-money. The agreement is called a conditional sale, but that does not make the ownership conditional; it is not different from the ownership under an ordinary agreement of sale by which the seller postpones the time for conveyance until the purchase-price has been paid. Neither is it different from the ownership of the mortgagor when he has conveyed the property to the mortgagee upon a condition that the mortgagee shall reconvey when the debt shall have been paid.[11]

If these analyses of the effect of a conditional sale agreement are correct, it would appear, as was suggested above, that there are strong grounds for suggesting that the provisions of the Sale of Goods Act relating to risk, have no application. Section 61 of the Sale of Goods Act (U.K.) provides as follows: "The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."[12] If a conditional sale agreement creates a mortgage relation for one purpose, as was held in the *Chan* case (*supra*), it seems inconsistent to endow it with chameleon properties, and to treat it as being something else when the question of risk is involved.[13] If such an agreement is, in its essence, merely a rolled-up form of security, it would seem to follow that the debt represented by the purchase price ought not to be affected by the fortuitous destruction of the goods after possession has been given but before the legal title has passed.[14] No

[10] [1925] 3 W.W.R. 669 at p. 670 (C.A.B.C.).

[11] See also *Re Simpson*, [1927] 2 D.L.R. 1043; *Minneapolis* v. *Paulerrou*, [1927] 3 W.W.R. 145.

[12] Ont., sec. 57; Man., Alta., sec. 58; B.C., sec. 83; N.S., sec. 59; P.E.I., sec. 63.

[13] For an interesting discussion on the question of the confusion which exists between the "ownership" element and the "pledge" element in the treatment of the so-called Lien Note, see 2 C.B. Rev. 491; see also Annotation, [1927] 1 D.L.R. 1. "Ownership" and "Pledge" theories do not coalesce very readily. Unless we take our choice and keep to it consistently, the law relating to conditional sale agreements is bound to be full of anomalies and inconsistencies. As against the "pledge" view it may be said that the prevailing type of instalment buying is such that the buyer never expects to acquire title. His hope is to turn in the article to the seller when it shows signs of obsolescence or when fashions change, receiving in return a new article, also bought on the conditional sale plan, and so on *ad infinitum*. If this practice becomes widespread, quasi-usufruct will take the place of ownership.

[14] See *Hesselbacher* v. *Ballantyne* (1896), 28 O.R. 182; (1898), 25 O.A.R. 36. In this case Rose, J., seems to have adopted the majority American

one would suggest that the duty of a chattel mortgagor to pay the amount which he has covenanted to pay, would be affected by the destruction of the goods covered by the mortgage, notwithstanding that the legal title was technically in the mortgagee. This would be so although the loss occurred without fault on the part of the mortgagor. In such a case the security is merely ancillary or collateral to the debt. It is the accessory and not the principal thing. The discharge of the debt normally releases the security but it does not follow that the physical destruction of the subject-matter of the security releases the debt which that property was intended to secure. If, as Newcombe, J., suggests, the court will look through the form to the substance, it is difficult to see how a different result can be reached in the case of a conditional sale transaction. The seller has done all he was to do under the agreement. The loss resulted from the buyer's user of the goods or it at least occurred during the period in which he was in possession for his own purposes. The postponement of the passing of the title is normally occasioned by the buyer's lack of means and it is ostensibly for his advantage. Until recent times the postponement was likewise made at the buyer's request. If possession has been given it cannot be said that

view. He held that the destruction of the goods while in the buyer's possession and without his fault, did not release him from the duty to pay the balance of the purchase price. This would be true although there was an express reservation of title in the seller. See also *Sawyer* v. *Pringle* (1891), 18 O.A.R. 218 at p. 222; see comments on this case in Blackburn on Sales (Can. ed.) p. 263s; *Goldie et al.* v. *Harper* (1899), 31 O.R. 284. The American cases which are usually quoted to support this view are *Burnley* v. *Tufts, supra,* and *American Soda Fountain etc.* v. *Vaughn, supra.* In *Burnley* v. *Tufts,* Tufts "sold" a soda water fountain to Burnley. Possession was given but title was to remain in Tufts until complete payment. Before the last payment was made, the fountain was destroyed by fire without the fault of either party. Cooper, J., uses the following language: "Burnley unconditionally agreed to pay a certain sum for the property, the possession of which he received from Tufts. The fact . . . . . (of destruction) . . . . . does not relieve him of payment of the price agreed upon . . . . . The transaction was something more than an executory conditional sale. The seller had done all he was to do except receive the price; the purchaser had received all he was to receive; . . . The contract made . . . imposed on the buyer an absolute promise to pay." In *American Soda Fountain etc.* v. *Vaughn,* the following language is used: "The question to be determined is, what was the consideration for the note? If the passing of the title to the apparatus was the consideration, the defence must prevail. If the delivery of the apparatus with the right to acquire title, was the consideration the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus with the right to acquire title . . . The title was retained by the plaintiff merely as security for the unpaid purchase money. Nothing remained to be done by the plaintiff to perfect the title of the defendant: that title would become perfect immediately on payment." With this might be read the following statement of Holmes, J., in *White* v. *Solomon,* 164 Mass. 16: "If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent him doing so, and thereby binding himself to pay the whole sum."

the destruction of the goods has worked a total failure of consideration.[15] The buyer is not subjected to extraordinary hardship if the risk is held to be in him. He has an insurable interest in the goods, which interest, for the purposes of insurance law at least, is treated as being absolute and unconditional.[16] If the goods are damaged or destroyed by the fault of a third person, the buyer has (notwithstanding a doubt expressed by Hyndman, J.A., in *Burke* v. *Weir*[17]) an action against such third person for damages covering the full value of the goods. A tortfeasor cannot raise the *jus tertii* by setting up that the legal title is still outstanding in the seller. The buyer has possession and to allow such a defence would amount to an overruling of *The Winkfield*,[18] and of the long line of cases to the same effect.[19] It is unnecessary to point out that the discussion in this note is confined to conditional sale agreements only. Hire-purchase agreements might raise a different problem.[20] Similarly the discussion herein is not directed particularly to the question whether a "lien note" is negotiable. The view that the obligation of the buyer to pay the price does not necessarily depend upon the continued existence of the goods, the legal title to which has not passed from the seller, removes one conditional element which has sometimes been treated as precluding negotiability. Nevertheless, until all conditions are eliminated, the arguments against negotiability would still prevail. Failure to transfer title for which the seller would be to blame, may be due to many contingencies having nothing to do with the accidental destruction of the goods. So long as such possibilities exist, the promise of the buyer to pay the price cannot be said to be unconditional within the meaning of

[15] See *Goldie, etc.* v. *Harper, supra.* The plaintiff sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery would pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. It was held that the defendant had had the possession and use of the machinery and an interest in it. There was, therefore, not a total failure of consideration for the notes. If there was a partial failure, it was not an ascertained one so as to operate *pro tanto* as a defence to an action on the notes. See Blackburn on Sales (Can. ed.), p. 263s.

[16] *Forsyth* v. *Imperial, etc., supra.*

[17] *Supra.*

[18] [1902] P. 42.

[19] See *Armory* v. *Delamirie* (1722), 1 Str. 505; *Jeffries* v. *G. W. R.* (1856), 5 E. & B. 802 at p. 805; *Nicolls* v. *Bastard* (1835), 2 C.M. & R. 659; *Dutton* v. *C.N.R.* (1916), 10 W.W.R. 1006; *Glenwood etc.* v. *Phillips*, [1904] A.C. 405; *Eastern etc.* v. *National etc.*, [1914] A.C. 197 at p. 209; *Gottschalk* v. *Hutton*, [1922] 1 W.W.R. 59; *Swaile* v. *Zurdayk*, [1924] 2 W.W.R. 555; *C. P. R.* v. *Stewart*, [1927] 3 D.L.R. 555; *Pinder Lumber* v. *Munro*, [1928] S.C.R. 177; *Harrington* v. *King*, 121 Mass. 269; Holmes' Common Law, 174; Holdsworth, 7 H. of E.L. 455.

[20] See *Helby* v. *Matthews*, [1895] A.C. 471.

the Bills of Exchange Act. Notwithstanding that the risk due to the physical destruction of the goods might be in the buyer in conditional sales, the seller might still be unable to give a good legal title for the simple reason that he has none to give. His ability to do so would normally be a condition upon which the buyer's obligation to pay the price would depend. There might, also, be conditions or uncertainties having nothing to do with the title or with the existence of the goods which would prevent the instrument from measuring up to the statutory tests of negotiability. A further discussion of this question is outside the scope of this note.[21]

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TROVER AND CONVERSION — ASSUMPSIT FOR MONEYS HAD AND RECEIVED—ELECTION—WAIVER—GARNISHEE PROCEEDINGS. — The difficulty often experienced in reconciling cases dealing with election and waiver may be due to the loose and at times inaccurate expressions used in regard to those doctrines, which in many instances are so confused that "election" and "waiver" are treated as interchangeable terms, signifying the same thing.[1] But, as a well-known writer[2] has pointed out, the doctrine of election consists of a choice of things, and "a right and an alternative right give rise to a right of election."[3] On the other hand, waiver is "an intentional relinquishment of a known right ."[4] When, then, a person has a choice of one of two things, and he elects to take one, he cannot rightly be said to "waive" the other; and the only right a person who resorts to the doctrine of election has is to make a choice, and in making the choice he exercises his right and "waives" nothing.[5] Whether or no consideration be necessary to support a waiver, therefore, the question cannot arise in reference to the doctrine of election.[6]

Once the person who has the right to elect does an act which unequivocally shows an election, he is irrevocably bound by that

[21] See on this question of negotiability annotation by Dean Falconbridge, [1927] 1 D.L.R. 1; Falconbridge on Banking and Bills of Exchange, 4th ed., 885-6; Russell on Bills, 2nd ed., p. 70; 5 C.B. Rev. 314.

[1] See judgment of Rose, J., in *Danforth Heights Limited* v. *McDermid* (1922), 52 O.L.R. 412 at p. 417.

[2] John S. Ewart: Waiver Distributed 7 *et seq.*

[3] Everest & Strode: The Law of Estoppel, 3rd ed., 301.

[4] Ewart, *ibid.*, 6.

[5] Rose, J., in *Danforth* v. *McDermid, supra,* at p. 427, and in *Hutchison* v. *Paxton* (1928), 62 O.L.R. 65 at p. 73.

[6] See in confirmation of this, Ewart, *ibid.*, 7, 39, 40.

election. If, therefore, a person bring an action grounded on the theory that he has ratified an unauthorized act done by another, the plaintiff in such action cannot subsequently institute proceedings on the opposite theory, namely, that he has repudiated the unauthorized act.[7] For, "if the act be ratified there is but one remedy; and if it be repudiated there is another. The two remedies do not co-exist."[8] Although some American writers[9] object to the *universality* of the rules enunciated above, there does not appear to be any serious doubt that the law is as so expressed. Moreover, it is the act itself which governs, and not the intention: If the act be unequivocal, the absence of expressed intention to elect, and even a denial of such intention, will be immaterial; the legal consequences of the act will follow, notwithstanding such absence or denial.[10]

The doctrine of election is frequently involved in cases where goods are tortiously seized and sold. In such cases, although an owner who stands by and sees his goods sold to an innocent purchaser may, as regards such purchaser, be estopped from repudiating the sale, yet, as against the wrongdoer, the owner has one of two remedies: (1) he may repudiate the sale and sue for damages in an action of trover and conversion, or, (2) he may elect to affirm the sale and sue in assumpsit for money had and received.[11] He cannot, however, affirm in one action and disaffirm in a subsequent;[12] but it seems that under our modern system of pleading inconsistent claims a plaintiff may, in one and the same action, claim in trover and, *in the alternative,* for money had and received.[13]

Clearwater v. *Childs Co. of Manitoba Ltd.*[14] was a recent case which came before the Manitoba Court of Appeal and involved a consideration of the principles set out above. Furniture was sold and delivered by S. to C. & W. under a lien note, and placed in premises

[7] *Brewer* v. *Sparrow* (1827), 7 B. & C. 310; *Pickard* v. *Sears* (1837), 6 A. & E. 469; 112 E.R. 179; *Buckland* v. *Johnson* (1854), 15 C.B. 145; *Lythgoe* v. *Vernon* (1860), 5 H. & N. 180; *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, particularly at pp. 353, 359, 361; *Roe* v. *The Mutual Loan Fund, Limited* (1887), 19 Q.B.D. 347; 3 Bac. Abr. tit. Election, E; 1 Tidd's Practice, 9th ed., 10; Everest & Strode: The Law of Estoppel, 3rd ed., 31, 32, 300-303 and authorities there cited.

[8] Ewart, *ibid.*, 70.

[9] See note on "Election of Remedies" in 42 Harv. L. Rev. 704.

[10] *Croft* v. *Lumley* (1858), 6 H.L.C. 672, Williams, J., at p. 725; *Davenport* v. *The Queen* (1877), 3 App. Cas. 115 at p. 131; Lord Blackburn in *Scarf* v. *Jardine, supra,* at p. 361; *Ripeka Te Peehi* v. *Hutchison,* [1921] N.Z.L.R. 758; Ewart, *ibid.*, 84-101.

[11] *Buckland* v. *Johnson, supra; Lythgoe* v. *Vernon, supra; Smith* v. *Baker, supra;* Everest & Strode, *supra,* 300-1; 3 Holdsworth, H. of E.L., pp. 350-1, 580-2; 9 Bac. Abr. tit. Trover F (2).

[12] *Ibid.*

[13] *Rice* v. *Reed,* [1900] 1 Q.B. 54.

[14] [1929] 2 W.W.R. 228; [1929] 3 D.L.R. 305.

leased by C. & W. from the defendant company. Shortly afterwards, C. & W. assigned to X. (amongst other things) all their rights in the furniture and the lease from the defendant company referred to above. Sundry payments were, from time to time, made on account of the purchase price of the furniture. About two months after the assignment to X., the plaintiff (who was a clerk employed by X.) paid S. the amount then due under the lien note and received an assignment thereof from S. Nine days after this assignment (X. being then indebted to the defendant company for arrears of rent), the defendant bailiff, by virtue of a distress warrant issued by the defendant company, seized the furniture covered by the lien note. Subsequently, the bailiff sold the furniture, and realized considerably more than sufficient to discharge the arrears of rent and the costs of the seizure. After the seizure and about a month before the sale, the plaintiff's solicitors wrote to the bailiff advising him that their client claimed the furniture by virtue of the assignment of the lien note to him, and that if the furniture were sold he would be held liable. The sale, nevertheless, took place, the plaintiff attending it by his solicitor. On the day of the sale and immediately thereafter, the plaintiff sued X. for wages and garnished the defendants, who, from the proceeds of the sale of the furniture, paid into court a certain sum, which was subsequently paid out to the plaintiff. Later, X. summoned the plaintiff before a County Court judge in connection with the alleged excessive costs of the distress, and the plaintiff claimed that any rebate on such costs should be paid to him under his garnishing order. The bailiff agreed to repay a certain sum, which, by consent of X., was paid direct to the plaintiff. The plaintiff then sued the defendants, claiming the balance due under the lien note at the time of the assignment thereof to him. The statement of claim was not framed strictly as for an action for damages for wrongful conversion, nor for an action for moneys had and received, but included phases of both, without any definite election, although it would seem that the trial proceeded on the basis of an action for conversion. The learned trial judge gave judgment for the plaintiff for the amount claimed, less the amount realized from the garnishee; and from this judgment the defendant company appealed. The principal ground of the appeal was, that the plaintiff had, by taking his action against X., issuing the garnishing order, and taking the moneys paid into court and to him directly, ratified and elected to confirm the sale, and thus "waived the tort" in respect to which the plaintiff brought his action against the appellant. The plaintiff cross-appealed against the deduction made by the learned trial judge, claiming that he (the plaintiff) should be allowed his demand in full.

The space at our disposal does not admit of any extended refer-

ence to the judgments of the members of the Court of Appeal; but they may be summarized as follows. Fullerton, J.A., after reviewing the facts and citing *Brewer* v. *Sparrow*,[15] *Smith* v. *Baker*,[16] *Roe* v. *Mutual*,[17] *and Pickard* v. *Sears*,[18] held that the plaintiff had elected to affirm the sale and to treat it as valid and was estopped from setting up that the sale was wrongful; that an action for money had and received is in point of law a conclusive election to "waive the tort"; that the present action was one for conversion; that the amounts paid into court and to the plaintiff direct in his action against X. were not allowable in reduction of the plaintiff's claim in this action, as the payment of such amounts in reduction of damages was not pleaded and could not have been proved and the plaintiff must recover in this action the whole damages proved or nothing; and that, as he held that the plaintiff could not maintain this action, he would allow the appeal and dismiss the action, both with costs. Trueman, J.A., after considering the facts, held that the appeal should be dismissed with costs, and the cross-appeal allowed and judgment entered for the plaintiff for the full amount of his claim; that the plaintiff had two causes of action, one for wages against X., and the other for conversion against the defendants; and that the plaintiff was thus not, after getting the benefit of the garnishing order, now making a claim inconsistent therewith to the prejudice of the defendants, but was enforcing a different claim previously brought to the defendants' attention and of which the defendants could not say they were led by the garnishing order to believe was abandoned. The judgment of the majority of the Court, delivered by Prendergast, J.A. (Perdue, C.J.M. and Dennistoun, J.A., concurring) dismissed the appeal with costs and the cross-appeal without costs, the grounds of such judgment, briefly stated, being as follows: that the plaintiff had disbarred himself from instituting an action for conversion under which he could claim the full value of the furniture; that the action was not one for conversion but for money had and received; that the garnishee proceedings were directed to such part of the money as was coming to X. as purchaser of the goods, and the present action was for such part of the same as came to the plaintiff as assignee of the original vendor; further, that such garnishee proceedings had legally attached nothing, on account of the prior claims of the plaintiff as assignee of the lien note and the landlord (i.e., the defendant company), the aggregate of which claims more than absorbed the proceeds of the

[15] *Supra.*
[16] *Supra.*
[17] *Supra.*
[18] *Supra.*

distress; that the defendants having under a misconception of fact paid the sums mentioned to the plaintiff under the garnishing order, the trial judge had properly deducted them from the plaintiff's claim in this action; that the plaintiff had by the attachment treated as his own the claim of X., which came third and last, and been paid therefor; that full payment of the plaintiff's claim under the lien note could now only be made by encroaching on the defendant company's claim for rent which was second in order; and that the plaintiff was thus estopped by his previous implied representation from asserting his demand for an amount beyond that which could be satisfied without interfering with the defendant company's rights.

These judgments show a perplexing diversity; and in particular one experiences difficulty in following the judgment of the learned judges who formed the majority of the Court. This judgment, as mentioned above, declares that full payment of the plaintiff's claim under the lien note could only be made by encroaching on the defendant company's claim for rent and that the plaintiff is estopped from asserting his demand for an amount beyond that which could be satisfied without interfering with the defendant company's rights. Yet, the effect of dismissing the company's appeal appears to be that the plaintiff actually *does* obtain full payment of his claim under the lien note, which was the amount sued for in the action and is satisfied by the sums actually paid to the plaintiff and the amount of the judgment which the majority of the Court of Appeal affirms; and it may also be observed that by virtue of the holding of such majority that the garnishee proceedings attached nothing, the plaintiff is entitled to recover in full the amount of his judgment against X. Furthermore, as the action now under review was declared by the majority to be one for money had and received, would not the defendant company, in the circumstances, have been entitled to succeed on its appeal, on the ground that such company had, in point of fact, actually accounted for and paid over to the plaintiff the moneys realized on the sale less its claim as landlord?

It may well be, however, as Dean Pound suggests,[10] that "while jurists have been declaiming against a jurisprudence of conceptions, courts have been quietly . . . finding a way by developing soft spots in what appears a hard legal crust, concealed by words and phrases that have the appearances of fixed conceptions yet yield readily to the touch."

Nevertheless, the hope is respectfully expressed that the legal crust will not yield *too* readily to the touch.

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[10] In the foreword, in Ewart: Waiver Distributed.