THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☛ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-first Annual Meeting of the Canadian Bar Association will be held in the City of Halifax on the 19th, 20th and 21st days of August, 1936.

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CASE AND COMMENT.

CRIMINAL LAW—ACCUSED AS WITNESS.—The lawyer whose work is largely concerned with prosecutions will naturally see weaknesses in legal proceedure from the point of view of one whose duty it is to protect the public and secure punishment for the malefactor. The specialist in defence work will be more concerned to protect the individual, and to see that the old principle is maintained that rather should ten guilty men escape than one innocent man be convicted. To remove the defects in the machinery for enforcing the law without encroaching upon this individual right to protection, must be the aim of the courts and the legislature. It must always be borne in mind that the enforcement of the criminal law is not a game, in which points are awarded for skilful moves. The criminal in most cases is anything but a sportsman. He begins by a mean action—for practically all crimes are mean—and he will use any trick to cover it up, and every artifice which he can devise (with legal advice) to escape the consequences. The prosecution must be armed to overcome these devices and expose them whenever possible. This does not mean that the prosecutor should meet trickery with trickery, but his hands should not be tied by legislation or rules which are not necessary and where the accused can be adequately protected without them.

The writer of an article in an earlier issue of this REVIEW,[1] suggests that under no circumstances should it be permitted to cross-examine an accused who gives evidence as to previous offences alleged to have been committed by him of which he has been acquitted. This would place an accused who had been previously tried and acquitted in a more favourable position than one whose previous (alleged) offences had never come to trial. For instance, it has always been held that on a charge of arson, evidence of former fires with which the accused was connected in a suspicious manner, may be given in proper circumstances.[2] On a charge of arson with an intent to defraud an insurance company, evidence may be given "that the accused had previously occupied houses which had been on fire, and in respect of which he had claimed and been paid the insurance money."[3] Apparently it is not even necessary to show that there was anything fraudulent or even suspicious about the former fires. This case was followed by the Saskatchewan Court of Appeal in *Rex* v. *Petrisor*,[4] and quoted with approval and the principle adopted by the British Columbia Court of Appeal in *Rex* v. *Anderson*.[5] If such evidence can be given as evidence in chief, it is a proper subject for cross-examination of the accused if he elects to go into the box. But supposing one of the previous instances has been the subject of a charge and acquittal, is all reference to that case to be barred? It is probably a more suspicious case than the ones which did not bring about a prosecution. Of course, such evidence is only admissible when a prima facie case has been made out by evidence relevant to the offence charged. It is given to show a system, or anticipate the defence of accident, or innocent intent. An accused person is not subject to cross-examination until such a case has been made out, that in default of adequate explanation, a jury would be justified in convicting. The prosecution of receivers of stolen goods will usually involve evidence and cross-examination of the kind referred to. Suppose an accused in his defence tells the usual story of having bought the stolen article from a stranger, whom he cannot find, and the jury give him the benefit of the doubt and acquit him. Six months later he is charged again and tells a similar story. Is all reference to the first charge to be barred, either as evidence in chief for the crown or on cross-examination? If the police had

[1] See (1935) 13 Can. Bar Rev. 605; (1934) 12 Can. Bar Rev. 519.
[2] *Regina* v. *Dossett* (1846), 2 C. & K. 306.
[3] *Regina* v. *Gray* (1866), 4 F. & F. 1102.
[4] (1931), 56 Can. C.C. 389.
[5] (1935), 50 B.C.R. 225. See a comment on this case in (1936), 14 Can. Bar Rev. 153.

accepted the story and laid no charge on the first occasion, then evidence of it could be given (Criminal Code, sec. 993) and the accused could be cross-examined on it. Why should he be in a better position because a charge had been laid? The verdict of acquittal proves nothing; it merely bars a further prosecution for the same offence. To question an accused about an offence for which he has been acquitted, and go no further than the fact of trial and acquittal, would appear to the writer to be the height of foolishness, even if not otherwise objectionable. It is just as liable to prejudice the jury in favour of the accused, and suggest persecution. It is the facts given in evidence at the former trial which are material, and especially the story told by the accused in his defence. It may be said that the fact that the jury acquitted should be accepted as proof that the accused told a true story. But that is not in accordance with the facts. The story may have been very improbable, but the jury not prepared to say it was untrue. But suppose a similar story is told on a second occasion, and a jury is asked to accept it again? Of course if the unlikely happened the first time, it can happen again—or a dozen times. But if it happen twice to the same man, though we suspect an intent or design the first time, we feel convinced of it the second. If cross-examination of an accused on these lines were barred, it would unnecessarily hamper the prosecution. Questions which lead nowhere but which might turn to prejudice often act as boomerangs, and the trial judge can be relied on to see that no injustice is done.

ARTHUR LEIGHTON.

Nanaimo, B.C.

[In commenting in earlier numbers of the REVIEW (12 Can. Bar Rev. 519; 13 Can. Bar Rev. 605) on the liability of an accused person to be cross-examined as to previous acquittals the writer only intended to denounce the practice in so far as it was done under the guise of an attack on credibility. It seems futile to argue that an acquittal on a previous charge is in any way relevant to credibility, yet it is on this ground that it has been allowed by some Canadian courts — a course which, in view of the House of Lords decision in *Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309, seems clearly indefensible. The present writer made no attempt to argue that evidence of similar acts might not be given, either to rebut a defence of innocent intent, or to prove the crime as part of a system. (See the comments in 14 Can. Bar Rev. 154). It would appear, however, that it is not the charge and acquittal that is relevant in this connection, but the actual similar fact or facts. Apart from the difficulty that one previous similar act is probably insufficient to prove a "system" or "design" (see 14 Can. Bar Rev. 154) the previous acquittal seems irrelevant to "intent" or "design". The jury on the former occasion may have believed the accused did not do the physical act; they may have believed he did it but with an innocent intent. Surely these matters cannot be gone into on the subsequent charge. If the Crown can prove a similar act *done* by the accused in order to show system or rebut a

defence of innocent intent, it is certainly entitled to do so. But, it is submitted, the fact of a charge and acquittal proves neither the connection of the accused with the act charged or the intention with which that act was done. To state, as Mr. Leighton does, that "the verdict of acquittal proves nothing", seems to be open to serious objection. It does prove that the accused is not guilty of the crime as charged. This was the pivotal point of the judgment of the House of Lords in the *Maxwell case* in which it was emphatically stated that there is no such verdict in English law as "Not Proven". In other words, every acquittal is *proof* of innocence of the act charged. In view of that fact, it is submitted that the question as to charge and acquittal is not only not relevant to credibility, but has no bearing on "system" or "design".

The Crown has a right to cross-examine as to similar acts, if the judge decides that a system might be proved. It is doubtful, however, whether an act, for which the accused has been tried and found "Not Guilty" should be treated as any part of a system, for as to that act, the law has already declared the prisoner guiltless. As the present writer stated on another occasion the proof of an isolated similar act itself is fraught with danger for the accused. To surround that act with an aura of suspicion that a previous court and jury were fooled, seems — on the consistent English attitude — unjustifiable.—C.A.W.]

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CRIMINAL LAW—VALIDITY OF A CONVICTION FOR FALSE PRETENCES ON A CHARGE OF THEFT.—A decision of special significance in relation to the law of theft and false pretences is to be found in the recent case of *Duplessis* v. *The King*.[1] The accused was convicted of theft. He appealed against his conviction on the ground, *inter alia*, that the evidence did not support a conviction for theft. The Quebec Court of King's Bench upheld this contention but also held that since the evidence disclosed the offence of obtaining money by false pretences the Court of Appeal was able, under sec. 1016 (2) of the Criminal Code,[2] to substitute a verdict of false pretences, being an offence of which the Magistrate could have found him guilty.

It is to be noted that the indictment charged the accused only with theft and contained no count for obtaining by false pretences. Under such circumstances, it has been provided by statute in England[3] that the accused may nevertheless be convicted on such an indictment of the offence of obtaining by false pretences, if the evidences prove the commission of that

[1] [1936] 2 D.L.R. 174.

[2] Section 1016 (2) provides that: "Where an appellant has been convicted of an offence and . . . . . the judge or magistrate could on the indictment have found him guilty of some other offence, and on the actual finding it appears to the Court of Appeal that the . . . . . judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity."

[3] Larceny Act, 1916, 6 & 7 Geo. V, c. 50, s. 44 (3).

offence rather than theft. The same statute provides[4] that on an indictment for false pretences, if it is proved that the accused stole the property in question, he is not by reason thereof entitled to be acquitted of obtaining such property by false pretences. There are no such provisions in express terms in the Canadian Criminal Code.

Barclay J. in delivering the judgment of the majority of the Quebec Court of King's Bench, pointed out that the offence of obtaining by false pretences and the offence of theft were offences of a cognate nature and that the former, being a lesser offence of the same nature, was included in the latter, the difference between the two being the means adopted for committing the offence. Hence the Magistrate cou'd, on the facts, have found the accused guilty of the lesser included offence according to the provisions of sec. 951 of the Code. He also pointed out that the definition of "theft" in the Code, unlike that in the English *Larceny Act* of 1916, was sufficiently broad to include the commission of the offence of false pretences.

As far as the writer is aware, this is the first Canadian case to place such a broad construction on the theft provisions of the Code. In *Rex* v. *Illsley*[5] the Supreme Court of Nova Scotia, on a Crown case reserved, held that on a charge of theft where the facts showed only obtaining goods by false pretences, the conviction should be quashed, but no reasons were given for the decision. In *Duplessis* v. *The King*,[6] Barclay J. suggested that in *Rex* v. *Illsley* the court lost sight of the broad definition of theft in the Criminal Code.

In *Rex* v. *Scheer*[7] the accused was indicted on two counts : (a) theft of a quantity of liquor, and (b) obtaining a quantity of liquor by false pretences. The jury found him not guilty on the first count and guilty on the second. On a case stated to the Manitoba Court of Appeal it was held that the offence, if any, disclosed by the evidence was theft and not obtaining by false pretences, but that as the jury had found the accused not guilty on the count for theft, that finding disposed of the whole indictment. The conviction was accordingly quashed.

In the course of his judgment Cameron J.A. said :

> In England it is provided by the Larceny Act, 1861 (Imp.), ch. 96, sec. 88, that if upon the trial of any person indicted for the offence of obtaining property by false pretences, it shall be proved

[4] Sec. 44 (4).
[5] (1917), 29 Can. C.C. 105.
[6] *Supra.*
[7] (1922), 39 Can. C.C. 82.

that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted. This provision is not at variance with any provision of the Code and it seems to me must be in force in this Province. If, therefore, the accused had been indicted for the obtaining of liquor by false pretences only and convicted, this Court, under the above provision, could have refused to set aside the conviction. But in this case there was also a count for theft on which the jury found the accused not guilty. Such being the case it is impossible to act under the above section of the Larceny Act.

There seems no escape from this conclusion which is much to be regretted. The conviction must, therefore, be quashed.[8]

In explanation of this statement it should be pointed out that by sec. 12 of the Criminal Code the criminal law of England as it existed on July 15, 1870, insofar as it is applicable to Manitoba, and insofar as it has not been repealed as to the province by the Criminal Code or any other Dominion statute, is the criminal law of Manitoba. This law would include the English *Larceny Act* of 1861, and, since the Criminal Code makes no express or implied provisions to the contrary, it would appear that in Manitoba, on an indictment for theft, the accused may be convicted instead of false pretences, if the evidence discloses that offence.

The noteworthy point about the statement of Cameron J.A. is that it suggests that in such cases a conviction for false pretences where the evidence proves theft, even though theft has not been charged, or a conviction for false pretences on a simple charge of theft is only justifiable under the express provisions of the English *Larceny Act*, which is part of the law of Manitoba, and not by the virtue of any enabling provisions in the Criminal Code itself.

Returning to the judgment of Barclay J. in the present case, he points out that whereas the English definition of theft still contains the words "without the consent of the owner", such words are omitted in the definition of theft in sec. 347 of the Criminal Code. The omission of such words is said to render unnecessary in Canada special provisions such as those in sec.44 of the English *Larceny Act*.

The writer would suggest, with all due deference, that the omission of these words from sec. 347 makes no material difference in the nature of the offence defined. It is submitted that there cannot be a "taking" or a "converting" "fraudulently and without colour of right" where the owner of the property has

[8] 39 Can. C.C. at p. 85.

consented to parting with possession. Consent of the owner, or a *bona fide* and reasonable belief of such consent on the part of the person appropriating the property, would appear to be one of the most obvious means of establishing a "colour of right."

As a matter of policy, the result arrived at in the present case is doubtless quite sound. The two offences are of a sufficiently similar nature that a mere omission to add to a charge of theft account for obtaining by false pretences should not prevent a conviction for the offence disclosed by the evidence. This is especially so since the law in force in Manitoba clearly appears to allow such a result, and there seems to be no good reason why the law should not be uniform in this respect. As a matter of law, however, it is submitted that such a result might be better and more safely obtained by a legislative enactment similar to the provisions of the English *Larceny Act* than by placing a doubtfully broad judicial interpretation upon the theft provisions of the Criminal Code.

GEORGE H. CROUSE.

Dalhousie Law School.

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BANKRUPTCY—PRIORITIES GRANTED BY PROVINCIAL LEGISLATION.—Municipalities throughout Ontario have been startled by the decision of The Supreme Court of Ontario in the case of *Re General Fireproofing Company of Canada, Limited.*[1] Upon a motion for direction by a trustee, Mr. Justice McEvoy held that the municipality's claim for business tax and the local Hydro Electric Commission claim for rates both ranked as ordinary unsecured claims with no priority whatsoever. The learned judge arrived at such a conclusion by finding section 112, subsec. 11, of the Assessment Act[2] to be legislation on the subject matter of "Bankruptcy", and therefore *ultra vires* of the provincial legislature.

McEvoy J. observed that the subsection in question confers no lien on the municipality for business tax nor upon the Commission for rates and it would appear that he thought such a lien was necessary before the protection of section 125 of the Bankruptcy Act (3) would be accorded these bodies. But surely the said section, which reads as follows,

> Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates or assessments, payable by or levied or

[1] [1936] O.W.N. 227, 17 C.B.R. 246.
[2] R.S.O. 1927, chap. 238.
[3] R.S.O. 1927, chap. 11.

> imposed upon the debtor upon any property of the debtor under any law of the Dominion or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

has a broader effect, and the protection of this section should be accorded to taxes created by valid Provincial Legislation even when a mere priority and not a lien is claimed.

Although as the judge remarked, the constitutional validity of the section of the Assessment Act has not been considered, taxes have been collected from trustees in bankruptcy in priority to other claims, *e.g.*, that of the landlord, and such priority has been granted by the courts.[4]

The case noted is important also in the ranking given the claim of the Minister of National Revenue for sales tax due under the provisions of The Special War Revenue Act.[5] Such a claim is given priority only over ordinary unsecured creditors, the municipality and Hydro Electric Commission being included in these by virtue of the above conclusion. This ranking seems to be in accord with the view of the Court of Appeal in *Re D. Moore Co. Ltd.*,[6] although it would have been interesting to have had the learned judge deal with the effect of section 107 of that Act[7] along with his previous decision in the case of in *Re Navilla Ice Cream Company, Limited.*[8] The reasoning of that decision considered along with the present case, cannot be said to clarify the topic of bankruptcy priorities.

WISHART F. SPENCE.

Osgoode Hall Law School.

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CONTRACTS—ILLEGALITY.—Contracts offending against the rules of law or morality are usually of interest for their facts alone. *Alexander* v. *Rayson*[1] also raises interesting points of law. Shortly the facts were these. R. agreed to lease a flat in Piccadilly from A. for a period of years at an annual rental of £1,200. A. prepared two documents, a lease stipulating an annual rental of £450, and an agreement to provide services at a cost of £750 per annum. In fact most of the services con-

[4] See *Re D. S. Patterson Company*, [1932] O.R. 432, 13 C.B.R. 428; *Re Lyman Brothers Limited* [1933] O.R. 159, 14 C.B.R. 248; *Re Andrew Motherwell Limited* (1922), 22 O.W.N. 612, 3 C.B.R. 95.

[5] R.S.C. 1927, chap. 179, and amendments thereto.

[6] (1927), 61 O.L.R. 434, 8 C.B.R. 339, 479.

[7] As amended by Stat. Can. 1930, chap. 43, sec. 4.

[8] [1934] O.R. 772.

[1] [1936] 1 K.B. 169.

templated by the supplemental agreement had been provided for in the lease itself, practically the only consideration for this additional £750 per annum being the provision and maintenance of a Frigidaire. A. then appealed against the municipal assessment on his property and, by producing only the lease, had his assessment materially reduced. The local authorities subsequently uncovered the ruse and restored the original assessment. Thus A. failed in his fraud. Of these proceedings R. was innocent having signed the two agreements in good faith.

Some years later R. being dissatisfied with the services provided, refused to pay an installment under the supplementary agreement and A. brought this action. R. pleaded, *inter alia*, that the agreement was void for illegality and that its enforcement would be contrary to public policy. The burden of proof being on the defendant she opened the case and when the evidence summarized above had been adduced the Plaintiff asked the Judge to rule that, if true, these facts afforded no defence in law. The trial judge (du Parcq J.) agreed and gave judgment for the plaintiff.

Since *Pearce* v. *Brooks*,[2] there has been no doubt that when the subject matter of a contract is to be used for an illegal or an immoral purpose it is unenforceable. But as the trial judge pointed out there is no case which decides that when one of the parties to a contract intends to make a representation to a third person about the document containing the contract, the contract itself is illegal. Here the plaintiff could fulfil his obligations to the defendant without doing anything wrong. He only intended to take advantage of the peculiar form of the documents to suppress the fact of the agreement. For these reasons the learned trial judge held that the illegal purpose was too remote from the contract to render the contract illegal.

The Court of Appeal came to a different conclusion. The case nearest to the present is *Scott* v. *Brown, Doering, McNab & Co.*,[3] where the plaintiffs sued stockbrokers on a contract to purchase shares of a certain company on the Exchange at a premium, in order to give a fictitious impression of value. In his reasons for judgment Lindley L.J. said : "The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances the plaintiff must look elsewhere than to a Court of Justice for such

[2] (1866), L.R. 1 Ex. 213.
[3] [1892] 2 Q.B. 724.

assistance as he may require against the persons he employed to assist him in his fraud if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced. But his illegal contract confers no rights on him." Commenting on these words in the present case Romer L.J. said : "It was the transaction of purchase on the market at a particular price, and not the thing purchased, of which an illegal use was to be made. So in the present case it was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject-matter of the transaction, of which an illegal use was to be made. In one sense, no doubt, it may be said that the plaintiff intended to use only the lease for an unlawful purpose, and not to use, but to conceal the agreement. In reality there was only one transaction between the parties. The splitting of it up into two documents was a device essential for the success of the plaintiff's fraud and both documents must be regarded as equally fraudulent in purpose."

The decision of the Court of Appeal was to the effect, therefore, that, assuming the illegal purpose, the plaintiff could not sue to recover rent due. It may seem odd that the defendant should receive the benefit of lodging rent-free, solely because the plaintiff was attempting to defraud the taxing authorities, but on the doctrine that the court will not assist any party to an agreement who is privy to an unlawful intention, the decision seems correct. It was suggested by the court that had the plaintiff been suing to recover possession of the premises he might have found himself in difficulties in securing the court's assistance to recover property granted away for a fixed term. In the present case the defendant was willing to surrender the lease. The maxim *in pari delicto potior est conditio defendentis* has given rise to many illustrations of a plaintiff's inability to recover property from a defendant. The present case is interesting because the *delictum* was all on the plaintiff's part. In a case where the plaintiff is innocent and the defendant alone *in delicto* the courts have allowed recovery.[4]

ALAN O. GIBBONS.

Toronto.

[4] See for example, *Wild* v. *Harris*, 7 C.B. 999 and *Millward* v. *Littlewood*, 5 Ex. 775, where promises of marriage were made by married men to women ignorant of the existing marriage.

QUEBEC—SALE OF THING NOT BELONGING TO VENDOR—DENIAL OF OWNER'S RIGHT OF REVENDICATION.—*Frigidaire Corporation* v. *Malone*[1] is the only case dealing with the sale of an object not belonging to the seller under Quebec law that has been decided by the Supreme Court of Canada. Dame Malone made a contract with the Standard Construction Company to have a building converted into an apartment house. The construction company signed a contract with the Frigidaire Corporation under which the latter installed refrigerators, twenty-five per cent of the price being paid when the installation was completed. No further payment being made, the Standard Construction Company, after having been paid in full by Dame Malone for all labour, materials and equipment, went into bankruptcy. The Frigidaire Corporation, claiming that ownership had been retained pending full payment according to a clause on the back of the contract, tried to revendicate the frigidaires.

In the Quebec Civil Code there are four articles under the Title of Sale[2] and one article under the Title of Prescription[3] which deal with the sale of an object not belonging to the

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[1] [1934] S.C.R. 121; Q.R. 54 K.B. 462.

[2] Art. 1487: The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following article. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter.

1488. The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing.

1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.

1490. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.

[3] Art. 2268. Actual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title. Any party, claiming such moveable must prove, besides his own right, the defects in the possession or in the title of the possessor, who claims prescription, or who, under the provisions of the present article, is exempt from doing so.

Prescription of corporeal moveables takes place after the lapse of three years, reckoning from the loss of possession, in favour of possessors, in good faith, even when the loss of possession has been occasioned by theft.

This prescription is not, however, necessary to prevent revendication, if the thing have been bought in good faith in a fair or market, or at a public sale or from a trader dealing in similar articles, nor in commercial matters generally; saving the exception contained in the following paragraph.

Nevertheless, so long as prescription has not been acquired, the thing lost or stolen may be revendicated although it have been bought in good faith in the cases of the preceding paragraph; but the revendication in such cases can only take place upon reimbursing the purchaser for the price which he has paid.

If the thing have been sold under the authority of law, it cannot, in any case, be revendicated.

The stealer or other violent or clandestine possessor of a thing, and his successors by general title, are debarred from prescribing by articles 2197 and 2198.

vendor. Prior to *Frigidaire* v. *Malone* the cases show divergent views as to the meaning of these articles.

The decisions fall into two distinct groups. Probably the best exposition of the first school's point of view is found in *National Cash Register Company* v. *Demetre*.[4] The company sold a cash register to one Martin reserving ownership until full payment. Before the price was fully paid Martin sold his restaurant (including equipment) as a going concern to Demetre. The Court of King's Bench held, first that Martin's sale of the business establishment was a commercial matter; and secondly that the owner of an object sold with a business establishment cannot revendicate from an acquirer in good faith because in commercial matters the sale of an object not belonging to the vendor is valid. To arrive at this decision the Court considers Articles 1488, 1489, 1490 and 2268 C.C. as a group, all dealing with the effect of the sale of a thing not belonging to the seller on the rights of the owner. This is equivalent to saying that the loss of the right of revendication is a consequence of the validity of the contract. The Court considered that the owner loses his right of revendication where the possessor in good faith has purchased not only in a fair or market place or at a public sale or from a trader dealing in similar articles but also in commercial transactions generally. Although there are isolated cases[5] holding that such a sale in any commercial matter is valid, the weight of authority[6] is to the effect that the sale must be commercial from the point of view of the vendor.

Opposed to this system of considering these articles as all dealing with the same question is the second school which considers Art. 1488 C.C. as dealing with the validity of the contract and Arts. 2268, 1489 and 1490 C.C. as determining the conditions under which the owner's right of revendication is lost. This distinction is seen in the Superior Court judgment in *Tremblay* v. *Mercier*.[7] Lachaine and Tremblay owned a grocery store in partnership. During Tremblay's absence and without his authorization Lachaine sold the store to Mercier. It was held that the exception contained in Art. 1488 (that the sale of an object not belonging to the vendor is valid in commercial matters) applies only to the contracting parties and

[4] (1905), Q.R. 14 K.B. 68.

[5] *Desrosiers* v. *Dault* (1920), Q.R. 59 S.C. 415.

[6] *Themens* v. *McLaughlin Carriage Company* (1915), Q.R. 49 S.C. 393: *Clermont* v. *Peloquin* (1923), 29 R.L. N.S. 364; *Charron* v. *Walker* (1918), Q.R. 54 S.C. 439; *Goldsmith Smelting & Refining Co.* v. *Roy* (1923) Q.R. 34 K.B. 520.

[7] (1909), Q.R. 38 S.C. 57.

has no effect on the rights of third parties.[8] In other words the contract as a contract is valid, but as a contract it is subject to the general rule of Art. 1023 C.C. in that it does not affect third parties.

In 1923 the Superior Court again criticized *National Cash Register* v. *Demetre* in the case of *Kriziuk* v. *McBride*.[9] Kriziuk bought a motor cycle from Shapiro and then had it taken away from him by two employees of McBride. McBride had rented the machine, with a promise of sale to Wilson who, without fulfilling any of his obligations sold it to Shapiro. Shapiro sold to Kriziuk. The question was whether McBride had a right of revendication. It was held, as in *Tremblay* v. *Mercier*, that Art. 1488 C.C. only deals with the validity of commercial sales in which the vendor does not own the property sold, and not with the rights of the owner. In this case, moreover, a corporeal moveable was involved and Art. 2268 C.C. was consulted to determine the rights of the original owner against the ultimate purchaser. Art. 2268 C.C., after stating that possession as proprietor of corporeal moveables creates a presumption of lawful title, lays down the rule that the owner may revendicate within three years. Paragraph 3 provides, exceptionally, that the owner cannot revendicate "if the thing has been bought in good faith in a fair or market or at a public sale or from a trader dealing in similar articles, nor in commercial matters generally." It is obvious that under this paragraph the owner loses his right of revendication where the object is acquired in good faith, in three definite cases:—1, in a fair or market; 2, at a public sale; or 3, from a trader dealing in similar articles. The question remains, what meaning should be attached to that grammatically misplaced phrase, "nor in commercial matters generally"? In *National Cash Register* v. *Demetre*, as we have seen, it was interpreted as extending the circumstances beyond those enumerated above to commercial transactions generally. In *Kriziuk* v. *McBride*, however, it was held that the phrase merely extends the effects resulting from a purchase to possession acquired through other contracts but under the three specified conditions.

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[8] "Tout ce que veut dire l'art. 1488, c'est qu'entre les parties contractantes, la vente de la chose d'autrui est valide, s'ils s'agit d'une affaire commerciale, et, par conséquent, l'acheteur peut être contraint si le vendeur réussit à s'entendre avec le propriétaire de la chose vendue, pour en faire la livraison, de la recevoir et d'en payer le prix, sans pouvoir arguer la nullite de la vente." Lafontaine J. at p. 58.

[9] 29 R.L.N.S. 328.

This view is substantially in accord with that of the Court of King's Bench in *Cassils* v. *Crawford*,[10] where it was held that the words "nor in commercial matters generally" of Art. 2268 C.C. apply "apparently to cases where the possession of the goods is obtained in a commercial transaction, whether by sale or otherwise but under the same circumstances by which a sale would be protected under Art. 1489 C.C." as the head note accurately puts it.

Thus we have two opinions on each of two questions of interpretation.[11] First there is disagreement as to whether the articles should be treated as a group all dealing with one question, the loss of the owner's right of revendication which is treated as a consequence of the validity of the contract; or whether Art. 1488 C.C., under the Title of Sale, should be considered as dealing with the validity of the contract as between the buyer and seller *inter se*, while Art. 2268 C.C., under the Title of Prescription, deals with a separate matter, the loss of the owner's right of revendication against the buyer. Secondly there is a difference of opinion as to whether, under Art. 2268 C.C., par. 3, revendication is denied to the proprietor, without the intervention of prescription, when an object belonging to him is sold by another in a commercial matter as well as in a fair or market, or at a public sale, or from a dealer in similar articles; or whether, on the other hand, the reference to commercial matters generally, merely extends the means of acquisition beyond sale while still requiring that the object be acquired under one of the three circumstances enumerated above.

With these cases before them, three judges of the Quebec Court of Appeal wrote judgments in *Frigidaire* v. *Malone*.[12] Letourneau J. quotes Arts. 1488 C.C. and 2268 C.C. together, and points out that it was not the intention of the legislator to limit to the case of purchase in a fair or market or at a public sale or from a trader dealing in similar articles the derogation from the general principle of nullity applicable to the sale of a

[10] (1876), 21 L.C.J. 1.

[11] It may be noted that in an English case (*City Bank* v. *Barrow* (1880), 5 App. Cas. 664) the validity of a pledge made in Lower Canada was in issue. Evidence as to Quebec law was given on commission but the House of Lords finding the evidence unsatisfactory studied the law for itself and formed its own opinion as to the meaning of the Quebec Code. The decision practically refused to give any meaning to the words "nor in commercial matters generally" and held that Art. 2268 C.C. could not even be extended to include pledge. This was in 1876 before the passing of Art. 1966 C.C.

[12] For the facts of the case see *supra*.

thing not belonging to the vendor. Having thus interpreted these articles he concludes, "Il suffisait donc à l'intimée pour qu'elle dût réussir à faire repouser la demande en revendication de l'appelante, qu'elle eût acquis les effects revendiqués par achat de la nature 'd'une affaire commerciale' (Art. 148 C.C.) on bien seulement 'en affaire de commerce en général'." The pith of Mr. Justice Bond's reasoning on this point is that the sale was a commercial matter, that the sale was consequently valid and that, therefore, the right or revendication was defeated. Galipeault J. writes: "La Compagnie Standard s'occupant de construction, achetant des materiaux pour les renvedre avec profit était une commerçante, au moins faisait acte de commerce dans son contrat avec l'intimée. Les articles 1488 et 2268 viennent alors au secours de l'intimée." In each case it will be noted that Arts. 1488 C.C. and 2268 C.C. are considered together and interpreted as laying down the rule that, in commercial matters the "vente de la chose d'autrui" is valid, and that this validity defeats the owner's right of revendication. Does it not seem that this reasoning is based upon a failure to appreciate that the validity of the contract and the effects of the acquisition on the owner's right of revendication may be two independent matters dealt with in different parts of the Code?

In delivering the judgment of the Supreme Court of Canada, Rinfret J. says that the respondent had raised several defences and had succeeded in both the Superior Court and the Court of King's Bench. Then he states, "Nous sommes d'avis que ces jugements doivent être confirmés pour les motifs suivants". He thus refused to adopt, without actually condemning, the reasoning of the Appeal Court. Rinfret J. found that the frigidaires were corporeal moveables and that Dame Malone, vis-à-vis the Frigidaire Corporation, was a third party in actual possession of these articles as proprietor under a contract with the Standard Construction Co. He proceeds, "A l'aide de ces faits il suffit d'envisager la cause du point de vue du troisième paragraphe de l'art. 2268." So far it looks as though the doctrine of the second school is approved and as though this action arising between buyer and owner will be decided solely on the terms of par. 3. art. 2268 C.C. in accordance with the distinction made in *Tremblay* v. *Mercier* and in *Kriziuk* v. *McBride*. But when in the sentences immediately following that quoted above Rinfret J. adds, "Il est probablement certain comme l'a dit Sir Alexandre Lacoste C. J. dans *National Cash Register* v. *Demetre*, que cet article (2268 C.C.) est le corollaire des articles 1487 et suivants. Mais la portée des articles 1487,

1488 et 1489 est plus générale que celle des paragraphes de l'art. 2268 qui traitent specialement de la revendication. Pour cette raison nous pouvons limiter notre judgment à l'interpretation de ce dernier article en tant qu'il réfère au cas qui nous est soumis."—it is clear that no stamp of approval has been placed on the distinction made in the Superior Court judgments. Although he says it is only "probably certain" that the interpretation of Sir Alexandre Lacoste C. J. is accurate nevertheless his lordship apparently refuses to draw a clear-cut distinction between the purpose of Art. 2268 C.C. and that of 1488 C.C.

In dealing with the second question the judgment seems to be a justification of the second view. Answering the argument raised on behalf of the Frigidaire Corporation, that Art. 2268 C.C. deals only with objects acquired by purchase and that the transaction in question was one of lease and hire of services, the Court states that the effect of the article is not limited to acquisitions by means of sale. It is said, "En introduisant dans le texte les mots 'ni en affaire de commerce en général', ce que le législateur a entendu proteger contre la revendication c'est la possession acquise dans certaines conditions. Il ne s'est pas preoccupé autant de la nature de l'acte d'acquisition que des circonstances dans lesquelles cette acquisition a eu lieu. Pour employer l'expression de Troplong le code protège 'le droit du tiers qui possède la chose avec un acte translatif'." Thus Rinfret J. holds that the words "nor in commercial matters generally" of 2268 C.C. imply an extension of the means of acquisition by which the possessor in good faith is able to defeat the owner's action in revendication. In the next paragraph he states that Art. 2268 C.C. is an exception in favour of acquirers created in the interest of commerce in general and that this was the interpretation in *National Cash Register* v. *Demetre*. It is true that this latter case held the article to be an exception created in the interest of commerce in general and to that extent this statement from the Supreme Court approves the holding of the Court of King's Bench in *National Cash Register* v. *Demetre*. But this does not mean that the Supreme Court has approved the interpretation given therein to the words "nor in commercial matters generally" which was, as we have seen that not only sales in a fair or market place or at a public sale or by a dealer in similar articles but also sales in any commercial matter would deprive the owner of his right of revendication. On the contrary the Supreme Court definitely extended the means of acquisition so as to include other *actes translatifs* as well as sale while keeping

within the specific three cases by considering the contractor to be a dealer in similar articles.

Thus it is impossible to say that the judgment of the Supreme Court definitely settled either of the two main controversies surrounding the interpretation of the articles dealing with the sale of an object not belonging to the seller. By considering the case according to the terms of Art. 2268 C.C. alone, the Supreme Court appears to recognize the distinction as to the separate functions of Arts. 1488 C.C. and 2268 C.C. This view, as was pointed out in *Kriziuk* v. *McBride* by Martineau J.,[13] is backed up by a consideration of the old law. Under the old law sale did not transfer ownership. The vendor was obliged to guarantee to the buyer merely the enjoyment to which an owner was entitled. Logically under this system the sale of an article not belonging to the vendor as a general rule was valid. But when you have sale transferring ownership it is only reasonable that you have a general rule proclaiming such sales null.[14] Art. 1488 C.C. provides for exceptional cases where the sale of an object not belonging to the vendor is valid. Under the old law, as a general rule, the sale was valid. Under the new law, exceptionally, the sale is valid. Under the old law the validity of the sale did not affect the owner's right to revendicate. Under the new law there seems to be no reason for assuming that there is any change in the effects of the valid sale of a thing not belonging to the vendor on the owner's right of revendication. This view is also borne out by the fact that although the buyer must have been in good faith in order to defeat the claims of the original owner (2268 C.C.) good faith is not mentioned as a requisite to the validity of the contract (1488 C.C.)—a perfectly logical distinction. The Supreme Court, however, as we have seen, did much to nullify its seeming approbation of the distinction between Arts. 1488 C.C. and 2268 C.C. by its approving reference to the *National Cash Register* interpretation, that one is the corollary of the other.

In the second controversy the judgment provides a clearer guide. It was held definitely that the words "nor in commercial matters generally" in Art. 2268 C.C. are broad enough to include any contract conveying title (*acte translatif*), the reason given being that the acquirer's title is protected, not because of the nature of the contract, but because of the circumstances surrounding the acquisition. Although it is the natural inference, it is

[13] 29 R.L.N.S. at pp. 330 and 331.
[14] Art. 1487 C.C.

not actually stated that the circumstances are limited to the three cases enumerated. Thus the inference might conceivably be drawn from the favourable references to *National Cash Register* v. *Demetre* that the Supreme Court approved extending the protection to acquisitions in any commercial matter. This inference, of course, could not override the definite statement that the act of acquisition is not restricted to sale. So the only doubt arising from the holding on this second controversy is whether the circumstances under which the acquisition takes place can also be extended.

GEORGE R. W. OWEN.

McGill University.