THE BILLS OF EXCHANGE ACT AND NOVATION IN THE PROVINCE OF QUEBEC *

III

THE EFFECTS OF NOVATION AND INCIDENTALLY OF DELEGATION

The principal effects of novation are covered in the Quebec Code in the five articles numbered from 1175 to 1179, of delegation in article 1180. Of these articles, 1176, 1178 and 1179 are identical with the corresponding 1278, 1280 and 1281 of the Code Napoléon. The Quebec article 1175 is similar to the corresponding 1276 of the French Code except that it contains no equivalent for the words, "ou que le délégué ne fût déjà en faillite ouverte, ou tombé en déconfiture au moment de la délégation", which in the latter follow the phrase, "à moins que l'acte n'en contienne une réserve expresse", and conclude the article. Articles 1177 and 1279 of the two Codes are likewise similar, except that the words "nor can they, without the concurrence of the former debtor, be reserved upon the property of the latter" have been added in the Quebec article. There is no equivalent for them in article 1279 of the French Code. Article 1180 does not appear at all in the Code Napoléon. These changes, with the exception of the addition of article 1180, the Quebec Commissioners characterized in their First Report as "verbal". Of the addition of that article they wrote, "Article 199(207) (now article 1180) has been accepted as an expression of a rule upon which the French code is silent but the importance of which is noticed by Maleville as cited".

The primary effect of novation, from which all the others to be discussed flow, is that it extinguishes an obligation at the same time as it creates a new one. Many of its effects are analogous to those of a payment, since the novated debt is extinguished as if it had been paid. But novation differs from payment in that it has created this new obligation, and from this obligation and the title evidencing it the nature of the juridical relationship between the parties must henceforth be sought. Thus, if a bill of exchange, cheque or promissory note has operated novation, the nature of their obligations is

* The first part of the present article appeared in the October issue of the REVIEW.

henceforth governed by the instrument. For example, the prescription applying to any actions they may take to enforce their rights is now the prescription that under article 2260 governs bills, cheques and notes.

When a debt is extinguished by novation, as by payment, its accessories, the privileges, hypothecs, pledges and the obligations of joint and several debtors and of sureties, are also extinguished.[55] In the same way, any actions available to the creditor, such as the action for the resiliation of a sale for failure to pay the purchase price, lapse along with the obligation to which they attach. As has been remarked previously, these are the consequences which make it unlikely that a creditor would voluntarily consent to novation and, since there can be no novation without his consent, account for the rarity with which a plea of novation is accepted by the courts.

The effects of novation with regard to privileges and hypothecs are dealt with in articles 1176 to 1178 of the Quebec Code. Article 1176 reads that "The privileges and hypothecs which attach to an ancient debt do not pass to the one which is substituted for it, unless the creditor has expressly reserved them". In other words, when novation has operated by change of debts, the creditor and debtor remaining the same, privileges and hypothecs do not as a general rule pass from the old to the new debt so as to retain their former rank, but the creditor is permitted exceptionally to stipulate that they shall pass. For example, the parties to a loan, which happens to be guaranteed by hypothec on the debtor's property, agree that it shall be novated by a promissory note. Ordinarily the hypothec is extinguished, but by article 1176 the creditor is permitted expressly to reserve it as a guarantee of the debt evidenced by the note.[56] In the example given the hypothec affected the debtor's property, but it may happen, though perhaps less frequently, that it affects the property of a third person. Though the article does not expressly so provide, the best opinion is to the effect that in that event the consent of the proprietor to the reservation is required. Those who maintain this view point out that the proprietor's consent is present even where it is the debtor's property that is affected, for the

[55] See *Laferté* v. *Péladeau* (1929), Q.R. 67 S.C. 225 at pp. 228, 229.

[56] Presumably the reserve could be made on the note itself, subject only to the possible effect of article 1228. Apropos of this, see section 176 (3) of the Bills of Exchange Act: "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof."

debtor in agreeing to the novation will have agreed to the reservation. In all cases the reservation must be made at the time of the novation.

When the novation has operated by change of debtors a distinction must be made. Article 1177 reads that, "When novation is effected by the substitution of a new debtor, the original privileges and hypothecs cannot be transferred to the property of the new debtor; nor can they, without the concurrence of the former debtor, be reserved upon the property of the latter." In other words, if A is indebted to B in virtue of a loan and the parties agree that B shall accept the promissory note of C, novating the original debt, the privileges and hypothecs that existed on the property of A as a guarantee of his indebtedness cannot be transferred to the property of C so as to retain their former rank. If they could be, the already-existing creditors of C, with debts similarly guaranteed, would be prejudiced. C may of course agree that the debt represented by his promissory note shall be guaranteed by a privilege or hypothec upon his property as was the original debt upon the property of A, but in that event it ranks as a new creation and cannot prejudice those who already have privileges and hypothecs on C's property. Finally, by an application of the same principle that finds expression in article 1176, when novation has operated by change of debtors the privileges and hypothecs existing on the property of the original debtor may be retained on it at their original rank if the latter consents.

When novation has operated by a change of creditors all privileges and hypothecs affecting the property of the debtor are likewise extinguished, unless of course the debtor agrees to their continuance, in which case they may retain their original rank.[57] As the authors point out, it is illogical that it should ever be possible to preserve the accessories of an extinguished debt at their original rank and transfer them to a new debt. From then on the new debt is guaranteed by a privilege or hypothec ranking from a date antecedent to that on which the debt itself was created, but perhaps the rule is justified on practical grounds so long as no prejudice is caused.

Article 1178 provides that, "When novation is effected between the creditor and one of joint and several debtors, the privileges and hypothecs which attach to the ancient debt can be reserved only upon the property of the codebtor who

[57] Colin et Capitant, *op. cit.*, Vol. II, p. 108.

contracts the new debt." Though the article does not say so, the majority of the authors are of opinion that the privileges and hypothecs can be reserved upon the property of the codebtors who have not contracted the new debt, provided that they have consented to the reservation. This interpretation is in keeping with that usually given to article 1176. Article 1176, so far as its wording goes, applies as well to the situation in which the privileges and hypothecs affect the property of a third person as of the debtor and the only condition mentioned is the express reservation of the creditor. But, as has been said, the best opinion holds that if the property of a third person is affected his consent to the reservation is required. Article 1178 is also inadequate in its failure to provide for the situation in which a debt owing by several joint and several debtors is novated by an agreement, not with one of them, but with a third person. It is clear, however, from article 1177 that the privileges and hypothecs affecting the property of the joint and several debtors can be retained if they agree.

The effect of novation upon privileges and hypothecs has been discussed in a number of Quebec cases in which bills, cheques and notes were involved. Thus in one case the claim of an unpaid vendor to receive by privilege the balance of the purchase price still owing him, out of the proceeds of a sheriff's sale, was met by the plea, denied by the court, that the debt with regard to the unpaid balance had been novated by a promissory note and the privilege in consequence extinguished.[58] In another case, a municipality sued a taxpayer for the amount of its collocated debt, and its claim was contested by another creditor of the taxpayer on the ground that the contestant should have been collocated by preference to the municipality by reason of his lessee's privilege. It was held that the municipality, in accepting the taxpayer's note, had in the circumstances consented to a novation of its debt and the extinction of its privilege.[59] In yet another case the buyer of an immoveable was sued on a draft that had been drawn on him for the unpaid balance of the purchase price and duly accepted. The purchaser pleaded that since the sale he had discovered that certain taxes which had been owing on the property were unpaid, and that under article 1535 he could delay payment of the purchase price. The plaintiff's contention that the

[58] *Noad et al. & Lampson* (1860), 11 L.C.R. 29 (Q.B.).
[59] *St. Charles* v. *Bernard & Frère, etc.* (1914), 16 Q.P.R. 406 (S.C.).

draft had novated the debt and that in consequence there could be no recourse to article 1535 was not maintained, since it was held that in the circumstances there had been no novation.[60] In other cases the effect of a possible novation on existing hypothecs has been the point in issue.[61]

The effect of novation with regard to pledges affecting the novated debt and to any actions available to the creditor is not provided for in the Code. On occasion it has, however, been discussed by the Quebec courts. It has been held that a pledge given to secure a debt could not be retained by the pledgee after the debt had been novated by the giving of a renewal note.[62] Where applicable, the principles governing the effect of novation on privileges and hypothecs govern here too. In another case certain moveables had been delivered to their purchaser on condition that ownership in them should not pass until the purchase price had been paid in full. It was held that, although promissory notes had been given for the unpaid balance of the purchase price, the right of revendication stipulated in the deed of sale was unaffected, since the notes had not in the circumstances operated novation.[63]

The effect of novation with regard to joint and several debtors and to sureties is provided for in the Quebec Code by article 1179, which lays down that :

> Joint and several debtors are discharged by novation effected between the creditor and one of the codebtors.
>
> Novation effected with respect to the principal debtor discharges his sureties.
>
> Nevertheless, if the creditor have stipulated in the first case, for the accession of the codebtors, and in the second, for that of the sureties, the ancient debt subsists if the codebtors or the sureties refuse to accede to the new contract.[64]

Not only are the joint and several debtors discharged by a novation effected between the creditor and one of the codebtors, but, as was said in connection with article 1178, privileges and hypothecs attaching to the original debt cannot be reserved upon the property of the codebtors thus discharged unless they agree.

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[60] *Richards & Co. & Théberge* (1906), Q.R. 15 K.B. 310, maintaining (1905) Q.R. 29 S.C. 308.

[61] See: *Mitchell & Holland* (1889), 16 Can. S.C.R. 687; *Banque Canadienne Nationale* v. *Brousseau et al.* (1930), Q.R. 70 S.C. 167.

[62] *Stevenson & The Canadian Bank of Commerce* (1892), 23 Can. S.C.R. 530 at pp. 541, 542, where article 1975 was referred to by analogy.

[63] *Tremblay* v. *Quinn et al.* (1910) Q.R. 39 S.C. 215 (C. of R.). See also *DeSaint-Aubin & Binet* (1912), Q.R. 22 K.B. 564, maintained by the Privy Council in a judgment reported at (1914) 18 D.L.R. 739.

[64] See also in this connection articles 1103, 1185, 1191 and 1958.

Although article 1179 ordinarily gives rise to no particular difficulties of application, some explanation is required before it can be applied to bills, cheques and notes. Those of the French authors who treat the point are of opinion that, while novation effected with respect to the principal debtor discharges his sureties, the contrary proposition is not ordinarily true and a novation effected with respect to the sureties does not usually discharge the principal debtor.[65] The accessory cannot subsist after the principal to which it is attached is extinguished, though the principal can subsist after its accessory has been extinguished. This rule is maintained by the French authors even when the sureties and the principal debtor are jointly and severally bound for the debt, and when therefore it might be assumed that the first paragraph of article 1179 would have application. The reason given by them is that the surety, although jointly and severally bound with the principal debtor, remains a surety; his joint and several responsibility takes effect only with regard to the creditor, and with respect to the principal debtor he remains an accessory. This general rule is only modified if it is perfectly plain that the novation effected between the creditor and the sureties was intended by the parties to release the principal debtor. The ordinary presumption must always be that the agreement between the creditor and surety was intended only to discharge the suretyship. If it is clear from the surrounding circumstances that the surety intended to take over the obligation of the principal debtor, there is a novation by change of debtors.

How does the principle discussed in the last paragraph concern article 1179 and bills, cheques and notes, if, as there seems no obvious reason to doubt, it is as true of Quebec as of France? The English common law holds that the party who is primarily responsible on an instrument, in the case of a bill the acceptor, and in the case of a note the maker, is *prima facie* the principal debtor and the other parties are with regard to him the sureties. But while in the case of a bill the drawer and the endorsers are sureties with regard to the acceptor, and in the case of a note the endorsers are sureties with regard to the maker, the other parties are also between themselves in the position of principal and surety, each party being *prima facie* a principal debtor with regard to each subse-

[65] Demolombe, *op. cit.*, Vol. XXVIII, Nos. 339 *ff.*, pp. 240 *ff.*; Laurent, *op. cit.*, Vol. XVIII, No. 325, pp. 351, 352; Aubry et Rau, *op. cit.*, Vol. IV, No. 324, pp. 367, 368.

quent party.[66] It will be noted, however, that this is only the *prima facie* relationship of the parties on an instrument. The facts and circumstances attendant upon the making, issue and transfer of a bill, cheque or note may be referred to for the purpose of ascertaining their true relationship, and reasonable inferences derived from these facts and circumstances are admissible to qualify, alter or even invert the relative responsibilities otherwise assigned to the parties by law.[67] Should the same rules as to the relationship of the different parties on a bill, cheque or note be applied in Quebec? It should be emphasized that the analogy between the relationship of the different parties on an instrument and that of principal and surety is not a perfect one in Quebec, but even with that limitation in mind an affirmative answer can be given for the purposes of article 1179. In the face of a similar difficulty it was said elsewhere that the Bills of Exchange Act, and in its silence the common law of England, must be looked to to discover the nature of the obligations of the different parties on an instrument, and this irrespective of the names that might be applied to those obligations in the Act or the common law.[68] In the common law the obligation of the acceptor or maker is said to be that of a principal debtor, and the obligations of the drawer and endorsers those of sureties with regard to him, because in the Act and the common law the obligation of the acceptor or maker is the primary one on the instrument and that of the other parties only accessory. For precisely similar reasons, namely because the obligation of a principal debtor is the primary one and that of the surety only accessory, the civil law holds that a novation effected with respect to the principal debtor discharges his sureties but that novation with respect to the surety does not ordinarily discharge the principal debtor.

As a preliminary, then, to the application of article 1179 to bills, cheques and notes the nature of the obligations of the different parties on the instrument must be sought in the Bills of Exchange Act and, when that Act is silent, in the common law of England. The particular rule of the common law that has importance before article 1179 can be applied is the rule that the acceptor or maker is *prima facie* in the position of principal debtor and the drawer and endorsers, as

[66] Maclaren, *op. cit.*, pp. 379 *ff.*; Chalmers, *op. cit.*, pp. 257 *ff.*; Byles, *op. cit.*, pp. 275 *ff.*

[67] *Macdonald & Whitfield* (1883), 8 App. Cas. 733 at pp. 744, 745.

[68] See the present writer's, "The Bills of Exchange Act and Prescription in the Province of Quebec", 16 La Revue du Droit (1937), pp. 30 *ff.* and 42.

regards him, of sureties, and that the drawer of a bill is *prima facie* the principal debtor as regards the endorsers, and the first endorser, whether of a bill or note, is the principal with regard to subsequent endorsers and so on. This *prima facie* relationship of the parties may however be altered by proof of their real relationship.[69] In Quebec of course it may happen that the true relationship of the parties, existing outside the instrument, must be sought in the civil law, and we have then the curious consequence that recourse is had to the civil law in virtue of a common-law rule. From all this it follows that in Quebec novation effected between the holder of a bill, cheque or note and the acceptor or maker ordinarily discharges the drawer and endorsers, and novation effected between the holder and the drawer or endorser discharges all subsequent parties.[70] On the other hand, a novation effected between the holder and an endorser does not ordinarily discharge the maker, acceptor, drawer or prior endorser, and a novation effected between the holder and a drawer does not discharge the acceptor, unless in each case such is shown clearly to have been the intention of the parties.[71] If it is shown that the *prima facie*

[69] As authority for holding this rule of the common law applicable in Quebec, see *Macdonald & Whitfield* (1883), 8 App. Cas. 733 at pp. 749, 750. This judgment antedates the Bills of Exchange Act, but article 2340 upon which it was decided is similar in wording to section 10 of the Act. See also, Falconbridge, *op. cit.*, pp. 511 and 512.

The holding in *Macdonald & Whitfield*, to the effect that the facts and circumstances attendant upon the making, issue and transfer of a bill, cheque or note may be referred to for the purpose of ascertaining the true relationship of the parties, has been recently approved in *Pépin* v. *Plamondon* (1936), 43 R.L.n.s. 1 (S.C.).

[70] In *Bolduc* v. *Dame Cloutier* (1923), Q.R. 62 S.C. 277, the facts were as follows. The defendant had given her note to the plaintiff in renewal of a note given by her son. She did not meet her note at maturity and the plaintiff accepted the note of a third person endorsed by her. When the maker of this last note became insolvent, the plaintiff accepted a composition with him. It was held that the note of the third person had novated the defendant's own note, and that she being in the position of a surety on this note of a third person, was released by the composition entered into with him.

It is often said that the acceptance of a composition without reserve operates novation. See: Mignault, *op. cit.*, Vol. V, p. 597; Massé, *op. cit.*, Vol. IV, No. 2198, p. 95; *Laferté* v. *Péladeau* (1929), Q.R. 67 S.C. 225 at pp. 228, 229. This also seems to be the English law, Chalmers, *op. cit.*, p. 261.

But compare: *Roy* v. *Faucher* (1885), 17 R.L. 287 (S.C.); *Heney et al.*, v. *Primeau* (1889), 18 R.L. 271 (S.C.); Laurent, *op. cit.*, Vol. XVIII, No. 277, p. 298; Aubry et Rau, *op. cit.*, Vol. IV, No. 324, p. 359.

It would seem to be more accurate to say that, while a composition will usually operate novation, all the facts and circumstances must be examined to see if the intention was actually to release the debtor and in consequence the accessories. The acceptance of the composition may of course have been subject to a reserve of all rights against the sureties, *La Banque d'Hochelaga & Beauchamp etc.* (1905), 36 Can. S.C.R. 18.

[71] See *La Banque Nationale* v. *Betournay et al.* (1887), 18 R.L. 175 (C. of R.)

relationship of the parties on the instrument is not the real one, then these rules must be altered to correspond with the true situation.

Since the usual effect of novation is to extinguish an obligation, it follows as a general rule that when a debtor has given to his creditor a new debtor by delegation, and is himself discharged by novation, the creditor has no recourse against him if for any reason he is unable to collect from the new debtor. This general rule receives application in article 1175, which provides that :

> A creditor who has discharged his debtor by whom delegation has been made, has no remedy against such debtor, if the person delegated become insolvent, unless there is a special reserve of the remedy.

The article is clear enough in itself but its omissions have given rise to difficulties. If the creditor has no remedy against the old debtor when the new debtor becomes insolvent, has he a recourse when the new debtor was already insolvent at the time of the delegation? Article 1276 of the Code Napoléon, which corresponds to our article 1175, after laying down the same rule as the Quebec article in identical phraseology, concludes "ou que le délégué ne fût déjà en faillite ouverte, ou tombé en déconfiture au moment de la délégation". The rule in France, then, is that the creditor has a remedy against the old debtor if the new debtor was insolvent at the time of the delegation. Are we to apply the rule of interpretation, *inclusio unius, fit exclusio alterius*, and conclude that the Quebec Code must be taken as meaning that there is a remedy when the new debtor was already insolvent since it fails to provide for such a situation, or must we conclude that the phrase of the French Code quoted above was omitted because it was intended to adopt a different rule in Quebec?

The Quebec Commissioners have not explained what their intention was in adopting the Quebec article in its present form. But fortunately they gave a strong hint as to their intention in the authorities referred to under their draft article 193 (201), which corresponds to the present article 1175. After certain references to the Code Napoléon, the Roman law and Pothier, which are not helpful in this connection, they refer to a highly significant passage in Domat.[72] In this passage Domat wrote :

[72] Domat, *op. cit.*, livre IV, titre 4, sect. I, No. 8 (Vol. IV, p. 387).

> Celui qui est délégué par le débiteur s'étant obligé envers le créancier, ne peut plus faire revivre la première dette anéantie par la délégation, ni engager les biens que le premier débiteur avait obligés. Et le créancier, de sa part, n'a plus de recours contre celui qui a délégué; soit que le nouveau débiteur devienne insolvable, ou qu'il le fût déjà au temps de la délégation.

Domat, in other words, was clearly of opinion that, when a delegation has amounted to a novation, the general rule that there is no remedy against the old debtor applies whether the new debtor was insolvent at the time of the delegation or became insolvent later. It seems equally clear that the intention of the Quebec Commissioners in drafting the present article 1175 was to adopt a similar rule in Quebec.[73]

The difficulty as to the proper interpretation to be given article 1175 infrequently arises of course in connection with bills, cheques and notes. Ordinarily the giving of a bill, cheque or note does not operate novation, and when there is no novation article 1175 has no application. For instance, where the note of a third party, given for a debt, is not met at maturity due to the maker's insolvency, that insolvency is irrelevant to the question of the creditor's possible recourse against the original debtor, once it has been held that the note did not operate novation.[74] Ordinarily, too, the debtor who wishes to make use of the procedure offered by the Bills of Exchange Act in giving his creditor a new debtor will do so by endorsing a note made by the new debtor or himself making a note which the new debtor endorses. In that event the nature of his responsibility is governed by the Act and the common law of England, even where the civil law holds that the note has operated novation. In the Act and the common law an endorsement is held to be a warranty that the instrument will be paid at maturity and, if it is not paid, because of the maker's insolvency or for any other reason, an action accrues against the endorser. Finally, where a debtor has given his creditor a new debtor by delegation and is himself discharged by novation, the real question with regard to the creditor's remedy in the event of the new debtor's insolvency at the time of the delegation will often be whether the old debtor knew of the insolvency and therefore was guilty of fraud.

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[73] Mignault, *op. cit.*, Vol. V, pp. 610 and 611, comes to the same conclusion, but without considering the effect of the reference to Domat.

[74] See *Cowan & Co. of Gault (Limited)* v. *Vezina* (1903), Q.R. 26 S.C. 7 (C. of R.).

And the question of fraud is a question distinct from that contemplated in article 1175.[75]

An interesting judgment was delivered by the old Court of Review in the case of *Rowe* v. *Cowan*.[76] The defendant had purchased a mare and harness from the plaintiff and for the amount of the purchase price had given the plaintiff the promissory note of a third person. This note had been made out in the defendant's name but had not been made payable to bearer or order. On the back of it the defendant placed his name before delivering it to the plaintiff, but this was held to have been done to authorize the plaintiff to collect as agent and not as the usual endorsement. The note was not met at maturity, the maker having become insolvent in the interval, and the plaintiff thereupon instituted action on the original debt offering to return the note to the defendant. The Court of Review was evidently of opinion, as the Superior Court had expressly stated, that a note payable to the defendant himself and not to his order or bearer could not be transferred to the plaintiff by any method recognized by the law merchant, but they held, unlike the Superior Court, that the delivery of the note to the plaintiff amounted in the circumstances to a sale to him of the defendant's debt against the maker, to be governed by the civil law. Since under articles 1576 and 1577 of the Quebec Code the seller of a debt is not responsible for the debtor's subsequent insolvency unless there had been a stipulation to that effect, which there had not been in this case, the action was dismissed.

It is not suggested that the decision in *Rowe* v. *Cowan* was correct on its particular facts. The note in issue was dated 1890 and it does not appear from the judgment whether the Court considered the Bills of Exchange Act applicable or not, but if it was applicable the Court seems to have failed to appreciate the significance of its section 22, which provides in part that a bill expressed to be payable to a particular person is payable to order. But the case is interesting as showing, what has been suggested already, that a bill of exchange, which fails as such may still operate as a delegation or the sale of a debt. As a matter of fact the same result would have been arrived at in this case had the Court held that the delivery of the note was a delegation which had operated novation and to which article 1175 must be applied.

[75] Baudry-Lacantinerie et Barde, *op. cit.*, Vol. XIII, No. 1749, pp. 57 *ff.* See also *Lewis et al.* v. *Jeffery et al.* (1875), M.L.R. 7 Q.B. 141.

[76] *Rowe* v. *Cowan* (1894), Q.R. 6 S.C. 161 (C. of R.). For another example of a transfer by civil-law methods see, *Dussault* v. *Letourneau* (1921), Q.R. 60 S.C. 507.

Only one further point remains for discussion here. The common law holds that, where the parties on an instrument stand in the relationship of principal and surety to each other, the sureties are discharged if the holder, having notice of the relationship, by a valid agreement grants an extension of time for payment to the principal without the consent of the sureties.[77] On the other hand article 1961 of the Quebec Code provides :

> The surety who has become bound with the consent of the debtor is not discharged by the delay given to such debtor by the creditor. He may in the case of such delay sue the debtor in order to compel him to pay.

Is the rule of the common or of the civil law to be applied when in Quebec it is sought to discover the effect upon those who are in the position of sureties on the instrument of a delay granted the party who is in the position of principal? A owes money to B and endorses over to him the note of C for the amount of the debt. B, without the knowledge of A, accepts a renewal note from C when C is unable to meet the first note at its maturity. What effect has this granting of a delay to C upon A's obligation on the note renewed? The question of course is not one of novation at all, but the two are often at issue in the same case and are so often confused that some reference to it must be made here. But it must always be remembered that the problem as to whether the renewal note mentioned above, for instance, has novated the note renewed is quite distinct from the problem as to whether the delay granted by means of the renewal note has discharged the party who is in the position of surety on the renewed note.[78] As has been said, the granting of a term for payment does not of itself operate novation.

A certain number of cases support the proposition that the common law must be applied when it is sought to discover the effect of a delay granted to the party on the bill, cheque or note, who is in the position of principal upon the obligations of those who are in the position of sureties, but the reasoning seems untenable.[79] If the delay for payment is granted in such

[77] Maclaren, *op. cit.*, pp. 379 *ff.*; Chalmers, *op. cit.*, pp. 257 *ff.*; Byles, *op. cit.*, pp. 279 *ff.*; Falconbridge, *op. cit.*, pp. 810 *ff.*

[78] Some of the Quebec cases confuse the two problems, namely the effect of novation and the effect of a delay granted to the principal debtor. See for instance: *Pelletier* v. *Dame Brosseau* (1890), M.L.R. 6 S.C. 331.

[79] *La Banque Ville-Marie & Mallette* (1888), 33 L.C. J. 8 (S.C. & Q.B.), which was decided before the passing of the Bills of Exchange Act upon article 2340 C.C. It was held by the Superior Court, reversed in appeal

a way that a new obligation is created, which in the circumstances novates the old one, there is no difficulty. It is universally agreed that the civil law governs the question as to the effect of novation and that the sureties will be released because the civil law says so. What justification can be given for making a distinction and applying the common law to the solution of the problem as to the effect of granting a term for payment to a principal debtor? The problems are distinct, as has been said, but the effect in both cases is to extinguish an obligation. It is true that the civil law will sometimes admit that the relationship of two parties on an instrument is that of principal and surety because the common law says so, but it does not follow that all the consequences of so holding must likewise be decided according to the common law. Once the relationship of the different parties on a bill, cheque or note has been decided according to the rule previously laid down, namely according to the common law or to the civil law when reference to it is made by the common law, then the effect of a delay granted to the party, who by that means is found to be in the position of principal debtor, upon the parties who are sureties with regard to him must be decided by reference to the civil law.[80] According to article 1961 of the Civil Code a delay granted by the creditor to his debtor does not discharge the sureties.

In some cases the necessity of choosing between the rules of the common and of the civil law will not of course arise. For instance, it may be shown that the sureties have agreed

on a question of proof, that the English law and not article 1961 must apply; *Guy* v. *Paré et al.* (1892), Q.R. 1 S.C. 443 (S.C. & C. of R.), the decision of the Superior Court and of Davidson J., dissenting in the Court of Review, which were likewise based on article 2340 C.C.

See also: *The City Bank* v. *Hunter and Maitland* (1847), 2 R. de L. 171 (Q.B.); *Desrosiers* v. *Guerin*, (1876) 21 L.C.J. 96 (S.C.); *O'Brien & Semple* (1887) M.L.R. 3 Q.B. 55; *Pelletier* v. *Dame Brosseau* (1890), M.L.R. 6 S.C. 331. In all of these cases the rule of the common law was applied, but without first considering whether it was applicable.

[80] *Guy* v. *Paré et al.* (1892), Q.R. 1 S.C. 443 (C. of R.), where the Court of Review with one dissent reversed the Superior Court; *Lusher* v. *Lacroix et Franco-Belgian Investment Co. Limited et al.* (1914), 23 R.L.N.S. 212 (S.C.); *La Banque d'Hochelaga* v. *Léger* (1918), 25 R.L.n.s. 158 (C. or R.).

See also: *Smith et al.* v. *Porteous* (1832), 8 L.C.J. 116 (Q.B.); *Massue* v. *Crebassa* (1863), 7 L.C.J. 211 (S.C.); *Meikle* v. *Dorion et al., etc.* (1892), Q.R. 1 S.C. 72 (C. of R.), in which the Quebec rule was applied, but without deciding whether the Quebec law was applicable.

Reference might also be made here to the recent case of *Pépin* v. *Plamondon* (1936), 43 R.L. n.s. 1 (S.C.), where it was held that a moratorium declared by law in favour of a debtor, did not, under article 1958 C.C., benefit a defendant who had endorsed a note as surety for the principal debtor.

either in advance or at the time to a delay being extended to their principal, and that agreement is binding upon them both in the common and the civil law.[81] Again, the English rule that the sureties are released by a delay granted to the principal is by no means as broad as many of the Quebec judgments have assumed. It is not applied, for instance, if the holder of the instrument is not aware of the relationship of principal and surety, or if at the time the delay is granted there is a reserve of rights against the sureties, even if the sureties are not parties to the reservation.

* * * *

It is now possible to estimate the effect, such as it is, of section 10 of the Bills of Exchange Act upon the choice of law to govern those questions of novation in which bills of exchange, cheques and promissory notes are concerned. Though the Act contains many provisions respecting the discharge of negotiable instruments and though the courts have always laid down that the discharge of an instrument was a question of bills, cheques and notes in a strict sense, to be governed under section 10 by the Act and the common law of England, it does not follow that that method of discharging an obligation known as novation is to be so governed. If section 10 could be interpreted as going so far as that, it would mean, as must appear from the preceding discussion, that the Dominion had interfered unduly with the right of the provinces to legislate on property and civil rights. Articles 1169 to 1180 of the Civil Code must be applied in Quebec to all questions of novation, even where bills of exchange, cheques and promissory notes are involved. Recourse to the Act and to the common law of England is only to be had in two exceptional cases, and then only as a preliminary to the application of the civil law :

1. Since the second condition required for novation is that there must be a valid obligation, which is extinguished, and a valid new obligation, which is substituted for it, it follows that an instrument invalid under the Act, as amplified by the common law, cannot as such be novated or operate novation;

[81] For an example of an agreement in advance by the sureties, the so-called continuing security, see *Brush & The Molson's Bank* (1893), Q.R. 3 Q.B. 12. For examples of the sureties' consent to the delay, given at the time the delay was extended, see: *The City Bank* v. *Hunter and Maitland* (1847), 2 R. de L. 171 (Q.B.); *Woodbury & Garth* (1858), 9 L.C.R. 438 (Q.B.).

2. The common law rules as to the *prima facie* relationship of the parties on an instrument, and as to the possibility of offering evidence to alter this relationship, must be applied as a preliminary to the application of article 1179 and of article 1961, though this latter article only indirectly concerns novation.

Such are the rules-of-thumb that must govern novation and bills of exchange, cheques and promissory notes.

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