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PAUL L. TURGEON (PLAINTIFF).... APPELLANT;

*May 13, 14
*Sept. 26.

AND

THE DOMINION BANK (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Bank and banking—Advances made to trader—Fire insurance policies—Transfer of eventual claim of loss as security—Validity—Interpretation of statutes—Observations on maxim "expressio unius est exclusio alterius"—Arts. 1981, 2472, 2474, 2432, 2568, 2571 C.C.—Bank Act, R.S.C., 1927, c. 12, s. 75—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 63, 64.

L., a merchant, was a customer of, and, in due course of business, received advances from, the respondent bank. In order to secure the repayment of moneys which he had borrowed, or intended to borrow, L. took out various policies of fire insurance upon his stock, making the loss, if any, payable to the bank. The policies were kept in force, and a fire occurred whereby the stock insured was destroyed or damaged. L. then became bankrupt and the appellant was appointed trustee. The latter brought an action against the respondent bank to recover the proceeds of the fire insurance policies which had been paid to the bank, and which, the appellant alleged, amounted to a fraudulent preference.

Held, that a bank is authorized, under s. 75 of the *Bank Act,* R.S.C., 1927, c. 12, to make to an insured advances upon, or take from him as security, the obligations of fire insurance companies to pay to him the indemnities stipulated in case of loss. The enumeration, contained in clause (*c*) of subs. 1 of s. 75, of certain negotiable securities upon which the bank may lend money and make advances does not have the effect of limiting the generality of the comprehensive power separately conferred by clause (*d*), so as to exclude the general lending powers which appertain to banking. The maxim "*expressio unius est exclusio alterius*" enunciates a general rule of interpretation in the construction of statutes and written instruments in order to discover the intention; but that maxim is not of universal application.

Held, also, that the clause in the policy "Loss, if any, payable to the Dominion Bank" does not have the effect of creating an assignment of the insurance policies to the bank, which had no insurable interest in the goods insured; but that stipulation operates only in the event of loss, and gives effect to the intention of the parties that the indemnities to which the insured may become entitled shall be paid to the bank as the nominee of the insured, the latter remaining bound by and subject to the terms of the policies.

Judgment of the Court of King's Bench (Q.O.R. 47 K.B. 383) aff.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, at Montreal, Archer J., and dismissing the appellant's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

P. St. Germain K.C. for the appellant.

L. E. Beaulieu K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE, J.—M. Lavut & Son, who were merchants, carrying on business in Montreal, had insured their stock in trade against fire in five insurance companies; the policies were issued severally at various times, and in different amounts, from 21st February, 1923, to 6th June, 1926; and, in order to secure the payment of moneys which the firm had borrowed, or intended to borrow, from the defendant bank, these policies, with one exception, contained the provision, in the body of the policy, " Loss, if any, payable to the Dominion Bank." The excepted policy was the first of the series, and it was issued to the assured, M. Lavut & Son, by the Alliance Assurance Company, Limited. By its terms,

> The company agree with the assured (subject to the terms and conditions endorsed hereon which are to be taken as part of this policy) that if, after payment of the premium, the property above described, or any part thereof, shall be destroyed or damaged by fire at any time between the hour of noon of the tenth day of January, 1923, and noon of the tenth day of January, 1924, (standard time at the place of location of the property insured), the company will make good by payment or reinstatement or repair all such loss or damage, to an amount not exceeding in respect of the several matters specified in this policy the sum set opposite thereto respectively. and not exceeding in the whole the sum of three thousand dollars.

Form 2 of the blank endorsements printed on the back of this policy was filled up and executed in August, 1924, as follows:

(1) (1928) Q.O.R. 47 K.B. 383.

Endorsements

Form no. 2,—Loss payable clause

In case of loss the amount for which the company shall be liable shall be payable to Dominion Bank of

Signed at Montreal the 8 August 1923 by

M. LAVUT & SON
per D. LAVUT,
Assured.

The company hereby accepts the above notice that the loss (if any) under this policy shall be payable to the said Dominion Bank.

Signed at Montreal, the 11th August, 1924, by

E. E. KENYON,
Per R. STEWART,
Manager.

The policies were kept in force, and a fire occurred on 20th September, 1926, whereby the stock insured was destroyed or damaged; the firm became bankrupt, presenting a petition on 13th October, 1926, which was granted on that day, and, on 11th November, 1926, the plaintiff became the trustee.

The following facts, among others, are stated in the admissions:

4. All these fire insurance policies were remitted to the defendant at the dates of the issue of the policies for those which were originally made "loss payable if any to the Dominion Bank" and on August 8, 1924, in so far as the Alliance Assurance Company Limited is concerned, and were all held by the defendant as security for advances made and to be made by the defendant to M. Lavut & Son, until the occurrence of the fire, on September 20, 1926.

5. At the time of the bankruptcy of the said J. Lavut & Son and of the fire, the latter was indebted to the defendant in the sum of $8,731 (as shown by sworn proof of claim now in the hands of the plaintiff, èsqualité).

6. The said sum of $8,731 was the balance of an account on advances made from time to time by defendant to the said M. Lavut & Son against the securities held by defendant.

7. After the fire the defendant received out of the fire insurance policies a total of $3,436.79, by cheque made by those fire insurance companies, each cheque payable to M. Lavut & Son and to the defendant, at the different dates mentioned in the evidence, and endorsed by M. Lavut & Son.

The purpose of the action is to have it declared

* * * que les cessions des indemnités par l'assuré M. Lavut & Son, à la défenderesse. provenant des diverses polices d'assurance ci-dessus mentionnées, soient déclarées frauduleuses, nulles et illégales;

and that the plaintiff trustee be adjudged to recover the indemnities for distribution among the creditors.

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Archer J., the learned trial judge, dismissed the action, and, upon appeal, he was upheld unanimously by the Court of King's Bench (1).

The errors now alleged are three; it is contended, first, that the courts below erred in holding that the bank was authorized, under s. 75 of *The Bank Act*, R.S.C. 1927, c. 12, to make advances upon, or to take as security, the obligations of fire insurance companies to pay the indemnities stipulated in case of loss; secondly, that the clause, "Loss, if any, payable to the Dominion Bank," did not operate otherwise than as an assignment of the insurance policies to the bank, and could not have that operation, inasmuch as the bank had no insurable interest in the property insured; and, thirdly, to use the words in which the point is stated, that the courts were wrong

> In finding that such an assignment of the eventual indemnities arising out of the fire insurance policies did not constitute an illegal preference towards the other creditors of the insured, inasmuch as it was made in prevision of an event which necessarily had to render said insured insolvent.

Respecting the first point, I should be reluctant to suggest a doubt as to the right of a trader to make his fire insurance available as a security to a bank in the manner adopted in this case, or as to the power or capacity of a bank to take or hold such a security. The argument arises upon the interpretation of s. 75 of *The Bank Act*, and it is said that, inasmuch as clause (*c*) of subs. 1 expressly mentions certain securities, including "bills of exchange, promissory notes and other negotiable securities," upon which the bank may lend money and make advances, it could not have been intended that the next following clause (*d*), of the same subsection, should extend to securities not included in the preceding specific description. But that is practically, and unnecessarily, to limit the generality of the comprehensive power separately defined by clause (*d*) so as to exclude the lending powers which appertain to banking. The words of the clause are these:

> The bank may * * *
>
> (*d*) engage in and carry on such business generally as appertains to the business of banking.

The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construc-

(1) (128) Q.O.R. 47 K.B. 383.

tion of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela,* by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

> It depends upon the intention of the parties, as it can be discovered upon the face of the instrument or upon the transaction;

per Lord Campbell, L.C., in *Saunders* v. *Evans* (1); *McLaughlin* v. *Westgrath* (2).

It is not denied that the transaction in question belongs to the business of banking within the meaning of clause (*d*), if that clause be not limited by the implied exception for which the plaintiff contends, and it must be remembered that, according to the frame of the Act, exceptions or prohibitions are intended to be expressed by subs. 2 of s. 75. These do not suggest any intention to exclude the lending of money upon securities, merely because the securities are not of the class which is described as negotiable; and the maxim is thus, perhaps, more aptly available to the bank when it contends that, since certain securities not foreign to the business of banking are expressly prohibited, it may be inferred that other securities of that character remain within the scope and operation of the general clause. Several provincial decisions of high authority are cited by the learned judges of the Court of King's Bench in support of the bank's power, and there is none to the contrary. My own view is that the Parliament, in introducing the securities enumerated by clause (*c*) of subs. 1, evidently did not intend to make those enumerations comprehensive, and that, so far as any question arising in this case is concerned, clause (*d*) was meant to have its full effect, subject to the provisions of subs. 2. Moreover, it is difficult to escape the

(1) (1861) 8 H.L.C. 721, at pp. 728, 729.

(2) (1906) 75 L.J.P.C. 117, at p. 118.

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inference from subs. 3 that insurance may be placed for the security of a bank; on the contrary, it is expressly provided that

> Nothing herein contained shall prevent such bank from requiring such insurance to be placed with an insurance company which it may approve.

Secondly, it is urged that the bank, having no insurable interest in the goods insured, was not qualified to receive payment of the amount of the loss under the direction to that effect embodied in or endorsed upon the policies, and the plaintiff relied upon several articles of the Quebec Civil Code, namely, 2472, 2474, 2482, 2568 and 2571, but they do not support his contention. It is said that the words under which the bank claims have effect as an assignment of the policies, but that is not so. The stipulations operate only in the event of loss, and give effect to the intention of the parties that the indemnities to which the assured have become entitled shall be paid to the bank as the nominee of the assured, the latter remaining bound by and subject to the terms of the policies which have been contracted. It seems unnecessary to add to the discussion which this question received in the reasons given by the learned judges of the Court of King's Bench; but it may be observed that the considerations which they advanced are supported, not only as matter of fair interpretation, but also by the authorities in Ontario and in the United States. See, *inter alia*, *McPhillips* v. *London Mutual Fire Insurance Company* (1); *Fogg* v. *Middlesex Mutual Fire Insurance Co.* (2); *Minturn* v. *Manufacturers' Insurance Co.* (3); *Frink* v. *The Hampden Insurance Co.* (4).

I find it somewhat difficult to realize the authority or principle which underlies the third objection. We are referred to art. 1981 of the Civil Code, and it is said that the transaction amounts to an illegal preference under the *Bankruptcy Act*, R.S.C., 1927, c. 11; but the article in question is not intended to prevent a debtor from creating a valid security; and, as to the *Bankruptcy Act*, admittedly none of these securities was given within the period of three months limited by s. 64 of that Act; and, moreover, there

(1) (1896) 23 Ont. App. Rep. 524.
(2) (1852) 10 Cushing (Mass.) 337.
(3) (1858) 10 Gray (Mass.) 501.
(4) (1865) 45 Barbour (N.Y.) 384.

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is evidence uncontradicted that the assured were not insolvent previously to the fire. It was also said that the claim of the bank was invalidated as a transfer of future book-debts under s. 63, which seems to be a hopeless contention. The good faith of the transaction is not justly impeached, and our attention has not been directed to any invalidating provision which applies.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Raymond & St. Germain.*

Solicitors for the respondent: *Myerson & Sigler.*