1956

*Mar. 7, 8
Dec. 21

MINETTE RACINE (*Defendant*) .....APPELLANT;

AND

DAME MINA J. BARRY AND DAME MINA GENE DELANY (*Plaintiffs*) } RESPONDENTS.

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

Liability to account—Trusts and trustees—Loan of company shares to be used as collateral and returned—Shares sold by borrower—Nature of recourse—Administration of property as foundation of liability to account—Civil Code, arts. 1763, 1765, 1766, 1777—Code of Civil Procedure, arts. 566 et seq.

A testatrix left all her property to her daughter M.J.B., "to be used for herself and daughter (M.G.D.) . . . and at the death of my daughter, what may remain is to go to her daughter (M.G.D.)". She appointed M.J.B., the defendant (her cousin) and the defendant's husband to be trustees under the will. Included in the succession were shares in two companies, and these shares were registered in the names of the three trustees and delivered to M.J.B. Subsequently M.J.B. lent the certificates to the defendant for the express purpose of being pledged with the defendant's broker, but with the understanding that M.J.B. would receive the revenue from the shares, and that the certificates would be returned to her at any time she wanted them. Some 18 years later M.J.B. learned that the shares had been sold and, with M.G.D., brought an action against the defendant for an accounting. The action was dismissed by the trial judge on the ground that the only appropriate remedy was a direct action for possession of the shares and their fruits, if any, or for their value. This judgment was reversed by the Court of Appeal.

Held (Rand and Kellock JJ. dissenting): The appeal should be allowed and the action should be dismissed, since the circumstances did not give rise to an action *en reddition de compte*. The account that could be claimed in such an action as this was an account of the administration of property on behalf of another, and the existence of such an administration was an essential foundation of the liability to account. Here the agreement between the parties constituted a loan rather than a mandate to administer the shares either for the estate or for the plaintiffs. The defendant was not a trustee, but a mere borrower. Even if she was liable to account for the dividends (which was doubtful), they had all been paid to M.J.B. It was not necessary to decide whether the loan was a prêt à usage, where the lender retained both the ownership and the legal possession of the thing lent, or a prêt de consommation, where the property in the thing passed to the borrower, whose obligation was to return an equivalent. In either case the sanction if the borrower did not perform his obligation to return was a condemnation in money, and this was not what was claimed in this action.

*PRESENT: Taschereau, Rand, Kellock, Fauteux and Abbott JJ.

Per Rand J., *dissenting*: The transaction between the parties was that of a prêt à usage, where the lender retains the ownership and the legal possession of the property and where the borrower assumes vis-à-vis the lender duties of a mandatary. As borrower, the defendant was under a duty to conserve and restore the shares, together with all their fruits and accessories, and this obligation could be enforced only after its extent was ascertained by an accounting. The shares were to be held for the double purpose of benefiting both the plaintiff and the defendant, the borrower as mandatary assuming a relation to the plaintiff's interest which carried with it an accounting responsibility.

The same result followed on another view of the facts: the persons named by the will as trustees did actually take the legal title to the shares and by their dealings with each other set up at least a *de facto* trust in which each assumed toward M.J.B. and M.G.D. the obligation that the law would have imputed to them, that of fiduciaries.

As to M.G.D., her contingent interest in the substitution was sufficient to entitle her to take this conservatory measure. The dealing in the shares took place in the face of the fiduciary duty toward her, and it was beyond controversy that such a duty called for an accounting.

The rule observed in this Court that on a matter of procedure the opinion, here unanimous, of the highest Court of the Province should be accorded the greatest respect, helped to fortify the conclusion reached on the case as a whole.

Per Kellock J., *dissenting*: It was well settled that this Court would not interfere with the decisions of provincial Courts in a matter of procedure where no injustice had been suffered; and it could not be said that there could be any injustice to the defendant in upholding a right of action requiring her to account for her dealings with the shares, rather than an action for damages in respect of those same dealings.

The loan of the shares constituted a prêt à usage, which is not inconsistent with the right given here to pledge them. Any intention that the property in the shares would pass to the defendant was excluded in the contract. The only significant difference, for the purposes of this case, between a prêt à usage and a contract of dépot, is that the borrower can use the thing loaned whereas the depositary cannot do so without specific permission. But both the borrower and the depositary are bound to restore the identical thing received and, in the case of a chose frugifère, as here, to render to the owner all fruits and accessories, whether obtained as a result of their illicit act or not. They are, therefore, both accountable.

Since the shares ceased by reason of the wrongful sale on the part of the defendant to be in her possession and could not therefore be returned, the plaintiff became entitled to get the equivalent from the defendant and the purpose of the accounting demanded in this action was to establish that equivalent. Apart from the dividends, which might be taken to have been received, the defendant was liable to account for the original shares, for all the shares into which they were converted or for which other shares were substituted, and for the proceeds. It is well settled in the jurisprudence of the Province that where a defendant not only refuses to give an accounting but refrains from

1956

RACINE v. BARRY et al.

furnishing any information either before the action or during the proceedings, the Court may condemn the defendant to pay a liquidated sum.

Assuming that the will did not make the defendant a trustee of the shares and that they became the absolute property of the plaintiff, they were in fact conveyed by her to the three trustees, and the trust thus established was accepted by the trustees. On this point of view also the defendant must account.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial and ordering an accounting. Appeal allowed.

V. Pager, Q.C., for the defendant, appellant.

A. E. Laverty, Q.C., and *C. D. Gonthier,* for the plaintiffs, respondents.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

TASCHEREAU J.:—Dame Mina J. Barry, veuve de Ernest E. Delany, tant personnellement qu'en sa qualité de fiduciaire de la succession de Christina Ross Barry, et Mina Gene Delany, ont institué des procédures légales contre Dame Minette Racine, de la Cité de Westmount, tant en sa qualité personnelle qu'en sa qualité de fiduciaire de la même succession

Les conclusions de l'action sont à l'effet que Minette Racine soit destituée de ses fonctions de fiduciaire, qu'elle soit condamnée à rendre compte de tout l'actif de la succession de Christina Ross Barry dont elle aurait eu la possession, ou qu'elle aurait administré, et qu'elle soit également condamné à payer tout reliquat de compte, à moins qu'elle ne préfère payer à la demanderesse Mina J. Barry, la somme de $40,500, et que dans le cas de défaut de rendre compte, elle soit condamnée à payer ladite somme de $40,500.

La Cour Supérieure, présidée par M. le Juge J. Archambault a rejeté cette action avec dépens, mais la Cour d'Appel (1) l'a maintenue en partie. Elle a infirmé le jugement et a statué que l'intimée devait rendre compte aux demandeurs de tous les biens de la succession de feu Dame Christina Ross Barry dont elle a eu la gestion ou

(1) [1956] Que. Q.B. 576.

la possession, et en particulier du produit de la vente des actions de Steel Company of Canada Limited et de Montreal Light, Heat & Power Consolidated, et de tous les dividendes, boni ou actions supplémentaires qu'elle aurait pu recevoir, le tout sous un délai de trente jours de la date du jugement, à moins que la défendresse ne préfère payer, sous le même délai, la somme de $21,812.80 avec intérêt. A défaut par la défenderesse de rendre compte sous le délai fixé, la Cour a condamné la défenderesse à payer aux appelants, sous un délai de quinze jours après l'expiration du délai fixé pour la reddition de compte, la somme de $21,812.80 avec intérêt à compter de la date du 7 novembre 1947. La défenderesse a été condamnée à payer les dépens et en Cour Supérieure et en Cour d'Appel.

Les faits qui ont donné naissance à ce litige sont assez simples. Christina Ross Barry, cousine de la défenderesse-appelante, a fait un testament olographe le 29 octobre 1927, et elle a ainsi disposé de ses biens:

> To my daughter Mina Jane, wife of E. E. Delany, I leave & bequeath all I possess, to be used by her for herself and daughter (Mina Gene Delany) and not to be used, or disposed of, to her husband, or for him, or for any debt of his, and at the death of my daughter, what may remain is to go to her daughter (Mina Gene Delany), the trustees to be *Mina Jane Delany, Yvon Dupré and his wife Minette Dupré.*
>
> My remains to be cremated, and the least possible expense to be incurred for funeral.
>
> (Signed) Christina Ross Barry.
>
> Also I do not wish Mina ever to go West again, or her money to be used in any business scheme where Ernest is concerned.
>
> (Signed) C. R. Barry.

(Les italiques sont de moi.)

La testatrice est décédée le 6 janvier 1928, et ce testament a été vérifié conformément à la loi.

On voit donc que deux des "trustees", Minette Racine Dupré, la défenderesse, et Mina Jane Delany sont en cause. Le troisième "trustee" Yvon Dupré, mari de Minette Racine Dupré, est maintenant décédé.

Quelque temps après le décès de la testatrice, le Notaire Joron, qui apparemment s'occupait du règlement des affaires de la succession, a, le 16 mai 1928, remis à l'un des "trustees", M. Yvon Dupré, certaines valeurs mobilières, dont un certificat pour 119 actions de la Montreal Light,

1956

RACINE v. BARRY et al.

Taschereau J.

Heat & Power Consolidated, et un autre certificat pour 71 actions ordinaires de Steel Company of Canada Limited. Ces deux certificats étaient enregistrés au nom des "trustees de la succession C. Ross Barry" et M. Dupré en a accusé réception sous sa signature. Peu après, M. Dupré a remis ces certificats à l'intimée qui les a gardés dans son coffret de sûreté. C'était bien une reconnaissance des droits de l'intimée à sa possession personnelle de ces valeurs suivant les termes mêmes du testament, où les mots significatifs "to be used by her" sont employés.

Ce sont les seules valeurs dont il soit question dans la présente cause. Subséquemment, Mina Jane Barry (Delany), la bénéficiaire, remit ces deux certificats à l'appelante qui s'en servit comme garantie collatérale de son compte au bureau de courtage de Shearson Hammill & Co. à Montréal. Il est bon de noter que les actions de Steel Company of Canada Limited furent subséquemment subdivisées en quatre, ce qui faisait que les héritiers détenaient en tout 284 actions de cette compagnie.

Aucun document bilatéral constate la nature de la transaction intervenue entre Mina Jane Delany et l'appelante Minette Racine Dupré. Deux exhibits importants ont été produits au dossier. Le premier, en date de juillet 1928, se lit ainsi:

Westmount, 210 Edgehill Road,

July 28

This is a note to my estate in case of death.

There is in Shearson, Hammill & Co. at their Montreal office (184 St. James Street) deposited as collateral, a certificate of seventy one shares of Steel Company of Canada, and one, of one hundred and nineteen shares of Montreal, Light Heat & Power Consolidated against account Yvon Dupre # 592 # 2. These certificates belong to the Estate of the late Mrs. C. R. Barry & should be returned to her heir Mrs. Mina J. Delany who lent them to me and to whom they belong.

(sgd) M. R. Dupre
" Yvon Dupre

Le second, en date du 24 janvier 1929, est rédigé dans les termes suivants:

Westmount, 210 Edgehill Road

January 24th, 1929.

This is to certify that I have in my possession certificates of one hundred & nineteen (119) shares of Montreal Light Heat & Power Consolidated, two hundred and eighty-four (284) shares of Steel Company of Canada

belonging to the Estate of the late Mrs. C. R. Barry which are deposited as collateral security at the office of Shearson Hammill & Co. Montreal (184 St. James Street).

These shares were lent to me by the heir of the late Mrs. Barry, Mrs. Mina J. Delany, to be used as such, and I agree to return same to her at any time she wants them back.

(sgd) M. R. Dupre
" Yvon Dupre

Dans le cours de l'année 1932, ces actions furent vendues sans doute pour combler le déficit du compte de l'appelante chez le courtier, et celle-ci fut en conséquence dans l'impossibilité de retourner ces valeurs à leur propriétaire, et de remplir l'obligation à laquelle elle s'était engagée. C'est en 1946 seulement que suivit l'action en reddition de compte. Cependant, avant que cette action ne fut intentée, l'appelante versa, comme elle s'y était d'ailleurs obligée à l'origine de la transaction, tous les dividendes déclarés par les deux compagnies, et un certain acompte sur le capital.

Le plaidoyer de la défenderesse-appelante est à l'effet qu'elle n'est pas comptable envers la demanderesse, et elle a en outre soutenu qu'il s'agit en l'occurrence d'un prêt à usage, et que si les certificats de valeurs mobilières qui font l'objet de ce prêt ne peuvent être remis, parce qu'ils ont été vendus, le seul recours de la créancière n'est pas une action en reddition de compte, mais bien une réclamation personnelle en argent pour la valeur des choses prêtées.

Il est certain que s'il s'agit d'un prêt, la transaction intervenue peut avoir le caractère d'un prêt à usage ou d'un prêt de consommation. Le prêt à usage est en effet un contrat par lequel l'une des parties livre une chose à une autre personne, qui peut s'en servir gratuitement pendant un temps, mais qui doit ensuite la rendre au prêteur: *Code Civil,* art. 1763. Dans ce cas, le prêteur entend conserver la propriété de la chose et a droit d'en exiger la restitution. Si la restitution devient une impossibilité, parce que l'emprunteur a disposé de la chose prêtée, le recours du créancier-prêteur est de réclamer la valeur de la chose qui a fait l'objet du contrat.

Au contraire, lorsqu'il s'agit d'un prêt de consommation, le prêteur livre à l'emprunteur une certaine chose qui se

1956

RACINE v. BARRY et al.

Taschereau J.

consomme par l'usage, à la charge par ce dernier de lui rendre une autre chose de même espèce et de même qualité: *Code Civil,* art. 1777.

Des opinions diverses ont été émises concernant la nature du prêt de valeurs mobilières. Ainsi, certains auteurs soutiennent que le prêt de valeurs mobilières constitue un prêt de consommation, vu qu'elles sont susceptibles d'être vendues, et particulièrement, comme dans le cas qui nous occupe. Dans le premier cas, la propriété demeure au prêteur; dans le second, vu qu'il y a consommation, la propriété est transférée à l'emprunteur: Dalloz, Petit Dictionnaire de Droit, p. 997; Dalloz, Nouveau Répertoire, vol. 3, p. 529; Dalloz, Encyclopédie, Droit Civil, vol. 4, p. 90, No 225; Ripert, Traité de Droit Civil, vol. 2, 3e ed. 1949, p. 881.

Je ne crois pas, pour la détermination de cette cause, qu'il soit nécessaire d'établir cette distinction, car, qu'il s'agisse d'un prêt à usage ou d'un prêt de consommation, la sanction à défaut par l'emprunteur de remplir son obligation, doit nécessairement être une condamnation pécuniaire.

Mais, ce n'est pas ce qui est réclamé dans la présente action. La demanderesse-intimée réclame une reddition de compte. Le compte, au sens de la reddition du compte, est l'exposé d'une gestion faite dans l'intérêt d'autrui. C'est la présentation à celui pour qui on a géré d'un état détaillé de ce qu'on a reçu et de ce qu'on a dépensé pour lui, à l'effet d'arriver à la fixation du reliquat, si la recette excède la dépense, ou de l'avance, si la dépense excède la recette. La reddition de compte est due par ceux qui ont administré le bien d'autrui, à quelque titre que ce soit. Ainsi doivent des comptes, tout mandataire ou gérant, le tuteur, l'héritier bénéficiaire, le curateur à une succession vacante, l'exécuteur testamentaire, le séquestre, les associés, le fiduciaire, etc. Il est essentiel, pour donner naissance au droit de l'oyant de réclamer un compte, que le rendant compte ait eu la détention de certains biens, et en ait eu l'administration: Dalloz, Petit Dictionnaire de Droit, p. 292.

L'action en reddition de compte est une action particulière que peut intenter celui dont les biens ont été gérés par un autre. Les règles qui en déterminent la nature sont prescrites par les arts. 566 et suivants du *Code de procédure*

civile. La première question qu'il faut déterminer est de savoir si le défendeur doit un compte; s'il n'en doit pas parce qu'il n'est pas comptable, l'action doit être rejetée. S'il en doit un, il doit être rendu à la personne qui y a droit, et doit contenir dans des chapitres distincts la recette et la dépense, et établir la balance qui peut exister. L'oyant compte est tenu de prendre connaissance du compte et des pièces justificatives au greffe et de produire ses débats de compte, s'il le conteste, dans un délai de quinze jours qui peut être prolongé par le juge sur requête. A défaut par le défendeur de rendre compte, le demandeur peut lui-même procéder à l'établir tel que prévu à l'art. 568 du *Code de procédure civile*, c'est-à-dire qu'il doit établir la recette et la dépense et déterminer la balance qui lui est due.

Cependant, la jurisprudence a accordé certains tempéraments à la rigueur des articles du *Code, lorsque les parties ont transformé l'action en reddition de compte* en un véritable débat de compte et qu'elles ont mis devant le tribunal toutes les pièces justificatives. Les cours ont prononcé que les règles du *Code de procédure civile* n'étaient pas impératives, et que l'obligation ultérieure de rendre compte après l'institution de l'action, devenait inutile lorsque par le débat engagé par le consentement des parties, on en était arrivé à une solution immédiate et définitive: *Cousineau v. Cousineau* (1).

C'est d'ailleurs l'opinion exprimée par la Cour d'Appel dans cette même cause de *Cousineau v. Cousineau* (non rapportée). Dans cette cause, M. le Juge Bissonnette exprimait son opinion de la façon suivante:

> Mais comme les *intimés ont laissé dévier la contestation de manière à transformer leur propre action en un débat de comptes et que les appelants en ont fait autant en mettant, devant le tribunal, livres et pièces justificatives* et en produisant tous les témoins aptes à déposer sur cette gestion sur laquelle n'existe aucun livre de comptabilité, il me paraît évident qu'il faut, dans cette espèce particulière, statuer que la gestion des appelants ne comporte aucun reliquat de comptes et les affranchir ainsi d'une obligation ultérieure de rendre compte, puisqu'un nouveau débat serait inutile.

(Les italiques sont de moi.)

Mais encore faut-il que les parties aient transformé l'action en un débat de compte. La demanderesse-intimée a bien tenté de le faire, mais non pas la défenderesse-appelante

(1) [1949] S.C.R. 694.

1956

RACINE v. BARRY et al.

Taschereau J.

qui n'a pas offert de preuve, n'a produit aucun compte, et qui a nié à la demanderesse le droit d'en réclamer un. La défenderesse a clairement limité le débat à la question de savoir si oui ou non elle était comptable.

A mon sens, la preuve révèle qu'il s'agit purement et simplement d'un prêt consenti par l'intimée à l'appelante, et non pas d'un mandat de gérer ni pour la succession ni pour l'intimée les valeurs mobilières qui ont été transportées. Il s'ensuit que l'appelante n'est pas comptable au sens de la loi vis-à-vis la succession, ni vis-à-vis l'intimée. Elle n'a rien eu à administrer pour personne. Elle n'a pas eu la possession de ces valeurs comme fiduciaire, *mais bien comme emprunteuse,* et c'est en cette qualité seule que sa responsabilité est engagée si la dette n'est pas encore payée.

On a soutenu à l'audience que si l'appelante n'est pas comptable du capital emprunté, elle l'est du moins en ce qui concerne les dividendes qu'elle aurait reçus. Je ne puis accueillir cette prétention, car même si l'appelante était comptable des dividendes, ce qui est fort douteux, ils ont tous été payés de l'avis même de l'intimée, ainsi qu'une substantielle partie du capital.

Je me vois donc à regret dans l'obligation de maintenir cet appel et de rejeter l'action. Le recours de la demanderesse n'était pas par action en reddition de compte, mais bien en remboursement du prêt consenti. C'est une application de la loi dans toute sa rigueur, et l'équité n'y peut apporter aucun tempérament.

Dans une cause de *Bouchard v. Perron* (1) où il s'agissait d'un dépôt, M. le Juge Prévost dit ce qui suit:

> En pareil cas, le recours approprié serait une action afin d'obtenir remboursement du dépôt et non pas une action en reddition de compte.

Vide également *Savard v. Charette* (2); *Boivin v. Rock Shoe Manufacturing Co.* (3); *Dallaire v. Doyon* (4).

Dans la cause de *Donoghue v. Lefebvre* (5), M. le Juge en chef Lamothe s'exprimait de la façon suivante:

> Dans l'action en reddition de compte, il faut prouver que le défendeur a administré des biens pour le demandeur (comme tuteur, curateur,

(1) (1934), 74 Que. S.C. 141 at 148.
(2) (1899), 5 R.L. N.S. 62.
(3) (1915), 49 Que. S.C. 24.
(4) (1930), 49 Que. K.B. 199.
(5) (1919), 29 Que. K.B. 1 at 5.

exécuteur testamentaire, etc.) et qu'il est comptable de cette administration. . . . le jugement doit être basé sur le fait que le défendeur a administré des biens pour le demandeur.

Dans un cas de prêt non remboursé, comme dans le cas qui nous occupe, l'action en reddition de compte n'est pas le remède approprié et ne peut être sanctionnée par les tribunaux. Cette obligation de rendre compte présuppose une administration. Sans doute, il est certain qu'il peut se présenter des cas, où l'emprunteur ou même le dépositaire, peut être tenu de restituer les fruits produits par la chose empruntée ou déposée, et même en rendre compte; mais dans le cas actuel, toute idée d'administration est exclue par la nature même de la convention intervenue. L'obligation contractée a été uniquement de remettre les actions et les dividendes, et ces derniers ont été intégralement transmis à l'intimée.

L'appel doit donc être maintenu, l'action rejetée, et le jugement du juge de première instance rétabli. L'appelante aura droit à ses frais devant la Cour du Banc de la Reine et devant cette Cour.

RAND J. (*dissenting*):—The ground taken on this appeal is essentially one of procedure. The facts are not seriously disputed and the documents which establish the primary allegations are given in the reasons of my brother Taschereau. The litigation, before the courts since 1946, has been befogged by irrelevant topics and the observation made by Bissonnette J. in the opening sentence of his reasons (1):

> Cette cause a pris une ampleur, dans l'appréciation du fait et du droit, que le fond du litige, s'il est circonscrit à la seule question à résoudre, ne justifiait pas.

is highly appropriate. I should add that the affirmative defence to the effect that the proceeds of the shares were applied to speculation debts of the respondent Mina Barry is, on the evidence, without the slightest foundation. The issue, then, is whether the appellant, admitting that in 1929 she received the shares of stock from the respondent Mina Barry for the purpose of tiding over her own account with brokers during the market debacle of that period, is bound to furnish an account of the securities and their

(1) [1956] Que. Q.B. 576 at 578.

1956

RACINE v. BARRY et al.

Rand J.

fruits or that these proceedings disclosing all the facts are to be dismissed as abortive.

Bissonnette J., disregarding the question of a trust between the parties arising under the will, treated the controversy as concerned with a prêt à usage for which the conclusion of the declaration for an account to be rendered, was, in the circumstances, proper; and on this footing I will first consider it.

As between the respondent Mina Barry and the appellant the oral evidence and the letters of acknowledgment by the latter prove all the elements of a prêt à usage. The shares of stock were lent gratuitously for a special purpose; and the borrower agreed to return "these certificates", the individual things in specie, to the respondent when the latter should call for them.

That a share of stock can be the subject of such a transaction is evident both under the old law and the article of the *Code*. Pothier, vol. 5 at p. 7, art. 2, para. 14 says:

> 14. Toutes les choses qui sont dans le commerce, et qui ne se consomment point par l'usage qu'on en fait, peuvent être l'objet de ce contrat.

and the *Civil Code:*

> 1765. Everything may be loaned for use which may be the object of the contract of lease or hire.

In his description of the uses to which the property may be put, Pothier gives a number of examples to distinguish the prêt à usage from that of mutuum, from which it is clear that the same property may be the subject of the one or other, depending on the character of the use authorized. Here, where the actual certificates were to be returned, the terms contemplated their preservation; there was no right to use them otherwise than as a continuing security for so long only as the lender would not call for their return; but physically and as representing a share interest in a company, they were to remain intact.

The lender, in such a situation, retains both the ownership and the legal possession of the property: Pothier, *supra,* art. 3, para. 9, p. 6:

> 9. . . . au lieu que dans le prêt à usage, ce n'est pas la chose même que le prêteur donne, il n'en donne que l'usage; il conserve la propriété de la chose qu'il prête: il en conserve même la possession, comme nous l'avons vu supra, n° 5, et l'emprunteur s'oblige de la lui rendre.

and vis-à-vis the lender the borrower assumes duties at least of a mandataire. The significance of continuing to retain property "à titre d'emprunt" is that, in the absence of a statute, prescription does not run while the property remains in the hands of the borrower.

As borrower the appellant was under a duty to conserve and to restore to the lender the shares, together with all their fruits and accessories. Pothier, *supra,* at p. 31, art. 3, para. 73, deals with fruits:

> Un troisième objet accessoire de cette action, est la restitution des fruits qui sont nés chez l'emprunteur, lorsque la chose prêtée était une chose frugifère.

and in para. 74 with accessories:

> 74. Enfin, on doit mettre au rang des objets de l'action commodati, la restitution de toutes les autres choses accessoires de la chose prêtée;

Dalloz, Encyclopédie, vol. 4, p. 83, item 55, uses the following language:

> 55. Ainsi, lorsque des pièces de monnaie ont été prêtées à un changeur pour les exposer dans sa vitrine. Ou encore, lorsque les objets qui font l'objet du prêt n'ont été remis que pour que l'emprunteur puisse les donner en gage à un tiers, à charge de les rendre en nature. (Baudry-Lacantinerie et Wahl, n° 801).

Applying these conceptions to a share of stock, it is obvious that dividends, in cash or stock, share warrants, new shares representing the subdivision of prior issues, the sum received for an unauthorized sale, intervening profits made out of moneys received, would, apart from damages, all come into consideration. These fruits and accessories must, in Pothier's language, be "rendered" to the lender and being, as here, by their nature expressed in terms of money or money's worth, they are "rendered" only as they may be ascertained by an account and paid over.

The authorities support this view. Garsonnet, ed. 1888, vol. 3, pp. 140-1-2, summarizes the persons liable to be charged with administration of another's property as follows:

> Quiconque est chargé ou se charge volontairement d'administrer tout ou partie du bien d'autrui doit rendre un compte détaillé de sa recette et de sa dépense. Tels sont, à moins qu'ils n'aient prescrit, transigé ou obtenu dispense de rendre compte, les mandataires, tuteurs, associés, copartageants, héritiers bénéficiaires, exécuteurs testamentaires, dépositaires, séquestres, créanciers-gagistes et antichrésistes, envoyés en possession provisoire de biens d'absent, curateurs aux successions vacantes et

1956

RACINE v. BARRY et al.

Rand J.

aux immeubles délaissés par hypothèque, gérants d'affaires, possesseurs de bonne ou de mauvaise foi, comptables de deniers publics; tels sont aussi le père administrateur légal, et l'époux survivant commun en biens qui n'a pas fait inventaire; tels sont, enfin, les conseils judiciaires et curateurs aux mineurs émancipés qui se sont immiscés dans l'administration qui ne leur était pas confiée, ou qu'ils avaient pour unique mission de surveiller.

and in J.-Cl. Proc., art. 529, p. 3, para. 12, as a general indication of the class, most of these items are reproduced with a reference to Garsonnet et Cézar-Bru, Proc. civ. 3e ed. 1913, t. III, n° 815, p. 607 et suiv. My brother Kellock, whose reasons I have had the advantage of reading, has traced the treatment of a dépositaire by the courts of Quebec to a demonstration of their agreement with the view of Garsonnet approved in the volume cited of Juris-Classeur.

In *Whitney v. Kerr* (1), one who had agreed to buy shares of stock in a company was upheld by the Court of Queen's Bench in an action brought to compel the seller, in order to determine the price agreed upon, to render an account of what the shares had cost him. The latter did not hold any property of the purchaser; but he had agreed to sell his own property which in equity and good faith he was bound to keep for the purposes of performing his obligation; and that interest furnished the foundation for the proceeding.

A similar view was taken by Archibald J. in *Brunet v. Banque Nationale* (2), in which the plaintiff, alleging that he was employed to assist in the collection of certain moneys to a percentage of which he was entitled for commission, claimed an accounting by the principal to determine the amount received.

Several decisions in actions brought by commercial travellers for commission for an account by the principal of goods sold have been dismissed; but it is plainly evident that in that relation no semblance of interest in property of the agent is to be found in the possession of the principal, and the cases have no bearing on the situation before us. To the same effect is *La Corporation du Village d'Yamaska v. Sigefroy Lauzière* (3), in which the person called upon for an account was "un simple surveillant" of works carried out by the corporation.

(1) (1910), 20 Que. K.B. 289. (2) (1897), 12 Que. S.C. 287.
(3) (1923), 36 Que. K.B. 142.

This category of prêt is seen to be characterized by the circumstance that a person is charged with the conservation of a principal thing and the administration of its fruits and accessories, coupled with the right to use the thing for a benefit which does not impair its individuality. The shares were to be held for the double purpose of benefits to both the respondents and the appellant, examples of which in Roman law are mentioned in Buckland's Text-Book of Roman Law (1921), p. 471. Toward the interests of the respondents the borrower as mandataire sustained a relation which carried with it an accounting responsibility. That was the view of Bissonnette J. and I am in entire agreement with it.

But in another view of the facts here the same result follows. Whatever may be the proper interpretation of the will as to the vesting of the property in the beneficiaries or the trustees, the persons named as "trustees" did actually take upon themselves the legal title to the shares. It appears that the deceased husband of the appellant as one of the trustees obtained the certificates for these shares as well as others from a notary and they were registered on the books of the companies in the three names as "Trustees of the estate of the late Mrs. C. R. Barry". This was done undoubtedly in the belief that it was in accordance with the provisions of the will and from a reference in a receipt given to the notary to a legal opinion on the will, dated February 7, 1928, about a month after the testatrix's death, under legal advice.

The dividends for 1930 and the first two quarters in 1931 were paid by cheques made out to all three, sent to the deceased husband, endorsed by him and the appellant, and handed over to the respondent, Mina Barry, who cashed them as her own funds. Although the shares were sold in 1931 without the knowledge or consent of the respondent Mina, an account introduced on behalf of the respondents purports to indicate that the appellant remitted personal cheques in favour of the respondent on the shares of the Steel Company of Canada, in 1932 for the amount of $496.80, which represents a rate of $1.75 on 280 shares, and in 1933 and each year following until 1946 for the amount of $337.80 representing a rate of $1.20 on the 284

1956

RACINE v. BARRY et al.

Rand J.

shares less $3. Since the institution of the action, these shares have been split on the basis of five for one. A rate of $1.75 appears to have been declared by the Steel Company for 1931 and 1932, $1.20 in 1933, $1.75 in 1934, $3.17½ in 1935, $3.75 from 1931 to 1940 inclusive, and $3 from 1940 to 1946. A list of similar remittances is shown to represent the dividends from the Montreal Light, Heat & Power Company in the sum of $360 in each year from 1931 to 1946 inclusive; there were 238 shares and the rate $1.50, an annual dividend of $357. From 1937 to 1946 additional sums in even dollar amounts ranging from $200 to $2,550 are shown to have been received in each year, but their appropriation to the principal of either stock or to a contra-loan account is not indicated. The statements were not to show with precise accuracy the accounting result but a *prima facie* proof of the substance of the dealings between the parties and the justification for claiming an account to be rendered by the appellant. The respondent was a novice in business matters and although for some time she had entertained suspicions that the shares had been sold, it was not until 1947 that she learned definitely of that fact.

By and between the parties, therefore, there was set up at least a *de facto* trust in which each assumed towards the beneficiaries, the respondents, the obligation that the law would have imputed to them, that of fiduciaries. The mention of trustees by the testatrix was in all likelihood for the purpose of placing her daughter and granddaughter under a protection in particular against interference with the property by the daughter's husband. Whatever may be said of the ability of the respondent Mina to act for herself, what the testatrix had in mind and what the other two trustees voluntarily undertook was that they should use the wider business understanding especially of the appellant's husband to safeguard the interests of both beneficiaries.

But the respondent Gene, the granddaughter, is in a different and stronger position. She had a contingent interest in the substitution sufficient, in the words of Bissonnette J. "pour prendre cette sorte de mesure conservatoire, afin de préserver les biens qu'elle était censée

recueillir". At the death of her grandmother she was an infant of six or seven years and the dealing in this stock took place in the face of the fiduciary duty toward her; and that that relationship is within the class enumerated by Garsonnet is, in my opinion, beyond controversy.

In this conclusion on the case as a whole I am fortified by the rule observed in this Court that on a matter of procedure the opinion, here unanimous, of the highest Court of the Province should be accorded the greatest respect.

I would, therefore, dismiss the appeal with costs.

KELLOCK J. (*dissenting*):—This action was dismissed by the learned trial judge on the ground that the respondent Mina J. Barry was not entitled to bring an action for reddition de compte against the appellant but that her sole right of action was "a direct action to be given possession of the thing loaned and the fruits of thing if any". He also held that the respondent Mina Gene Delany had no right of action at all. The Court of Appeal (1) set aside this judgment, holding that the respondents were entitled to bring such an action.

The evidence established that the shares here in question were the subject of a loan to the appellant and her husband to be returned to the respondent Mina J. Barry at any time she might ask for them, and that instead of being returned, they were sold by the appellant. The sole issue in the appeal is as to whether the said respondent was entitled to bring an action for reddition de compte or whether her only right was some other form of action.

It is well settled that this Court, although having jurisdiction, will not interfere with the decision of the provincial Courts in a matter of procedure where no injustice has been suffered: *Roessel v. Perlo,* Feb. 10, 1921, cited in Cameron, 3rd ed. 1924, p. 86; *Finnie v. City of Montreal* (2). In the latter case this Court refused to interfere although the matter brought before the Court was "a *demande* almost different from the matter actually in controversy".

(1) [1956] Que. Q.B. 576. (2) (1902), 32 S.C.R. 335.

1956

RACINE v. BARRY et al.

Kellock J.

It cannot be said that there could be any injustice to the appellant involved in upholding a right of action requiring her to account for her dealings with the shares here in question as against an action for damages in respect of those same dealings. It is therefore clear, in my opinion, that the appeal ought to be dismissed on this ground alone. I am, however, also of opinion that the appeal ought to be dismissed on other grounds.

Leaving aside for the moment the question of trust, it is, in my opinion, clear that the loan of shares by the respondent, Mina J. Barry, to the appellant and her husband constituted a prêt à usage, the property loaned to be returned to the said respondent "at any time she wants them back". There is no question that demands for its return were made but never complied with. The obligation of the borrowers was not to return merely "a like quantity of things of the same kind and quality", which would have been the case had the loan been one for consumption within art. 1777 of the *Civil Code*. That it was the specific certificates loaned which were to be returned was expressly acknowledged in writing by the appellant and her husband. Accordingly, arts. 1763 *et seq.* are the relevant articles on the facts of this case. The distinction between the two kinds of contract is clearly stated in Dalloz, Petit Dictionnaire de Droit, p. 998, para. 9, as follows:

> Tout prêt de consommation, à la différence du prêt à usage, suppose l'aliénation de la chose au profit de l'emprunteur.

As the contract here in question did not permit of a sale, any intention that the property in the shares should ever pass to the borrowers was excluded.

> Et toutes les fois que les juges ne peuvent déceler cette intention de transférer la propriété et les risques, ils doivent décider qu'il y a prêt à usage, et non prêt de consommation.

Dalloz, Encyclopédie de Droit Civil, vol. IV, p. 90, para. 216. Again, Dalloz, Nouveau Répertoire, vol. III, p. 529, para. 5:

> Le prêt à usage diffère du *prêt de consommation* en ce que le prêteur conserve la propriété de la chose prêtée (art. 1877) (C.C. 1784), donc le droit de la revendiquer, à condition de respecter l'usage consenti à l'emprunteur. La distinction des deux sortes de prêt est parfois difficile; ainsi, lorsque le contrat porte sur des titres au porteur. Pour la résoudre, il convient de rechercher si le prêteur a entendu, lors du contrat, conserver la propriété de ses titres et en exiger la restitution à l'échéance. Ainsi, ne

constitue pas un prêt à usage, mais bien un prêt de consommation, le prêt de titres au porteur qui n'ont été revêtus d'aucune marque particulière permettant de les individualiser.

Unquestionably the certificates in the case at bar were numbered certificates.

It has been held by La Cour de Cassation, 11 May 1901, D.P. 1902.2.415, that the fact that the borrower of specific shares has the right under the contract to pledge them with a creditor of the latter is entirely consistent with a contract of prêt à usage. Similarly, Huc, Commentaire du Code Civil, vol. XI, p. 207; *S.* 1895, 1.160; *S.* 1906, 1.430.

There is therefore, in my opinion, no question but that the case at bar is one of prêt à usage, as the learned judge of first instance found.

There is no evidence, as the learned trial judge seems to have thought, that the shares were sold by the pledgees, although it may be assumed the latter would not have accepted the certificates from their clients, the appellant and her husband, without the endorsement of the registered shareholders. The only evidence as to why the certificates were not returned to the respondent is that of the latter, who testified that the appellant had told her, some years after the certificates had been loaned, that she had sold them, but no information was then or at any time given as to when the sale had taken place nor as to the amount of the proceeds.

In the course of his judgment dismissing the action, the learned judge of first instance said:

. . . if Plaintiffs have any recourse against Defendant, they can exercise that recourse by direct action, they can sue her as their debtor, asking the Court to condemn Defendant to give back to Plaintiffs the shares that she loaned them or the value of the said shares at the market price with the dividends that were distributed on those shares and that she did not receive, the whole with interest, but she cannot take an action for accounting;

The learned judge does not state his view as to the time as of which the "market price" is to be determined, whether at the date when the shares ought to have been returned or the date of their sale by the appellant or the date of the judgment; *vide* Pothier 5, p. 29, paras. 68, 72; *S.* 1850, 1.455; *S.* 1933, 1.87. As already mentioned, the only person

1956

RACINE v. BARRY et al.

Kellock J.

with knowledge of the date of sale is the appellant, who has not only refused the information but, by her pleading, denied any sale. Moreover, should it be held that the market price on any date other than the date of sale is the relevant date for the purpose of assessing the value by way of damages, the appellant would be enabled, if the price on that date should turn out to be less than the price actually realized by the sale, to put herself, by her own wrongful act, in a position of making a profit, while depriving the owner of the proceeds of her own property.

If such were considered to be a permissible result under the civil law of the Province, it would seem that an owner of property would be in a considerably less favourable position under the regime of that law than would be the case in similar circumstances in other jurisdictions where he may, at his option, sue for damages for the wrongful conversion of his property or for an accounting and recovery of the actual proceeds of sale: *United Australia, Limited v. Barclay's Bank, Limited* (1); *Trusts & Guarantee Co. v. Brenner* (2). Viscount Simon in the case first above mentioned refers, at p. 12, to the case of *Lamine v. Dorrell* (3), decided in the year 1705, where certain Irish debentures had been wrongfully sold, and where Powell J. said:

> But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use.

Any suggestion that another result would be permissible under the civil law would seem to be negatived by the principle of unjust enrichment firmly embedded in that law to a much greater extent than in the common law. An interesting example of its application in circumstances not too remote in principle from the case at bar is the decision of the Cour de Cassation; Gaz. Pal. 1927.1.426.

It is of interest also, in this connection to observe that Bioche, in the second volume of his Dictionnaire de Procédure, under the head of "Compte de Fruits", in treating of fruits required to be rendered in specie, says, at p. 551, para. 45:

> 45. Si le débiteur ne possède pas de fruits, mais qu'il lui soit possible de s'en procurer, même à des prix plus élevés que le prix commun au

(1) [1941] A.C. 1. (2) [1932] O.R. 245 at 248, [1932] 2 D.L.R. 688.
(3) (1705) 2 Ld. Raym. 1216, 92 E.R. 303.

moment de la demande, il doit être forcé à la restitution en nature: l'impossibilité de payer en nature doit être réelle et absolue, elle ne peut être un prétexte pour enrichir un débiteur de mauvaise foi, au préjudice de son créancier. Toullier, 7, n° 63.

Coming to the ground upon which the learned judge of first instance proceeded, it may be that where the subject-matter of loan is a shovel or a machine or similar object, the result reached by the learned judge might be proper but where, as here, the property loaned consists of "une chose frugifère", other considerations apply.

For reasons which will appear, it is useful to compare the prêt à usage with the contract of dépôt. In the one the borrower is entitled to the use of the thing loaned for the purpose "intended by its nature or by agreement" (art. 1766), while in the other, the depositary "has no right to use the thing deposited without the permission of the depositor" (art. 1803). For present purposes there is no other significant difference between the two. Both the borrower and the depositary are bound to restore the identical thing received and to render to the owner all fruits and "accessories". Title remains, in both cases, vested in the owner. Pothier, in speaking of the prêt à usage, refers, in vol. 4, p. 3, para. 5; p. 5, para. 9; and p. 9, para. 20, note (1), to the fact that even the legal possession resides in the lender, the borrower having nothing more than physical possession. See also Mignault, vol. 2, p. 482.

With respect to the remedy by way of an action for reddition de compte, Dalloz, in his Répertoire Pratique, vol. 3, p. 406, defines "La reddition de compte" as:

la présentation, à celui pour qui l'on a géré, d'un état détaillé de ce qu'on a reçu et de ce qu'on a dépensé pour lui, à l'effet d'arriver à la fixation définitive de la situation des parties.

At p. 407, under the heading "Cas où il est dû un compte", Dalloz says, in para. 9:

9. 1. En principe, tous ceux qui ont administré la fortune d'autrui, à quelque titre que ce soit, *avec ou sans mandat,* sont obligés de rendre compte de leur gestion. Ainsi doivent des comptes . . . *le dépositaire.*

Again, Glasson-Tissier, Procédure Civile, 3rd ed. 1936, vol. 5, p. 207, para. 1734, under the heading "Des Redditions de Comptes":

1734. Généralités. Caractère facultatif de la procédure spéciale de la reddition de compte.—Un grand nombre de personnes: . . . *dépositaires* . . .

1956

RACINE v. BARRY et al.

Kellock J.

etc., peuvent avoir à rendre compte de leur gestion. S'ils ne remplissent pas à cet égard leur obligation, ils peuvent être poursuivis en reddition de compte; . . .

Similarly, Garsonnet, 3rd ed. 1913, vol. 3, s. IV, n. 815, p. 607:

Quiconque est chargé ou se charge volontairement d'administrer tout ou partie du bien d'autrui doit rendre un compte détaillé de sa recette et de sa dépense. Tels sont . . . *dépositaires* . . . *possesseurs* de bonne ou de mauvaise foi . . .

Further, Fuzier-Herman, V° Compte, p. 972, para. 14:

Sont donc comptables: toute personne qui accepte un mandat contractuel (C. civ., art. 1793); toute personne qui prend spontanément une gestion d'affaires (C. civ., art. 1372); les envoyés en possession provisoire des biens de l'absent (C. civ., art. 125); le père, administrateur légal des biens de ses enfants mineurs (C. civ., art. 389; V. supra, v° Administration légale, n. 137 et s.); le tuteur (V. infra, v° Compte de tutelle); le curateur d'un mineur émancipé (C. civ., art. 482); le curateur d'une succession vacante (C. civ., art. 813 et s.); l'administrateur provisoire donné à celui qu'on veut faire interdire (C. civ., art. 497); l'exécuteur testamentaire (C. civ., art. 1031); *le dépositaire* (C. civ., art. 1936); le séquestre (C. civ., art. 1956, 1963); le créancier gagiste (C. civ., art. 2079, 2081); le créancier antichrésiste (C. civ., art. 2085-2086); le curateur au délaissement par hypothèque d'un immeuble (C. civ., art. 2174 et s.). Les envoyés en possession définitive des biens d'un absent n'ont pas à rendre compte, puisqu'ils restituent les biens dans l'état où ils se trouvent (C. civ., art. 132).— V. supra, v° Absence.

To the same effect Rolland de Villargues "Répertoire de la Jurisprudence du Notariat", vol. III, p. 17, div. 1, paras. 1 and 2:

En général, ceux qui ont administré les biens d'autrui, à quelque titre que ce soit, avec ou sans mandat, sont obligés de rendre compte de leur administration.

Ainsi, . . . le simple possesseur (549 et 2060, 2°).

Again, Pigeau, "Procédure Civile", 2nd ed. 1811, vol. II, p. 365, under the heading "Compte en Général":

On doit compte toutes les fois qu'on a administré le bien d'autrui, lors même qu'on est propriétaire d'une portion de ce bien . . .

6° Lorsqu'on a géré comme mandataire, *ou même sans mandat.*

As already pointed out, the position of a borrower cannot be distinguished from that of a depositary and in so far as a possessor has no rights to fruits, he is in a similar position.

In Quebec the law is stated in the same sense by Sir F.-X. Lemieux C.J., in *Boivin v. Rock Shoe Manufacturing Co.* (1):

> Sont donc comptables, toute personne qui accepte un mandat contractuel, toute personne qui prend spontanément une gestion d'affaires, le tuteur, le curateur, le dépositaire, le séquestre, le curateur au délaissement, à l'hypothèque de l'immeuble, etc. C'est là le langage des auteurs.

The learned Chief Justice founds himself on a number of authors, including Fuzier-Herman, v° Compte, Nos. 11, 13 and 14. The last mentioned paragraph I have reproduced above.

In *Bouchard v. Perron* (2), Prévost J., without any discussion of doctrine or jurisprudence, purported to found a contrary opinion upon, *inter alia,* the *Boivin* case, overlooking that that case was decided by Chief Justice Lemieux on a view of the law to the direct contrary. *Savard v. Charette* (3), also referred to by Prévost J., contains no discussion of the law and does not advance matters. The other two cases referred to by Prévost J., namely *Donoghue v. Lefebvre* (4) and *Dallaire v. Doyon* (5), are, neither of them, authority for his view.

The point under discussion is expressly covered in the case of a dépôt by Pothier, vol. 5, p. 141, para. 47, as follows:

> 47. Les fruits de la chose donnée en dépôt, que le dépositaire a perçus, sont aussi un des objets de la restitution du dépôt. Soit qu'il ait encore par devers lui la chose qui lui a été donnée en dépôt, soit qu'il ne l'ait plus, il doit tenir compte des fruits qu'il en a perçus, à celui qui la lui a donnée en dépôt; car un dépositaire ne doit profiter en rien du dépôt.
>
> Par exemple, lorsqu'on a donné à quelqu'un des vaches en dépôt, le dépositaire doit tenir compte à celui qui les lui a données en dépôt, du lait et des veaux, sous la déduction des frais qu'il a faits pour la nourriture et la garde
>
> Le dépositaire, tant qu'il n'a pas été en demeure de rendre la chose qui lui a été donnée en dépôt, n'est tenu de rendre que les fruits qu'il a perçus: il n'est pas tenu de ceux qu'on eût pu percevoir, et qu'il n'a pas perçus: mais depuis qu'il a été mis en demeure, il est tenu de tenir compte de tous ceux qu'on a pu percevoir, quoiqu'il ne les ait pas perçus; c'est un effet de la demeure, suivant les principes établis en notre *Traité des Obligations,* n° 143.

(1) (1915), 49 Que. S.C. 24 at 26.
(2) (1934), 74 Que. S.C. 141 at 148.
(3) (1899), 5 R.L. N.S. 62.
(4) (1919), 29 Que. K.B. 1.
(5) (1930), 49 Que. K.B. 199.

1956

RACINE
v.
BARRY
et al.

Kellock J.

Glasson in his "Procédure Civile", vol. 1, p. 542, para. 503, points out that:

> Il y a un certain nombre de cas dans lesquels la loi ordonne une restitution de fruits, et cette restitution peut être accessoire à une demande principale ou faire, elle-même, l'objet exclusif du procès; dans les deux cas, le système de la loi est le même.

And further:

> Tout jugement qui condamne à une restitution de fruits nécessite trois opérations: 1° il faut d'abord fixer la quantité de fruits recueillis et qui doivent être restitués. Le jugement qui ordonne la restitution n'en opère pas en principe la liquidation; il ordonne de s'engager pour cette liquidation dans la procédure de reddition de compte (art. 526 C. pr.); mais cette procédure n'est pas prescrite à peine de nullité, et les juges pourraient, sans recourir à la procédure de reddition de compte, opérer cette liquidation par le jugement, s'ils en trouvaient les éléments dans les pièces du procès (Req., 23 février 1859, D.P. 59. 1. 386; req., 12 décembre 1882, D.P. 83. 1. 188); 2° une fois connue la quantité des fruits à rendre, il faut déterminer la valeur de ces fruits; 3° ensuite on en déduit la dépense; c'est ce qui fait l'objet de la seconde et de la troisième opération (art. 129 C. pr.).

Such being the position with regard to fruits and accessories coming into the hands of a borrower or depositary, is the situation any different where the fruits or accessories come into existence as the result of an illicit act on the part of the borrower or depositary? As one might expect, the law is that the obligation is to render all fruits howsoever obtained.

Pothier, in vol. 5, p. 31, para. 73, in discussing the obligation of the borrower, says:

> Pareillement, si celui à qui j'avais prêté une chose afin qu'il s'en servît pour son usage, l'a louée à un autre et en a retiré un loyer, *ce loyer* qu'il en a retiré est un fruit civil de ma chose, qui doit m'appartenir et qu'il doit me rendre . . .

To the same effect Trudel in his "Traité de Droit Civil du Québec" by Hervé Roch, vol. 13, p. 171:

> Dans le cas, toutefois, où l'emprunteur tire un profit de l'usage illicite de la chose, ce profit appartient au prêteur.

As put by Story on Bailments, 9th ed. 1878, p. 240, para. 269:

> If, by any improper use of the thing loaned, the borrower has made a profit, that profit also belongs to the lender.

The position is the same in the case of a wrongful sale.

Pothier, in treating of dépôt, vol. 5, p. 140, para. 43, says:

> Néanmoins, si c'était par son dol qu'il ne l'eût plus, ou par quelque faute, de l'espèce de celles dont il est tenu; en ce cas, il ne serait pas

déchargé de son obligation de rendre la chose. Faute d'y pouvoir satisfaire, il serait tenu d'en rendre le prix; et même, selon les circonstances, il pourrait être, *en outre,* tenu des dommages et intérêts de celui qui la lui a donnée en dépôt.

Le dépositaire qui a vendu de mauvaise foi la chose qui lui a été donnée en dépôt, n'est pas déchargé de l'obligation de la rendre, quoiqu'il ait racheté la chose pour la garder comme auparavant, et qu'elle soit depuis périe chez lui sans sa faute.

Pothier distinguishes the case of the person who has innocently sold the thing deposited. At the foot of the same page he says:

Un autre exemple, c'est lorsque l'héritier du dépositaire, ignorant le dépôt, a vendu la chose donnée en dépôt, qu'il croyait être de la succession du défunt: cet héritier qui l'a vendue de bonne foi, n'est pas obligé, à la vérité, de rendre la chose à celui qui l'a donnée en dépôt au défunt; mais il est obligé de lui rendre la somme qu'il a reçue pour le prix de cette chose; à moins que celui qui avait donné la chose en dépôt, n'aimât mieux la revendiquer sur l'acheteur par devers qui elle est; auquel cas ce serait à cet acheteur que l'argent devrait être rendu.

It could not be suggested that the right of action of the depositor is on any lower footing as against the depositary who fraudulently sells the subject-matter of the deposit. The liability of the innocent vendor for the price of the thing sold received by him is embodied in art. 1806 of the *Civil Code.* With respect to all of the articles dealing with the obligations of the depositary, namely, arts. 1802 to 1811, the Codifiers, in their sixth report, say, at p. 20:

The contract which forms the subject of this title, like that of the preceding one, (loan) is founded upon principles derived from the Roman law. The ancient law of France as expressed by Pothier in his treatise upon *dépôt* and *séquestre,* following that of Rome with little or no deviation, affords a clear and complete system of rules; these have been, for the most part, adopted in the modern code, . . .

As the property loaned in the case at bar was company shares, the use of which was granted to the appellant for the limited purpose of pledging with the appellant's broker but with the duty of preventing any sale, the appellant was charged with the receipt and rendering to the lender of all "fruits" and "accessories", including dividends and shares to which the shareholder might become entitled by way of bonus or conversion of the existing shares, in a word, any profit whatever which might accrue to the shareholder as such during the currency of the loan. In support of their action in the case at bar, the respondents have pro-

1956

RACINE v. BARRY et al.

Kellock J.

duced evidence under the hand of the appellant that there was a substitution or conversion of the Steel Company shares.

In view of the clear obligation to account described by Pothier, as above set out, it is not necessary to say more but it may be asked how a depositor or lender may ascertain what have been the fruits and accessories while the subject-matter of the loan or deposit was in the custody of the borrower or depositary unless he can call for an account. Without such a remedy he could never put himself in a position to claim or even to give evidence that there had been fruits or accessories, whether properly or illicitly acquired, where the only knowledge of their having come into existence resides with the defendant. As stated by Rinfret J., as he then was, in *Johnston v. Channell* (1):

> The purpose of the accounting is to ascertain whether the monies and securities are still in the appellants' possession, in which case the respondent would be authorized to take possession of them, as her property, in the hands of the appellants. And the alternative purpose of the accounting, if the monies and securities have ceased to be in the possession of the appellants, is to establish what is the equivalent that they should pay to the respondent in lieu of her property.

It is, moreover, provided by art. 406 of the *Civil Code* that

> Ownership is the right of enjoying and of disposing of things in the most absolute manner. . . .

and by art. 408 of the *Civil Code*:

> Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially. This right is called the right of accession.

It cannot be said that the obligation to return the thing loaned rested, for example, upon a borrower by art. 1763 of the *Code*, places the lender in any inferior position to that of an owner whose property is in the possession of a mere possessor similarly obliged by art. 411 to return to the owner the thing and, subject to the terms of that article and art. 412, its fruits.

In *Johnston v. Channell, supra,* the action was brought by the respondent, a married woman, against a firm of brokers, who had received certain moneys and securities

(1) [1937] S.C.R. 275 at 281, [1937] 3 D.L.R. 214.

from her as security for a brokerage account she was operating with them without her husband's consent. The respondent had asked for an account of all moneys and securities delivered to the appellants and, in default, that they be condemned to pay the respondent the sum of $162,000. It was held that the appellants were under obligation to render an accounting, the double purpose of which was as already stated in the passage above quoted. Rinfret J., as he then was, had said earlier in his judgment (1):

> Her right to repossess herself of these monies and securities is strictly based on her title of ownership. It is the undisputed right of every proprietor to hold and to possess his property in the most absolute way (art. 406 C.C.). If, on account of the fact that the monies and securities are no longer in the appellants' possession, it has become impossible to return them to the respondent, then she is entitled to get the equivalent from the appellants; and that is the nature of the prayer in the conclusion of the respondent's declaration.

In the case at bar, the securities which were the subject-matter of the loan were the property of the respondent. They ceased by reason of the wrongful sale on the part of the appellant to be in her possession and thus it became impossible for her to return them. The respondent, therefore, became "entitled to get the equivalent from the appellant" and the purpose of the accounting demanded in this action is to establish that equivalent.

Leaving out of consideration the matter of dividends, which the respondent may be taken to have received in full, the appellant is accordingly liable to account for original shares, for all shares into which they were converted or for which other shares were substituted and for the proceeds. She has not only refused to give an accounting but has refrained from furnishing any information to the respondent either before action or in these proceedings as to the amount which she received on the sale. It is well settled in the jurisprudence of the Province that in such case the Court may condemn the defendant to pay a liquidated sum. The authorities are reviewed and followed in *Whitney v. Kerr* (2); *Bird v. Canadian Car & Foundry Co. Ltd.* (3).

(1) [1937] S.C.R. 275 at 281. (2) (1910), 20 Que. K.B. 289.
(3) (1922), 33 Que. K.B. 166.

1956

RACINE v. BARRY et al.

Kellock J.

With respect to the question of trust, the learned trial judge considered that there was no conveyance by the will of any property to the "so-called trustees" as required by art. 981(*a*) of the *Civil Code,* and that accordingly the appellant was never a trustee of the shares in question.

Assuming, but without deciding, such to be the proper construction of the will, that does not end the matter. If, as the learned trial judge determined, the shares and other assets disposed of by the will became "the absolute property" of the respondent Mina J. Barry under the will, those shares were in fact conveyed by her to the three trustees. The simple fact is that the shares which, at the date of death stood in the name of the deceased Christina Ross and which devolved upon the respondent Mina J. Barry as her property, with substitution in favour of the latter's daughter, were transferred to the three trustees by the respondent Barry, and the trust thus established, of which the beneficiaries were the respondents or one of them, was accepted by the trustees. There is no question therefore, in my opinion, that from this point of view also, the appellant must account.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs, Rand and Kellock JJ. dissenting.

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