

Between

THE KING ON THE INFORMATION OF THE  
ATTORNEY-GENERAL FOR THE DOMINION  
OF CANADA..... } PLAINTIFF;

1906  
Jan. 26.

AND

JOHN CONNOR, MICHAEL CON-  
NOLLY, PATRICK L. CONNOR,  
THOMAS P. CONNOR, KATIE A.  
CONNOR AND JOHANNA CON-  
NOR, EXECUTRIX OF THE ESTATE OF  
THE LATE ROBERT W. CONNOR,  
AND THE CANADIAN BANK OF  
COMMERCE..... } DEFENDANTS.

*Subrogation--Partnership debt--Rights of one partner paying same.*

Under the principles of the Common Law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner. (The law as applied in similar cases by the Courts of Quebec and of the United States discussed.)

INFORMATION filed by His Majesty's Attorney-General for the Dominion of Canada to obtain a declaration of the rights of the several defendants in certain securities held by the Crown under a deed of assignment of the 4th day of March, 1896, made by the defendant John Connor, and others, in favour of the Warden of the Kingston Penitentiary.

The facts of the case are fully stated in the reasons for judgment.

June 8th, 16th and 17th, 1905.

The case came on for hearing at Ottawa.

*F. H. Chrysler, K.C., and C. J. R. Bethune* for the plaintiff.

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Argument  
of Counsel

*A. B. Aylesworth, K.C., and C. Murphy* for the defendant Michael Connolly.

*W. D. Hogg, K.C.,* for the defendant John Connor.

*T. A. Beaumont* for defendants Katie A. Connor, Johanna Connor and Patrick L. Connor.

*Dr. A. A. Stockton, K.C.,* for the defendant Thomas P. Connor.

*J. J. Gormully, K.C., and J. F. Orde* for the Canadian Bank of Commerce.

Mr. *Aylesworth*, for the defendant Michael Connolly, contended that as Connolly had paid the debt of the partnership to the Crown he was entitled to the securities held by the Crown in respect of that debt. Connolly was in the position of a surety called upon to pay the debt of the principal. Moreover, Connor was a defaulter to the Crown, and in respect of such default the Connollys were sureties and not partners. Had Connolly paid a security held by a bank, the bank would have handed over to him the security. That is the position in equity.

Mr. *Hogg*, for the defendant John Connor, argued that Connolly was not entitled to the securities because he, in fact, had not settled the Crown's claim against the partnership. An action was still pending in the courts between the Crown and the partnership. Connolly and Connor must, therefore, be looked upon as joint-debtors to the Crown, and the relation of principal and surety could not possibly arise.

Mr. *Orde* for the Canadian Bank of Commerce, contended that Connolly, as a partner of the firm, was debarred from enjoying the rights of a surety of the firm, and therefore, could not be subrogated to any of the Crown's rights in respect of the securities in question.

(*Lindley on Partnership* (1); *Averill v. Loucks* (2); *Murray v. Stair* (3); *Phipson on Evidence* (4); *London Freehold and Leasehold Property Co. v. Sheffield* (5)).

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Mr. *Beament*, for the defendants Katie A., Johanna and P. L. Connor, contended that the defendant Connolly had no rights as against them in relation to the securities in question.

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Mr. *Bethune*, for the plaintiff, asked that the order of the court be so framed as to relieve the Crown of all responsibility in respect of the securities when handed over to the parties found entitled to them. He also asked for costs.

Mr. *Aylesworth* replied for the defendant Connolly, citing *Housinger v. Love* (6); *The Mercantile Amendment Act*, R. S. O., 1887, c. 122, secs. 234; *Chitty's Prerogatives* (7).

THE JUDGE OF THE EXCHEQUER COURT now (January 26th, 1906,) delivered judgment.

This information is filed to obtain a declaration of the rights of the several defendants in certain securities held by the Crown under a deed of assignment of the 4th day of March, 1896, made by the defendant John Connor and others in favour of the Warden of the Kingston Penitentiary.

On the 23rd day of January, 1895, at the City of Montreal, the late Nicholas K. Connolly, of the City of Quebec, and the defendant Michael Connolly, of the City of Montreal, and John Connor, of the City of Saint John, entered into articles of co-partnership for the purpose of manufacturing cordage and binder twine and for the purchase and sale of fibre; and it was thereby agreed

(1) 7th ed. p. 128.

(2) 6 Barb. 470.

(3) 2 B. & C. 82.

(4) 3rd ed. p. 521.

(5) [1897] 2 Ch. 608.

(6) 16 Ont. R. 170.

(7) P. 332.

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that the articles should apply not only to the fibre that might be purchased and manufactured directly by the parties thereto, but also to such transactions as they or any of them might have or conclude with the Dominion Government in respect to the manufacture and sale of binder twine from the Kingston Penitentiary; and also to any business that might result to any of them in respect of the Central Prison output, then controlled by the Government of the Province of Ontario; and that it should also include the output of any factory leased or acquired by them. The partners were to share equally in the profits or losses, as the case might be, resulting from the proposed operations. The firm name was to be "The Continental Binder Twine Co." Each party was to contribute an equal proportion of the capital required; and it was provided that if either of them should contribute a larger amount than his respective proportion interest should be allowed on such excess at the rate of six per centum per annum. Connor had been a manufacturer of twine and cordage. The Connollys were brothers, and at the time were in partnership with each other, as contractors, under the name and style of N. K. and M. Connolly. Subsequently, after the death of Nicholas K. Connolly, Michael Connolly purchased the former's estate, and acquired his interest in the matters now in controversy. During the existence of the partnership between the Connollys and Connor, namely, on the 15th day of April, 1895, Connor entered into an agreement with the Warden of the Kingston Penitentiary with respect to the sale of all the binder twine then on hand at the Penitentiary and all that should be there manufactured between the date of the agreement and the fifteenth day of August then next. By this agreement it was, among other things, provided that Connor should be the agent for the sale of the twine; that the Warden should fix the price at which it was to be sold, but not

to exceed the price at which the same grade of twine manufactured elsewhere in Canada was sold; that the sales by the agent were as regards credit to be upon the usual terms in the trade; that the agent should guarantee the sale of all the twine and be personally responsible to the Warden for the aggregate value thereof at the prices so fixed, less ten per cent; that the Warden was to deliver the twine as the agent might desire; and the latter was to furnish the Warden with collateral security to cover the value at the selling price of each shipment of twine delivered to him or to his order. During the season of 1895 a large quantity of twine was delivered by the Warden to Connor, for which the latter pledged as security a number of bonds of the Baie des Chaleurs Railway Company. These bonds, which were at the time of no commercial value, were the property of N. K. and M. Connolly. The following is Michael Connolly's explanation of how he came to hand them over to Connor for the purpose for which they were used:

“ Well, I did give Connor some bonds in Kingston. “ He came to me and told me when we were building “ the dredge there, if he could get the entire output “ from the Department and give the people credit he “ could probably make ten per cent. more on the output, “ and asked me if we had any bonds lying around we “ could deposit with the Government, or with the Warden “ rather. At the time I must tell you I had every con- “ fidence in Mr. Connor's honesty; and I said, No we have “ not anything except some Baie des Chaleurs bonds, but “ they are of no commercial value at present; and I do “ not think the Warden would take them. Oh, he said, “ the Warden will take them all right. I said if you “ think he will take them I will send them up to you. “ So I telegraphed to Quebec and got the bonds sent up “ in a package. I turned them over to Mr. Connor's

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“ brother who took them out and gave them to the  
 Warden of the Penitentiary.

“ Mr. AYLESWORTH: Your brother?—A. Thomas P.

“ Connor, and the Warden of the Penitentiary never  
 looked at them, but threw them in the safe. The  
 poor old man lost his job over it afterwards.

“ Mr. HOGG: These bonds were returned to you?—

“ A. They were.

“ Q. For some reason, either that they were of no  
 value as a security, or what?—A. Well, I think the  
 principal reason was that we assumed the debt.

“ Q. That you assumed the debt of the firm?—A.

“ Yes sir, and they were of no commercial value either.”

On the 18th day of February, 1896, the Connollys and Connor dissolved the partnership created by the articles of the 23rd of January, 1895. From one of the recitals in the agreement by which the dissolution was affected, it appears that owing to the large sums of money paid into the business and placed to the credit of the copartnership by the Connollys there was at the time due to them a large sum of money, and to meet this all the assets of the co-partnership, including the debts due to it, were assigned to N. K. and M. Connolly, who undertook to account to Connor for any sum realized in excess of what was due to them. At that time nothing had been paid to the Warden of the Kingston Penitentiary on account of the twine delivered to Connor. October was the time of settlement in the trade, and the Warden had rendered an account in November. The amount of Connor's indebtedness was \$49,670.13, and he had been pressed for payment. Of this sum he had actually collected about twenty-three thousand dollars, of which he had, he says, paid about nineteen thousand dollars to the Connollys or to their order. Michael Connolly does not deny the receipt of this money, but he says he did not know it

was realized from the sale of the Kingston Penitentiary twine.

About the 29th day of January, 1896, the Continental Twine and Cordage Company, under which name, instead of that of "The Continental Binder Twine Co." mentioned in the articles of co-partnership, Connor and the Connollys had carried on the business of manufacturing twine at Brantford, received from the Consumers' Cordage Company a cheque for \$22,421.65, which was afterwards endorsed and delivered to Michael Connolly for N. K. and M. Connolly. This amount was paid for stock sold from the Brantford Mill, and according to Connor the sale was effected to provide funds to be applied in payment *pro tanto* of the amount due to the Warden of the Kingston Penitentiary. Michael Connolly denies this. He says that at that time he did not know that anything was due to the Warden on the twine that Connor had sold as the Warden's agent. This is one of a number of instances in which there is a direct conflict of testimony between the two witnesses. Connor says that Connolly did know, and a letter is produced which it is contended supports Connor's statements. The letter is dated at Montreal the 27th day of January, 1896, and is addressed by Michael Connolly to the defendant Connor. The following is an extract therefrom:—

" We got a telegram from Hume this morning saying  
 " sale would take place if not postponed, which has made  
 " us rather anxious, so much so, that N. K. concluded to  
 " go and see you at Brantford so as to get you to with-  
 " hold the payments until after we see what the Govern-  
 " ment is disposed to do. We sent Hume up to get out  
 " a statement of last season's operations while you are  
 " there. I would suggest that you would not part with  
 " any funds until after Saturday next, for if parties have  
 " to buy in the dredge we want to be in a position to  
 " take care of ourselves."

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At that time a dredge belonging to the Connollys was under seizure and was about to be sold to satisfy a judgment that the Crown had obtained against them and others, and they wished Connor to keep in hand any moneys that might come in from the Consumers Cordage Company, or otherwise, in order that the same might be available in case they had to buy in the dredge. So far there is no conflict of testimony. And it is also clear from the letter that Michael Connolly anticipated that the money might be paid out by Connor to some one unless he were requested not to do so. Now as to that, Michael Connolly says that there were at the time no outstanding debts of the company (Notes of Evidence, p. 179), and his explanation is that Connor had to pay "for hemp and raw material and what was going on." (Notes of Evidence, p. 56). The substance of Connor's version of the matter is contained in the following extract from his evidence:—

"Q. You received this letter from Mr. Connolly, I suppose, on the day following? This is dated 27th January, 1896. This is the letter which we read. There is one clause in it 'I would suggest that you would not part with any funds until after Saturday next.' I do not know what day Saturday would be. For if parties have to buy in the dredge we want to be in a position to take care of ourselves.' What funds had you on hand?—A. That would be funds that were in anticipation of coming in, the cheque of the Consumers' Cordage Company. Mr. Connolly when he wrote that letter had no advice that the funds had come to hand. About the 30th January the cheque came in. About the 29th January. That was about the date the cheque was due, and Mr. Connolly from previous understanding with me knew that that cheque was to be remitted forthwith to the warden to apply on account. Then Mr. Connolly followed that let-

“ter up to Brantford, and I think he arrived there about  
“the 30th January, and the first question he inquired  
“was whether I had received that letter. I said I had.  
“Then he inquired if there was any word from the  
“Consumers’ Cordage Company in respect of the cheque.  
“I said, yes, the cheque came in yesterday and I have it  
“here in my wallet, putting my hand into my inner coat  
“pocket, opening the wallet and showing it to him. Mr.  
“Connolly says you notice from the contents of the letter  
“that we may have to buy in the dredge, and it may  
“become necessary for us to protect ourselves by having  
“funds. Now I would like to take this cheque and use  
“it for a few days, after which time I will be in a  
“position to make it good. Well, I says, Mr. Connolly,  
“before doing this you must not forget that the under-  
“standing was that this amount should be remitted to  
“the Warden. You know that already \$23,000 has been  
“collected on account of the Continental Twine sales, and  
“you have already got \$19,000 of the \$23,000 that has  
“come in. Now the two notes are past due with the  
“Warden, the 5-day note for \$20,000 and the 15-day  
“note for \$29,600 in favour of the Warden. I said it is  
“important that a payment equivalent to the amount  
“collected on the Twine account should be remitted,  
“and then I could explain delay for the balance, because  
“it is in the form of uncollected indebtedness. Well,  
“he says, after a few days I will be able to make a  
“remittance equivalent to this cheque, you will be safe  
“in letting me have it, so on those representations I  
“handed the cheque of the Consumers’ Cordage Com-  
“pany, which was drawn in favor of the Continental  
“Twine and Cordage Company, and I put the stamp  
“Continental Twine and Cordage Company then on it,  
“and endorsed it by John Connor, and handed that  
“cheque to Mr. Connolly.”

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Connor being further pressed for payment of the amount due to the Warden disclosed to Mr. Newcombe, the deputy of the Minister of Justice, the fact that the Connollys had been partners with him in the business which he had been carrying on. He also gave such security as he could to cover the amount of his indebtedness. This security consisted of a promissory note dated the 4th day of March, 1896, and made by John Connor, Patrick L. Connor, Thomas P. Connor, Robert W. Connor and Johanna Connor, whereby for value received they promised to pay to the Warden of the Kingston Penitentiary at his office at Kingston thirty thousand dollars, with interest, thirty days after date; and of a deed of assignment also bearing date of the 4th day of March, 1896, whereby John Connor, Patrick L. Connor, Thomas P. Connor, Robert W. Connor and Katie A. Connor transferred to the Warden certain bonds, twine on hand, debts and other property mentioned in the assignment and in the schedules thereto.

Mr. Newcombe, for the Government, sought also to obtain payment from the Connollys of the amount due, on the ground that they were co-partners with Connor, and there was considerable negotiation on the subject. The Connollys did not admit liability; but on the 30th of March, 1896, they transmitted to the Honourable John Costigan a cheque drawn by their brokers, R. Moat & Co. on The Molsons Bank in favour of the Deputy Minister of Justice for twenty two thousand four hundred and sixty one dollars, and this cheque was handed to Mr. Newcombe with a slip attached thereto on which was written "paid on behalf of John Connor." The amount of the cheque which was cashed and credited to Connor's account, represented approximately the difference between Connor's indebtedness and the face value of the debts alleged to be outstanding for twine sold and of the twine said to be on hand.

On the first of April of the same year John Connor assigned by way of mortgage to the Halifax Banking Company all his interest in the securities mentioned in the deed of assignment to the Warden of the 4th day of March, 1896 excepting the real estate and shipping. The second assignment was subject to the first, and was intended to secure an indebtedness of John Connor to the bank of an amount exceeding the sum of twelve thousand dollars. Due notice of this second assignment was given to the Warden of Kingston Penitentiary and to the deputy of the Minister of Justice. The defendant, The Canadian Bank of Commerce, has succeeded to the rights of the Halifax Banking Company, and at the time of the hearing of the information herein Connor owed the bank a sum of \$10,714.61 and interest, of which amount it appeared that at least \$7000.00 was secured by the mortgage.

On the 8th day of April, 1896, Connor, by a letter addressed to Michael Connolly, in consideration of the latter settling the Government's claim for binder twine, agreed, among other things, "to assign insurance policies amounting to twelve thousand dollars in addition to all the security then contained in the schedule annexed to the agreement by which the Dominion Government were given collateral security under date March 28th last past."

There is an error in the latter date but there is no doubt about the agreement intended. At the time the letter was written Connor informed Connolly of the assignment by way of mortgage to The Halifax Banking Company, and because it had been given he agreed to assign and afterwards did assign to Connolly the insurance policies mentioned. That, in substance, is Connor's statement as to that transaction, and it is not denied by Connolly.

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Between the date of the assignment of March 4th, 1896 and the 13th of July of the same year there was realized from the securities therein mentioned an amount something in excess of five thousand dollars, so that Connor's indebtedness to the Warden, at the latter date, stood at the sum of \$21,649.52. It was then proposed that the Warden should, on payment of this sum by Michael Connolly, assign to him the promissory note for thirty thousand dollars that has been referred to, and also the property, debts and securities mentioned in the deed of assignment of the 4th day of March, 1896. This was to be done in pursuance of a provision contained in that instrument whereby it was in substance provided that in the event of the Warden endorsing or transferring to any person the said note, he was empowered to convey, assign, transfer and hand over to such person the balance of the real and personal property mentioned therein and in the schedules thereto. Accordingly an indenture of assignment was prepared in triplicate to give effect to that proposal. It bore date of the 13th of July, 1896, and was made between the Warden of the Kingston Penitentiary and Michael Connolly. It did not contain any express covenant on the part of the latter to pay the amount mentioned therein as due to the Warden. It did however contain some provisions not now material, which the assignee was to observe for the benefit of John Connor and the other parties who had joined with him in giving the assignment of the 4th day of March, 1896, and who now with him appeared and assented to this assignment of the 13th day of July of the same year.

After execution this deed of assignment in triplicate and an assignment by the Warden to Michael Connolly of the note for thirty thousand dollars mentioned, remained in the hands of the deputy of the Minister of Justice. The following letter discloses his view of the conditions under which he held the same.—

“ DEPARTMENT OF JUSTICE,

“ OTTAWA, 12th August, 1896.

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“ GENTLEMEN,—I am directed to inform you that the  
“ Deed of Assignment of 13th ultimo, by which the  
“ Warden of the Kingston Penitentiary transfers to  
“ Michael Connolly the securities held by him under the  
“ Deed of Assignment to him of the 4th of March last,  
“ from John Connor and others, has been duly executed  
“ by the several parties thereto, and is ready for delivery.  
“ The first mentioned deed has, as you are aware, been  
“ prepared and executed for the purpose of giving effect  
“ to the agreement entered into between Michael Con-  
“ nolly and this Department, whereby, in consideration  
“ of such assignment, and the endorsation to him of the  
“ promissory note of \$30,000 therein referred to, he was  
“ to pay the balance of Mr. Connor’s indebtedness to the  
“ Department, amounting to \$21,649.52.

“ I am to inform you that the Assignment will be  
“ delivered and the note endorsed to Michael Connolly  
“ upon payment of the amount mentioned.

“ I am further to state that the Department requires  
“ immediate payment from you, or one of you, of the  
“ amount, both because of the obligation under the agree-  
“ ment and deed, to which I have referred, and because  
“ of the liability therefor arising out of the partnership  
“ formerly existing between you and Mr. Connor, on  
“ behalf of which partnership Mr. Connor’s agreement  
“ with the Warden of the 15th April, 1895, was made,  
“ and his liability thereunder incurred; and I am to add  
“ that unless immediate payment be made, I am directed  
“ by the Minister to institute legal proceedings against  
“ you for the enforcement thereof.

“ I am, Sir,

“ MICHAEL CONNOLLY, Esq., “ Your obedient servant,  
“ N. K. CONNOLLY, Esq., (Sgd.) “ E. L. NEWCOMBE,  
“ Montreal, Q.” “ Deputy Minister of Justice.”

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Afterwards Mr. Michael Connolly went to Mr. Newcombe and refused to carry out the agreement, or to pay the money. He claimed to have delivery of the assignment and the benefit thereof without paying anything more. He said he would not pay a cent more. Mr. Newcombe regarded the position he took as untenable and ridiculous and retained the assignments. When Connolly refused to pay the amount due to the Warden, he thought the negotiation was off altogether. Subsequently he caused an information to be filed in this court against the Connollys and Connor to recover the amount mentioned. The warden of a penitentiary is a corporation sole and as such may sue and be sued, but he acts for the Crown, and the debt in question was in reality a Crown debt. The information was filed on the 23rd of September, 1896, and by it a claim was made against the defendants upon the ground that they were co-partners in the transaction out of which the liability arose; and also upon the deed of assignment of July 13th, 1896. The statement of the claim set up on this instrument is to be found in the 13th paragraph of the information. Mr. Newcombe appears to have inserted it as a matter of caution, and not, he tells us, because he could support it by his evidence. This deed of assignment in triplicate was afterwards removed from the files of the Department of Justice by some person, but by whom is not known, and it has never been recovered. A copy of it is in evidence.

The information of the 23rd day of September, 1896, did not come on for hearing until the 24th day of April, 1900, and in the meantime the sum due to the Crown had been greatly reduced by amounts realized from the securities that the Crown held. At the latter date the amount due to the Crown was eight thousand eight hundred and twenty dollars, and for that sum, with costs, there was on the 25th day of April, 1900, judgment

against all the defendants, Nicholas K. Connolly and Michael Connolly having consented that such judgment should be entered against them on the condition that the securities which the Crown then held should be retained by the Crown until the accounts should be adjusted between them and the other defendant John Connor. With reference to these securities it also appears that Mr. Barwick, acting for Mr. Michael Connolly, preferred to the Minister of Justice a claim to have them transferred to Michael Connolly, and that the latter under his advice, offered the Minister to pay the balance then due in order to obtain the securities. Mr. Barwick thinks that this occurred sometime in the year 1902. If so, it was subsequent to the date of the judgment mentioned.

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On the 7th day of December, 1900, John Connor assigned to the Crown a claim he had against the Hobbs Hardware Company of the City of London, for which an action had then recently been brought in the High Court of Justice of Ontario. The assignment was subject to a prior assignment of the same claim to Robert W. Connor to secure the payment of the sum of eighteen hundred dollars and interest, and any amount recovered by the Crown was to be held in trust to secure the payment *pro tanto* of the judgment of the 25th of April, 1900. Robert W. Connor's claim has, it appears, been satisfied, but no part of the moneys accruing from this assignment has, so far as I understand the matter, been applied on account of the said judgment.

On the 31st day of May, 1901, an information was filed by the Crown against John Connor, P. L. Connor, Thomas P. Connor, Johanna Connor, and Johanna Connor, administratrix of the estate of R. W. Connor, deceased, to recover a balance of \$9,002.32 and interest alleged to be due on the note for thirty thousand dollars made in favour of the Warden of Kingston Penitentiary

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on the 4th day of March, 1896. That action was not further prosecuted.

Eventually the judgment of the 25th of April, 1900, was satisfied by the amount of it being taken into account in the settlement of a number of matters then outstanding between Mr. Michael Connolly and the Crown. The statement of account in which the amount of the judgment with interest and costs appears as a debit entry against Mr. Connolly was sent by the Auditor-General to the solicitor then acting for Mr. Connolly on the 21st of December, 1903, and the matter was closed on the 8th of January following by the payment to him and his acceptance of a balance of \$754.75 which the statement showed to exist in his favour.

Of the securities that the Crown held to secure Connor's indebtedness to the Warden of the Kingston Penitentiary it now has in its possession, or under its control, the following:—

1. Bonds of The Tobique Valley Railway Company, as follows:—
  - 12 1st Mortgage Bonds, Nos. 97 to 108, both inclusive;
  - 70 2nd Mortgage Bonds, Nos. 281 to 350, both inclusive;
  - 16 1st Mortgage Bonds, Nos. 27 to 42 both inclusive;
  - 44 2nd Mortgage Bonds, Nos. 421 to 464, both inclusive;
  - 27 1st Mortgage Bonds, Nos. 43 to 69, both inclusive; and
  - 12 1st Mortgage Bonds, Nos. 15 to 26, both inclusive.
2. A Certificate numbered 235, for 100 shares in the John Good Cordage and Machine Company.
3. The promissory note for thirty thousand dollars that has been mentioned.

4. A promissory note, dated the 16th day of December, 1895, for \$5,777.74, made by Frank P. Killeen and John A. Monniger in favour of John Connor.

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5. A balance in cash amounting to \$1,950.76.

With regard to other property and securities that the Crown held as security for the amount due to it, the twine, or such of it as turned out to have been manufactured at the Kingston Penitentiary, was sold, and the debts due for that which Connor had disposed of were collected as far as that was possible. For the rest it is said that a number of the things mentioned in the schedules to the deed of assignment never came into the possession of the Crown. As to others there were prior charges, and as to some, and that refers especially to the real estate, there is nothing to show what the grantor's title was or whether he had any. It seems to me, therefore, to be convenient to deal at present with those things only that have been enumerated, and to reserve any question that may arise as to any other matter, giving any of the parties interested leave to apply for further directions. I am also compelled from the want of sufficient information as to the source or sources from which the balance of \$1950.76, mentioned as being in the hands of the Crown, was derived to reserve the question as to what disposition should be made of it.

The defendants, Patrick L. Connor, Katie A. Connor, the wife of John Connor, and Johanna Connor, the executrix of the estate of the late Robert W. Connor, appear and disclaim any interest in the matters now in controversy. They demur to the information and ask that it be dismissed as against them with costs.

The defendant, Thomas P. Connor, is the owner of twenty-seven first mortgage bonds of the Tobique Valley Railway Company which he and Robert W. Connor assigned to the Warden of the Kingston Penitentiary by

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the deed of the 4th day of March, 1896, as security for John Connor's indebtedness to the Warden. He now claims these bonds with all the interest that has been collected upon them. Otherwise he is not interested in any of the questions arising in this matter.

The defendant, The Canadian Bank of Commerce, claims under the indenture of assignment by way of mortgage of the 1st day of April, 1896, to have a transfer and delivery by the Crown of all securities and property (excepting real estate and shipping) still remaining in its hands and comprised in such indenture, and particularly certain items of property enumerated in the statement in defence. This enumeration includes the items of property that have been mentioned as being now in the possession of the Crown, except the promissory note for thirty thousand dollars and the twenty-seven first mortgage bonds of the Tobique Valley Railway Company that Thomas P. Connor claims. It also includes some items as to which there will, for the reasons stated, be no decision at present.

The defendant, Michael Connolly, claims to stand in the position of the Crown in respect to everything remaining of the property assigned by the deed of March 4th, 1896, and to be entitled thereto and to the benefit of the note of that date for thirty thousand dollars, and to have the action brought thereon continued to judgment. This claim is in the statement in defence grounded upon an agreement alleged to have been made in the month of March, 1896, between the Crown, as represented by the Attorney-General of Canada, and himself whereby in consideration of his paying the balance of Connor's indebtedness, all the securities mentioned were to be transferred to him, and he alleges that he paid such balance and is entitled to the securities. The evidence does not in any way support this alleged agreement. There was no doubt negotiation on the subject, but

nothing came of it other than the indenture of the 13th of July, 1896, that was not delivered. Any claim that Michael Connolly now has to such securities depends upon the documents and facts that have been already mentioned.

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The defendant, John Connor, admits the claim of the Canadian Bank of Commerce to the securities comprised in the mortgage of the 1st day of April, 1896, but subject thereto claims that he is entitled to a reconveyance of all the property, real and personal, transferred by him under the deed of assignment of the 4th day of March, 1896. He contests Michael Connolly's claim to the securities mentioned, and among other things alleges that if the accounts of the co-partnership were taken it would be found that Michael Connolly individually and as executor for Nicholas K. Connolly, deceased, is indebted to him, Connor, in a large amount.

The first question to be determined is this:—Did the deed of assignment of July 13th, 1896, to which reference has been made ever become operative and effective in favour of Michael Connolly? If it did, then he is entitled to succeed as against all the other defendants claiming any interest in any of the securities mentioned. In the view I take of the evidence that question must be answered in the negative, and if his claim is to be supported it must be on other grounds. And that brings us to a second question? Is he entitled to be subrogated to the rights of the Crown under the deed of the 4th day of March, 1896, by reason of the payment of the sum of \$22,461 on the 30th or 31st day of March, 1896, or because he satisfied the judgment of the 25th of April, 1900? As to that, it seems clear that he and his brother Nicholas K. Connolly were co-partners with John Connor in the transactions out of which the latter's indebtedness to the Warden of the Kingston Penitentiary arose; and if what Connor states as to the circumstances under

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which Michael Connolly about the last of January, 1896, got the cheque for \$22,421.65 made by the Consumers' Cordage Company in favour of the Continental Twine and Cordage Company, is true, it would be difficult to see how any equity would arise in favour of the Connollys by reason of the payment of the sum of \$22,461 made to the Crown in March following. But these matters are in dispute between Mr. Connolly and Mr. Connor, and perhaps it is not necessary to come to a conclusion as to whether credit should be given to one or to the other. It does appear to me however that Mr. Connor's version of the matter fits in with Mr. Connolly's letter of the 27th day of January, 1896, better than Mr. Connolly's does. And then, while of course it may be true that the latter had no information about the state of the account between the Warden and Mr. Connor, it is not what, having regard to the facts about which there is no room for dispute, would be expected of as good a business man as Mr. Connolly. The articles of co-partnership of the 23rd day of January, 1895, contemplated an arrangement by one or more of the co-partners with respect to the binder twine manufactured at the Kingston Penitentiary. Mr. Connolly knew that Mr. Connor had made some arrangement of that kind, and he had provided the bonds that enabled the latter to get possession of the twine. The Connollys were to share in the profits and losses accruing from this transaction. Under such circumstances one would naturally expect them to be interested in knowing what the state of the account between the Warden and Connor was.

But assuming Mr. Connolly's version of the matter to be correct, it appears to me that his claim to be subrogated to the rights of the Crown because of the payment of this sum of \$22,461, or of the amount of the judgment of the 25th of April, 1900, cannot be sustained.

The articles of co-partnership, to which reference has been made, were entered into by the Connollys and Connor in the Province of Quebec. The business of the firm or company was for the most part to be carried on in the Province of Ontario; and the transactions, out of which the liability for which the securities were assigned, arose, occurred there. In the Province of Quebec subrogation to the rights of a creditor in favour of a third person who pays him is either conventional or legal (1). Subrogation takes place by the sole operation of law in favour of a party who pays a debt for which he is held with others or for others; and has an interest in paying it (2). The doctrine of subrogation by operation of law has been adopted and acted upon by the courts of the Province of Ontario; and in addition it is in that Province provided by statute that every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied, by the payment of the debt or the performance of the duty (3). This provision was adopted from the 5th section of the English Mercantile Amendment Act, 1856 (19 and 20 Vict. c. 97, s. 5) which was enacted to meet the case of a surety who paid off the bond debt of his principal, for which he was bound; and who as the law then stood could not require the creditor to assign to him such bond debt because it was satisfied and extinguished by the very act of payment by the surety (4).

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(1) The Civil Code, Art. 1154.

(3) The Mercantile Amendment Act,

(2) The Civil Code, Art. 1156 (3). R.S.O. 1897, c. 145, ss. 2, 3 and 4.

(4) DeColyar's Law of Guarantee, 3rd ed. p. 226.

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No case has been cited, and I am not aware of any, in which in England or in Ontario a partner paying a partnership debt has been subrogated to the rights of the creditor against a co-partner, and in the Province of Quebec it has been held that a partner who has paid the amount of a judgment rendered against him and his co-partner, jointly and severally, is not entitled to be subrogated in the rights of the plaintiff, but has an action *pro socio* only for his recourse (1). In some of the States of the United States, where the doctrine of subrogation has been carried further than it has been in England or in Ontario, there are cases in which a partner paying a partnership debt has been subrogated to the rights of the creditor against a co-partner. But that has happened in cases in which there had been a settlement of the affairs of the co-partnership; or where something had occurred to place one partner in the position of a surety for his co-partner (2).

And it is on the latter ground, that in this aspect of the case, it was argued that Michael Connolly's claim to the securities in question should be supported. It is alleged that Connor was, in fact, a defaulter to the Crown; and it was contended that in respect of such default the Connollys were sureties and not partners. The facts have been stated. Connor obtained possession of the twine mentioned by depositing with the Warden of Kingston Penitentiary bonds of no commercial value provided for that purpose by the Connollys. Connor collected some twenty-three thousand dollars from the purchasers of the twine and paid nothing to the Warden. Something over nineteen thousand dollars of the amount so collected was paid over to the Connollys by Connor. Michael Connolly

(1) *Leduc v. Turcot*, 5 L.C.J. 96. *mont*, 35; *Fessler v. Hickernell*, 82

(2) *LePage v. McCrea*, 1 Wend. Penn. 150; *in re Smith* 16 Nat. 164; *Baily v. Brownfield*, 20 Penn. Bank. Reg. R. 113; *Bittner v. 41*; *Shattuck v. Lawson*, 10 Gray *Hartman*, 139 Penn. 632; and *Mc- 140*; *Field v. Hamilton*, 45 Ver- *Donald v. Holmes* 29 Pac. R. 735.

knew that the bonds were of no commercial value and of the use that was to be made of them. He denies having any knowledge as to where the nineteen thousand dollars came from. But even so, the important thing and that which made all the rest possible was the advantage taken of the Warden in depositing with him worthless securities, and as to that Michael Connolly's position is little, if any better, than Connor's. In respect of the matters in issue here the Connollys were, I think, co-partners with John Connor, and not sureties for him.

But assuming even that by reason of the premises some equity has arisen against John Connor in Michael Connolly's favour, no effect ought to be given to it against the parties to the note for thirty thousand dollars, who joined in making it to secure a debt for which the Connollys as well as John Connor was liable. Their equity in the matter would be greater than Connolly's. And as between Michael Connolly and the defendant Thomas P. Connor the same would be true in respect of the twenty-seven first mortgage bonds of The Tobique Valley Railway Company that he and Robert W. Connor assigned to the warden.

The answers that have been given to the questions stated, and the considerations that have been mentioned dispose, I think, of all the grounds upon which Michael Connolly's claim to the securities in question could be sustained as against any of the defendants other than John Connor. But as between Michael Connolly and John Connor there still remains the letter of the 8th day of April, 1896, and the condition contained in the judgment of the 25th day of April, 1900; and as to these matters the result appears to be that neither of them is as yet in a position to claim an assignment or reconveyance of anything comprised in the schedules of the deed of assignment of the 4th day of March, 1896. Their accounts have not been adjusted or settled. In this

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aspect of the case, and in the condition recited in the judgment mentioned that the Crown was to retain these securities until such accounts were adjusted, I have found some difficulty in making any disposition of the matters in controversy. But as more than five years have elapsed since that judgment was entered, it seems reasonable that in favour of other parties having superior rights to such securities the Crown should not be held to the terms of the condition, and that a declaration should be made in favour of such parties.

There will be a declaration :

1 That the makers of the promissory note of the 4th day of March, 1896, for thirty thousand dollars, are discharged from any liability thereon and are entitled to have the same delivered to them or to their order.

2. That the defendant Thomas P. Connor is the owner of and entitled to the twenty-seven first mortgage bonds of The Tobique Valley Railway Company that he and Robert W. Connor assigned to the Warden of the Kingston Penitentiary by the deed of assignment of the 4th day of March, 1896, and that he is entitled to have the same transferred and delivered to him.

3. That the defendant the Canadian Bank of Commerce is entitled to a transfer and delivery to it (to be held under and for the purposes mentioned in the indenture of assignment by way of mortgage of the 1st day of April, 1896) :

(a) Of the other first mortgage bonds of The Tobique Valley Railway Company, hereinbefore mentioned ;

(b) Of the second mortgage bonds of that company hereinbefore mentioned ;

(c) Of the stock certificate No. 235 of The John Good Cordage and Machine Company ; and

(d) Of the note of Killeen & Monniger of the 16th December, 1895, in favour of John Connor.

And I reserve all other questions arising in the premises, including the question of costs, and give leave to any party hereto to apply for further directions.

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*Judgment accordingly.*

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Solicitors for the plaintiff: *Chrysler & Bethune.*

Solicitor for the defendant John Connor: *T. A. Beament.*

Solicitors for the defendant M. Connolly: *Murphy & Fisher.*

Solicitor for the defendants P. L. Connor,

Katie Connor and Johanna Connor: *W. J. Code.*

Solicitor for the defendant T. P. Connor: *A. A. Stockton.*

Solicitors for the defendant, the

Canadian Bank of Commerce: *Gormully & Orde.*

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