Unreported Judgments

From time to time, judgments of interest to the legal community, which do not, for one reason or another, appear in the regular reports in this province, will be published in the *McGill Law Journal.* In all cases, the words in smaller type are extracted *verbatim* from the judge's notes; words appearing in larger type are those of the editors.

BANKRUPTCY — EQUITABLE JURISDICTION OF THE COURT

In the matter of the bankruptcy of: ALLIANCE CREDIT CORPORATION (Bankrupt), and ARMAND GAGNON (Petitioner), and MONTREAL TRUST COMPANY (Respondent) and TRUST GENERAL DU CANADA (Intervenant), S.C.M. (Bankruptcy) 7864, May 11, 1971, Mr. Justice Paul Carignan.

Bankruptcy — Default of bankrupt under Trust Deeds — Provision for "premiums" Equity — Nature of the premium — Is it due in case of bankruptcy — Bankruptcy Act, 1952, B.S.C., c. 14, ss. 93, 140(1).

Petitioner, in his quality as trustee to the assets of the bankrupt, seeks an order declaring him entitled to a certain sum, for the benefit of the mass of creditors. The amount, $1,072,359 is held by Respondent, trustee by virtue of a Trust Deed, subsequent to the bankrupt's default and the Respondent's realization of the assets. The essence of the case is whether Respondent is, in its quality, entitled to "premiums" provided for by the Trust Deed, especially since these premiums would entitle the secured bond holders to receive more than 100 cents on the dollar and thereby greatly prejudice the unsecured creditors. In reaching its decision, the court invoked its equitable jurisdiction and allowed the petition.

Mr. Justice Carignan

The Petitioner seeks an order declaring that he is entitled to payment to him, for the benefit of the mass of creditors, of a sum of $1,072,359.52 together with interest in such amounts as would be payable thereon in accordance with the terms of the Trust Deeds under which the Respondent is acting, as well as judgment against the Respondent ès-qualité in that amount, and other subsidiary conclusions which will be examined below. The amount involved represents the camulative total of "premiums" in varying percentages, ranging from 4 to 6%, of the principal amounts of notes designated as Series "E" and Series "J" to "R" inclusive secured by certain Trust Deeds — the so-called "Principal Trust Deed" of Novemnber 1, 1962 and a number of Supplemental Trust Deeds. (Exhibit R-1) —

The Respondent is the Trustee named in these Trust Deeds. It is vested with certain powers including, obviously, the power to realize on the property of the borrower, Alliance Credit Corporation and its subsidiaries, in the event of default, and the various events of default are spelled out in the Principal Trust Deed. In addition to the right to be repaid principal and interest, the abovementioned series of notes were characterized, in the Supplement Trust Deeds securing them, by the purported right of the holders thereof to be paid a *premium* under certain conditions; the holders of notes Series "A" to "D" inclusive and notes Series "F" to "I" inclusive, had no such right.

On June 19, 1967, Respondent, as Trustee for the noteholders, gave notice of default to Alliance Credit Corporation (Exhibit R-3). The default complained of not having been cured in the ensuing 60 days, Respondent proceeded to declare the security constituted by the Trust Deeds to have become enforceable and gave notice of this fact on August 21, 1967 (Exhibit R-4). Alliance Credit Corporation acknowledged its default on the same day (Exhibit R-5) and Respondent complied with the appropriate provisions of the *Special Corporate Powers Act* by publishing notices of default (Exhibit R-6). Pursuant thereto, Respondent took possession of the assets of Alliance Credit Corporation and commenced its realization thereon.

A receiving order was granted against Alliance Credit Corporation on February 14, 1968 and, on March 12, 1968, the appointment of Armand Gaguon as Trustee was confirmed at the first meeting of creditors. Prior to the receiving order, the Respondent had already distributed almost $21,000,000 to the secured noteholders and by the end of June, 1969, a total of $62,333,714.45 had been so distributed.

According to Mr. Macklaier's testimony of June 11, 1970 (page 13), these distributions were made without particular imputation of any sums to capital, interest or "premium", and cheques were made without any breakdown by item. The Respondent has withheld from final distribution a sum of money which will be sufficient to satisfy a judgment, should the Petitioner (or the Intervenant) be successful in these proceedings. Such retention of funds by respondent is in accordance with an exchange of correspondence between counsel for Petitioner and counsel for Respondent (Exhibit R-2) and obviates the necessity of dealing with conclusions (a) and (b) of Petitioner's amended petition.

An intervention by Trust Général du Canada was received by this Court after the petition was filed. The intervention was not contested in writing by either of the other parties and the Intervenant made no proof, apparently contenting itself with a statement of the various legal propositions set forth in the intervention itself. Trust Général du Canada, as Trustee under various Trust Deeds (Exhibit I-1) securing senior debentures, avers that if the amounts of money representing "premium" and interest thereon are not awarded to Petitioner on grounds of equity or on a basis which is personal to the Petitioner, in his quality as Trustee in bankruptcy, such amounts would form part of a residue or excess of Alliance Credit assets accruing to the Intervenant in virtue of the floating charge created by Exhibit I-1. Accordingly, the Intervenant concludes simply for the rejection of conclusion (e) of Petitioner's peti-

tion. The implication is that if the Petitioner were to succeed on grounds of law, the amounts withheld by Respondent should be paid over to the Intervenant for distribution by the latter to the senior debentureholders. This position is consistent with the understanding reached between the Intervenant and the Petitioner, reflected in Exhibit P-3.

The issue for determination by the Court is whether Petitioner is entitled to the amount of money represented by the "premium" and interest accrued thereon, whether this sum is the property of the Respondent for distribution to the secured noteholders or whether this sum should accrue to the benefit of the Intervenant.

It should be noted immediately that the secured noteholders have received (or the Respondent has available for final distribution, in addition to amounts withheld for "premium" and interest thereon) the entire amount represented by the face amount of the notes, as well as all interest called for by the Trust Deeds, Exhibit R-1. They have received, or will have received, no matter what the terms of the present judgment may be, the full amount of their investment plus full interest since all realization expenses, including legal and other expenses, have been provided for in the realization by Respondent, over and above payments to the secured noteholders.

The unsecured creditors, on the other hand, are unlikely, on the basis of the proof before the Court, to realize any dividend whatsoever unless the Petitioner succeeds in the present case. The total of unsecured creditors amounts to $7,685,484.80, of which $5,183.69 constitutes privileged claims. Included in the unsecured portion is a contested claim amounting to $3,994,000.00 as well as $3,633,296.20 owing to junior debentureholders, whose claim is admitted by the parties to be unsecured. The Petitioner, in his testimony, avers that there will definitely be more unsecured claims filed.

The Petitioner urges five grounds in support of his Petition:

(a) A proper reading of the Trust Deeds issued reveals that, on a proper construction, the premium stipulated would not be payable in the circumstances of this case;

(b) The Bankruptcy Court is a Court of equity and, exercising its equitable jurisdiction, this Court ought not to enforce payment of a premium to the detriment of the unsecured creditors in the circumstances of the present case;

(c) The *Bankruptcy Act* provides for payment of only one hundred cents on the dollar on all provable claims and no more, and payment of a premium in the circumstances of this case would yield a payment in excess of one hundred cents on the dollar to holders of the secured notes (Section 93);

(d) It would be unjust, unconscionable and unreasonable, in the circumstances of this case, to enforce the payment of what is effectively a penalty, payment of which has traditionally been refused in matters of bankruptcy, both in the Province of Quebec and in all countries whose bankruptcy legislation is based on the English *Bankruptcy Act*, as is the case of the *Bankruptcy Act* of Canada;

(e) Only the principal Trust Deed, bearing formal date of November 1, 1962, the third supplemental Trust Deed purporting to authorize the issue

of Series "F", "G", "H" and "I" and the seventh supplemental Trust Deed have been registered, all of the other supposed Trust Deeds not having been registered, and, consequently, since none of the Trust Deeds securing the issue of notes purportedly entitled to redemption premiums have been registered, no redemption premiums are due.

Before dealing with any of these arguments, it would be useful to determine the nature of a "premium" as this term is used in relation to the issuing of securities. The Respondent, in its contestation, characterizes it as something akin to "liquidated damages or a penal sum" the objective of which is, in part, to compensate the purchaser of a security for the cost of being forced, prior to the normal maturity date of the security, to receive payment and then investigate and place his funds in another suitable investment.

Mr. Paul Vien, a witness with much experience in the securities market, describes it as one of the techniques commonly used to make it less interesting for a corporate borrower to redeem securities prematurely in order to benefit from a falling interest market, (Page 80):

> "A. For instance, if a company for reasons of, by the sale of assets or for other reasons, comes into a large cash position, it may redeem under certain terms and conditions. But obviously, if you borrowed, that is different, than if you go out and borrow it at 6% while your original yield was at 7.
>
> Q. And use your 6% money to buy back your 7%.
>
> A. That's right. And this is why we normally say that you won't have the right to do this for a period of X years..."

This is the concept described by Mr. Vien as "non call for financial advantage". To accomplish the same purpose, that is, to discourage premature redemption to the disadvantage of the investor, securities will frequently provide for payment of a "premium" upon premature redemption of the security. In Bogen, *Financial Handbook*, an extract of which was produced as Exhibit P-10, the matter is discussed in the following terms:

> "A bond issue may be made redeemable before maturity in whole or in part. If so, redemption is at the option of the issuing corporation, unless there is a provision for a sinking fund that makes a periodical 'call' compulsory. The advantage to the debtor corporation of the *optional call* lies in the flexibility that such a provision adds to the company's capital structure. The call privilege has been used advantageously by corporations for the purpose of (a) eliminating bond issues with unfavorable indenture provisions, (b) replacing short-term obligations with long-term obligations, or vice versa, (c) reducing debt, and (d) refunding high coupon bonds with low coupon bonds if interest rates decline. The last-named advantage, *refunding to effect interest savings,* has been of great value in periods of low interest rates like the 1930's. Corporations with noncallable issues deprive themselves of this opportunity to effect substantial interest savings through refunding. Hence, corporations seek to make all bond issues callable at small or no premiums over par.
>
> *Investors and the call feature.* Investors strongly dislike callable bonds, since corporations will exercise the option to call in bonds

only when it is advantageous to themselves. When bonds are called in during a period of low interest rates, as is often the case, investors are deprived of higher-yielding issues at a time when these can be replaced only with lower yields.

This conflict of interest between issuer and investor can be *resolved in two ways.* First, investors are given *call protection,* usually by a provision that a bond issue may not be called in for a period of years, such as 5 or 10, immediately after it is put out. Secondly, bonds are made *callable only at premium prices,* to reimburse the investor for the loss of his investment at a time when it cannot be replaced advantageously. Call prices are usually scaled down over a period of years, so that the premium narrows as the bond approaches maturity. For example, a 30-year bond issue may not be callable during the first 5 years of its life; it may be callable at 108 during the second 5 years; at 106 during the third 5 years; at 104 during the fourth 5 years; at 102 during the fifth 5 years, and at 101 during the last 5 years before maturity, when it becomes redeemable at par value. Because investors seek call protection, bonds that enjoy such protection can usually be sold at materially lower yields than those without it."

It is thus apparent that the objective of stipulating a "premium" in cases of redemption or "call" prior to maturity of the instrument is to discourage borrowers from using money borrowed at low interest rates to acquit obligations of the borrower which bear higher interest. As a corollary to the foregoing, the "premium" is meant to compensate the investor whose investment cannot be replaced as advantageously, since the proceeds of redemption can likely be reinvested only at a lower yield — the same factor which motivated the borrower to redeem prematurely in the first instance. Conversely, however, in a rising interest market, it would be very much in the investor's interests to have the instrument redeemed prior to maturity, so that the investor might reinvest at a higher yield. In a rising interest market, the borrower is, of course, quite content that the repayment of the debts should await its maturity.

Payment of a "premium" appears to be exigible, generally, ouly in the case of *voluntary* redemption prior to maturity; it is not applicable in other instances, such as redemption through the use of sinking funds or in the case of involuntary redemption. The witness Vien points out that:

"Obviously again *the source of redemption becomes a factor.* For instance, I'm talking about a complete redemption because on many occasions, for instance in the case of sinking funds when you agree at the beginning of the period that you will retire the issue in a percentage each year and you commit to deposit funds with the institution in the redeemed bonds, let's say, on an obligatory basis, then there's no premium at all. And we've done that quite often. When we're talking about redemption, I think you have to divide it basically in three main areas, one being the sinking fund which is A. (sic) redemptions per se, but it's, then you're obligated to do it by contract and usually there is no premium on that particular redemption. In

> the case that redemption, *in the case of*, well, like, the own decision of *the company for many reasons, they make their own decision to redeem the bonds* for whatever reason, *then we have this premium that we're talking about* and then you've got the other situation the redemption or the reimbursement of the bond by virtue of bankruptcy or something else that is not really under the control or hands of the one that's borrowed; at which point you find that sometimes, for instance, I think the clearest area is in preferred shares when we defer or *make a difference between a redemption which is voluntary and which the premium is applicable and where, in the case of involuntary wind-up, then there's no premium...*" [sic]

The Principal Trust Deed does in fact envisage situations where a "premium" would not be exigible on redemption prior to the maturity date of the notes. Sec. 8.01, Clause 15, Paragraph 2(a), provides that the company (Alliance Credit) may redeem some notes prior to their maturity for principal and accrued interest, but without "premium", in order to maintain a predetermined ratio between short term and long term notes. The same clause further envisages redemption of notes without "premium" if the Company's receivables and paper arising from its finance operations fall below and remain below a predetermined level. Redemption through the use of a Sinking Fund (Article X) does not carry with it the payment of a "premium".

Consequently, payment of a "premium" on premature redemption is by no means automatic. It is true that section 11.02 provides that when the security becomes enforceable, the Trustee may (or "shall", if so directed) "declare the principal of and interest on the Notes, together with the premium, *if any*, which would have been payable thereon if the company had redeemed the Notes on the date of such declaration... to be due and payable...".

It is nowhere stipulated, either in the Principal Trust Deed, or in the Supplemental Deeds, that a "premium" is automatically payable in the case of premature redemption as a result of default. A "premium" is payable only if it would have been otherwise payable had the company redeemed the notes on the date of default or on the next interest payment date. Thus, for example, if the company had been entitled to redeem without a "premium" on that date as a result of the decline of paper and receivables defined on pages 35-36 of the Principal Trust Deed, no "premium" would be payable notwithstanding the declaration of a default.

Logical though this argument may be, there is no proof in the record that the Company could, in fact, have redeemed the notes on the date of default by using one of the techniques above described which does not carry with it the payment of a "premium". The Court would have used the powers available to it under C.C.P. 292 to remedy this gap in the proof, but in view of the conclusions reached by the Court on other grounds, this is unnecessary.

Petitioner complains, in a further argument, that those supplemental deeds which provide for the issue of premium-bearing notes were not registered and, consequently, no premiums are due on redemption. Only the Principal Trust Deed (providing for the issue of notes of a value of up to $20,000,000.00), the third supplemental trust deed (increasing the

charge to $50,000,000.00 and providing for the issue of Series "F" to "I" inclusive, without providing for a premium) and the seventh supplemental trust deed (increasing the charge to $250,000,000.00), together with an additional sum equal to 10% of the principal amount, in each case, have been registered. In other words, those deeds providing for the issue of premium-bearing notes were never available for public examination for which registration would have provided.

The *Special Corporate Powers Act* provides that the hypothec, privilege, mortgage or pledge takes effect from the date of registration *"of the deed by which they are constituted"* and, in the opinion of the Court, only the Principal Trust Deed and the Third and Seventh supplemental deeds *constituted* such charge, with the consequence that only these deeds require registration to give them validity against third parties. To require registration of the other deeds, which do not *constitute* the security but simply provide for the issue of further series of notes, the value of which is already included in the registered deeds, adds a requirement which the law, admittedly one of exception, does not envisage.

The basic argument of the Petitioner is that the enforcement of the payment of the premium, in the circumstances of this case, would be unjust and inequitable. It is clear from the proof that the secured noteholders obtained a benefit as a result of the premature redemption which, in the circumstances, shocks the conscience.

The value which the open market gave to the notes prior to the taking of possession by the Respondent was between 60% and 67% of their nominal or face value. Indeed, except for one transaction at 67% of face value, the witness Leonard testifies that all other trades of Alliance notes through his brokerage house were at 60% of face value, and that any other brokerage houses maintaining a market in these notes would have put through trades "dans ces niveaux-là". Respondent adduced no proof to the contrary and the Court finds, as a matter of fact, that the secured notes were worth no more than ⅔ of their face value, at best, in the open market, when Respondent took possession of the assets of the Bankrupt.

The Court further finds, as a matter of fact (and this is, in any event, admitted by Respondent) that at the time that Respondent took possession, at the time of default by the Bankrupt, at the time of the bankruptcy of the Bankrupt and at the time of each partial distribution by the Respondent (paragraph 40 of the Contestation), the secured noteholders could have invested in similar grade or quality securities at substantially higher yields or bearing substantially higher coupon rates or in higher grade securities yielding at least the same, if not a better, return. Interest rates, from 1967 on, were constantly rising.

As a result of the premature redemption, the secured noteholders obtained the following unanticipated benefits:

(a) They obtained 100 cents on the dollar and all accrued interest, net of any expense, since the Respondent realized enough on possession to pay all expenses. Had they sold their securities on the open market, they would have realized 60¢ or, at best, 67¢ on the dollar;

(b) They were able to obtain an identical yield on the proceeds of redemption immediately, and this, in a security of better quality *or*

(c) They were able to obtain a better yield on the proceeds of redemption by reinvesting in securities of equal quality.

In short, premature redemption of the notes resulted in very substantial advantages to the noteholders represented by the Respondent. To give them a yet additional advantage, a premium which would deprive the unsecured creditors of any meaningful dividend, borders on the immoral.

The Intervenant cannot, in the opinion of the Court complain of this result. On page 38 of Exhibit I-1, the Intervenant's Trust Deed, one finds, in section 6.05, the express acknowledgement that the security thereby created is subordinated, and subject to, the security created by the Principal Trust Deed and supplemental trust deeds upon which the Respondent relies, and the Intervenant further acknowledges the priority of Respondent's security in capital, interest, premium, if any, and other moneys secured, to its own.

The Intervenant is consequently bound by its own acknowledgements; it can no more succeed by intervening in Petitioner's proceedings than it could have succeeded in proceedings of its own. Nor can it rely on the terms of Exhibit P-3, which does not, in any event, bind the Court.

Exhibit P-3 purports to recognize that the Intervenant will be entitled to the proceeds of the "premium" if the judgment to intervene is based on grounds of law, while it stipulates that the Petitioner will be entitled to the proceeds if the judgment is based on grounds of equity or on grounds purely personal to the Petitioner in virtue of the *Bankruptcy Act*.

But in view of the Intervenant's own acknowledgements in Exhibit I-1, it could not succeed on grounds of law and, accordingly, the Intervention must be dismissed. There should be no award of costs on the Intervention, since such award could only further reduce the dividend available to the unsecured creditors and, in any event, neither of the parties contested the Intervention in writing and no enquête took place with respect to the Intervention.

Having arrived at the conclusion that the payment of the "premium" by the Respondent would be inequitable and unjust, the Court may, in virtue of the *Bankruptcy Act*, declare it to be payable to the Petitioner. Such a conclusion is consistent with both the letter and the spirit of the *Bankruptcy Act*. It does not fall into the assets transmitted to the Intervenant for the reasons herein above given, and the right to demand payment of it vests in the Petitioner alone because of the special status given to a trustee in bankruptcy.

This special status has been recently examined and described in the following terms by Mr. Justice O'Connor in the case of *Quebec Trucks and Trailers Inc.*, (1968), 11 C.B.R. n.s. 115, at page 117:

> "...The Trustee under the bankruptcy has been given by statute a separate and distinct right superior to any right which the debtor may have given to certain grove of his creditors by trust deed. This separate right given to the trustee in bankruptcy has been recognized by Canadian commentators and jurisprudence."

Certain rights are conferred by the *Act* upon the trustee alone, and he alone, subject to the provisions of sec. 16, has the right to exercise them.

Included in such rights is the right to seek equitable relief from the Courts charged with the application of the Bankruptcy law. Duncan and Honsberger, *Bankruptcy in Canada,* (3rd ed.) point out at page 807 that:

"...A Court in its bankruptcy jurisdiction is a Court of equity and as such is bound to give equitable relief to suitors entitled thereto in proceedings in bankruptcy."

Section 140 of the *Act* itself vests the Court sitting in bankruptcy matters with appropriate jurisdiction at law and "in equity" to carry out its functions. Houlden and Morawetz, *Bankruptcy Law of Canada,* (1960), say — at page 285 — that:

"...The bankruptcy Court in its administration of the joint principles of equity and the common law is the inheritor of the powers of these courts..."

The jurisprudence has consistently applied principles of equity to the solution of problems in bankruptcy matters. It was said in the case of *Heron,* (1934), 15 C.B.R. 39, at page 51, that:

"...The Court in its bankruptcy jurisdiction is a Court of equity."

In *Fredericton Co-Operative Ltd.* v. *Smith,* (1922), 2 C.B.R. 154, the Chief Justice of the New Brunswick King's Bench Division cites with approval a dictum of Fletcher-Moulton, L.J. refusing to sanction the perpetration of an "injustice" in a bankruptcy matter.

In the case of *Gold Medal Manufacturing Co. Ltd.,* (1927), 8 C.B.R. 39, the Court, applying principles of equity, ordered the reformation of a contract to eliminate an inequity.

Mr. Justice Fisher, in the case of *Stanley and Bunting,* (1925), 5 C.B.R. 18, applied principles of equity in a bankruptcy matter to relieve an injustice.

In the unreported case of *B. & J. Finance Inc.,* (Montreal, No. 6961, Feb. 4, 1970), Mr. Justice Aronovitch reiterated that "the *Bankruptcy Act* is a law of equity".

In the case of *Duranceau,* (1954), 34 C.B.R. 198, at pp. 199-200, it was said that:

"...Mais il y a la loi de faillite. Or, celle-ci, qui prévoit que la Cour possède non seulement une juridiction en droit mais en équité (art. 140(1)), a pour l'un de ses objets principaux de protéger, autant que possible, la masse de créanciers garantis et ordinaires d'un failli et d'éviter, de façon générale, que les uns bénéficient d'avantages indus au détriment des autres...

...[La] Cour croit qu'il s'agit ici d'un cas où il lui incomberait d'intervenir 'en équité'..."

In reversing this judgment, on different grounds, the Court of Appeal nevertheless acknowledges that principles of equity form part of the bankruptcy law. Referring to the Notes of the Court (rather than to the reported summary, which is incomplete), the following passages are noted:

Rinfret, J.:

"...Le cas pourrait se présenter où l'exercice par un créancier hypothécaire de la plénitude de ses droits de créance en vertu de son acte d'obligation affecterait de façon sensible les créanciers chirographaires

de son débiteur. Il y aura lieu alors de se demander si, appliquant les règles d'équité, l'on doit arbitrer.

...Je n'ai pourtant pas à considérer le point dans la présente instance, puisque les créanciers chirographaires ne sont pas affectés."

St-Jacques, J.:

"...En recevant la totalité de sa réclamation moins ce qui devra en être déduit, tant pour le fisc que pour le syndic, la créancière hypothécaire ne recevra même pas cent cents dans le dollar de sa créance, tel que stipulé.

Qui aura le bénéfice de cette déduction, si ce n'est pas le second créancier hypothécaire qui, dans l'espèce, comme on l'a vu, se trouve être l'un des membres de la société Perras et Perras.

"Comment peut-il être question d'équité en faveur d'un créancier hypothécaire dont la créance occupe un rang postérieur à celui de la réclamante et alors *qu'il est certain que les créanciers ordinaires ne recevront pas un sou du produit des immeubles vendus.*

...Avec tout le respect possible, je ne puis me résoudre à admettre que, *dans le cas présent,* la décision du syndic, confirmée par la Cour Supérieure, puisse s'appuyer sur cette disposition de la loi de faillite qui *permet, dans certaines circonstances, d'envisager l'équité, en même temps que la loi."*

In the *Duranceau* case, our Court of Appeals refused to apply principles of equity because (a) the hypothecary creditor was not receiving 100 cents on the dollar because of the deduction of various costs and taxes, (b) the mass of chirographic creditors did not stand to benefit from the application of equitable principles and (c) as a result of certain manipulations, the party who would benefit from the application of equity was the trustee's partner.

None of these factors is applicable in the present case; as was seen earlier, the secured noteholders are obtaining 100 cents on the dollar plus all accrued interest, net of all expenses. Can they, and should they, obtain more at the expense of the unsecured creditors?

Sec. 93 of the *Act* provides that:

"Subject to the provisions of section eighty-nine, a creditor shall in no case receive more than one hundred cents in the dollar and interest as provided by this *Act."*

This provision was contained in the 1919 *Bankruptcy Act* which came into force on July 1, 1920 and was based on Sec. 18 of the Second Schedule to the English (Imperial) *Bankruptcy Act of 1914.* The Respondent contends that this rule is applicable only to secured creditors who have proved their claims in the bankruptcy.

The *Act,* in Sec. 2, defines both "creditor" and "secured creditor", the former term including the latter in its defined meaning. Had the legislator wanted to differentiate between the two in Sec. 93, it would have done so in the manner as it did elsewhere in the *Act.* Not having done so, the Court must give to Sec. 93 its plain and obvious meaning — that is, that Sec. 93 must apply to all creditors, irrespective of the nature of their debt. Accordingly, Sec. 93 is applicable to the Respondent.

In the *Duranceau* case above cited, Mr. Justice Montpetit holds that the indemnity of 10% should not be paid to the secured creditor but should rather be paid to the mass of creditors, because the secured creditor "...ne perd absolument rien et, à vrai dire, elle n'a encouru aucun des dommages (même s'ils sont déclarés liquides à l'avance) pour lesquels cette indemnité avait été prévue".

Respondent argues that the Petitioner has no interest in instituting the present proceedings since a trustee in bankruptcy is simply an assignee of the bankrupt, who takes the property and assets of the bankrupt, subject to any prior assignment or security which may exist in relation to the property of the bankrupt. Accordingly, Respondent argues that the Petitioner's rights are subordinate to those of the Intervenant.

This proposition is only partially true; in many instances, the trustee in bankruptcy simply stands in the shoes of the bankrupt, having no greater rights than the bankrupt may have had. But in many other respects, the rights of the trustee in bankruptcy are superior to those which the bankrupt may have had.

An assignee of the *creditors* collectively, the trustee may have, vis-à-vis certain parties, the rights of a third party. He may thus, for example, bring suit to annul contracts which, but for the bankruptcy, may have been completely binding on the debtor. He may recover payments which, but for the bankruptcy, would have been validly made by the debtor. He may redeem a security in circumstances where the debtor would have had no such right. He may disclaim certain onerous contracts. He may, in short, do many things and enjoy certain rights which the law bestows upon him so that the law's purposes may be better fulfilled. Paramount among these purposes is the equitable distribution of the debtor's assets among the mass of creditors.

The trustee's powers and capacity certainly transcend those of a mere assignee. It is thus in vain that Respondent argues that the Petitioner has no interest in instituting the present proceedings: his interest is that of the mass of creditors and, as was pointed out in the *Quebec Trucks and Trailers* case, this interest may be "superior to any right which the debtor may have given to certain of his creditors by Trust Deed". Nor is the Petitioner's interest affected by the security which the Intervenant purports to have; Petitioner could well have, and does in fact have, rights to the proceeds of the "premium" while the Intervenant has none.

Both counsel devoted a significant proportion of their proof, and their notes and authorities, to an analysis of what the eventual realization of the assets of the Bankrupt might yield, and whether there would be a sufficient excess, after payment of the Respondent's claim, to pay the Intervenant's claim and, thereafter, leave a dividend for the mass. It is unnecessary for the Court to pronounce itself on such proof. If Mr. Macklaier's analysis is overly pessimistic, it is properly so, for he is administering in a fiduciary capacity and must, necessarily, take a conservative view. In any event, even if the excess were to be insufficient to pay the Intervenant's claim in full, and this notwithstanding the addition to such excess of the proceeds of the "premium", this would in no way affect the Petitioner's rights.

Respondent argues strenuously that the concept of "equity" is not applicable in bankruptcy matters.

The Court cannot accept this argument in the face of the clear wording of Sec. 140 and the necessary implication of Sec. 93. The *Act* abounds with equitable concepts. Thus, in the other provinces of Canada, "equitable assignments" i.e. those which, although they are technically or in strict law invalid, are nevertheless clearly expressive of the intentions of the parties, are protected against the rigorous provisions of Sec. 63.

Sec. 36 permits a court to set aside a proposal when it cannot proceed without "injustice".

The jurisprudence cited above and the doctrine make of the Court, in the exercise of its bankruptcy jurisdiction, a "Court of Equity".

It is true that there were in England two systems of administration of justice, one of them applying the common law and the other, deriving from the Ecclesiastical Courts and known as Courts of Chancery, applying a system of jurisprudence known as "Equity". It is not, however, in this sense that the term is used in Sec. 140; the use of the term "equity" in this section gives to the Court the power, as was pointed out in *Gold Medal Manufacturing Co. Ltd.* above cited, to "give equitable relief to suitors entitled thereto in proceedings in bankruptcy", and this precisely because the strict legal remedies might be insufficient for such purpose. There is nothing startling about the insertion of equitable concepts in the *Bankruptcy Act;* our Civil Code also requires the application of equity for the solution of certain problems. Aside from C.C. 1040(a) and following, which are comparatively recent amendments, the Code stipulates, in Art. 1024, which is of entirely French derivation, that the obligations of a contract extend to consequences which, by *equity,* are incidental to the contract. Art. 1135 of the Code Napoléon is identical to C.C. 1024.

Nor is the Canadian *Bankruptcy Act* unique in applying equitable principles. The Supreme Court of the United States, in the case of *Kothe* v. *R.C. Taylor Trust,* 280 U.S. 224 (1930), at page 227 said as follows:

> "...The broad purpose of the *Bankruptcy Act* is to bring about an *equitable distribution* of the bankrupt's estate among the creditors holding just demands based on adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavour."

Respondent relies on the judgment of *In re: Civano Construction,* 4 C.B.R. n.s., 294. This case is, however, substantially different from *Civano.* The latter case dealt with a bonus of 10% due specifically in the event of bankruptcy; no such clause is contained in the Respondent's security documents. No proof was apparently made of any change in interest rates. Moreover, the trustee in the *Civano* case had done certain acts which estopped him from attacking payment of the bonus. The gist of the judgment — and that which distinguishes it from the present case — is contained in page 298:

> "...Lorsque le syndic, aidé des inspecteurs, a décidé de procéder lui-même à la vente des immeubles avec le consentement des créanciers hypothécaires, il a dû évidemment se rendre compte des obligations

du débiteur envers ces derniers. Il lui était alors loisible d'examiner les contrats, et de constater quels étaient les montants dus en capital, en intérêts, aussi bien qu'en indemnité prévues à la clause spéciale ci-dessus mentionnée. C'est donc en toute connaissance de cause que le syndic a accepté de procéder lui-même à la vente des immeubles, et c'est sans doute après s'être rendu compte qu'il pouvait, malgré toutes ces charges, y avoir un avantage pour la masse des créanciers, qu'il a décidé de faire la vente lui-même."

As Petitioner points out in his Notes, it is obvious that the judgment would have been different had the creditors tried to protect themselves rather than leading the secured creditor to the position in which it found itself in that case.

For the Foregoing reasons, the Court:

Maintains Petitioner's petition in part; with costs against Respondent, ès-qualité;

Dismisses the Intervention, without costs;

Declares that Respondent ès-qualité does not have the right to make any payments whatsoever on account of the alleged premium and interest thereon accrued;

Declares that no premium whatsoever, and no interest thereon, is due to the secured noteholders for which Respondent is acting as Trustee;

Condemns the Respondent ès-qualité to pay to Petitioner ès-qualité, for the sole benefit of the mass, the total amount of the purported premium, to wit: $1,072,359.52, and interest thereon accrued by Respondent in such amount as would be payable thereon in accordance with the terms of the Principal and Supplemental Trust Deeds.

RESPONSIBILITY

THEODORE DIDONE *v.* HANS MUROVIC and VLADIMIR MUROVIC, and M. H. BLAKELY, Intervenant, and VLADIMIR MUROVIC v. M. H. BLAKELY, S.C.M. 745,255, February 18, 1971, Mr. Justice Puddicombe.

Automobile accident — Presumption of Liability of owner of vehicle — Rebuttal Theft of vehicle — Action in warranty — Highway Victims Indemnity Act, 1964, R.S.Q. c. 232, s. 3.

In this action, plaintiff sues Hans Murovic, the driver, and Vladimir Murovic, the owner of the vehicle, for damages suffered in an accident. Vladimir impleaded M. H. Blakely in warranty, in his quality as Attorney in Canada for the Non-Marine Underwriters, members of Lloyd's, London.

The principal action centered around the determination of whether unauthorized use, contrary to an express prohibition, by

a son, of his father's car constituted "theft" in order to rebut the presumption of liability imposed upon the owner by the *Highway Victims Indemnity Act.*

In the action in warranty, co-defendant Vladimir wanted to force his insurers to take in his defence. Defendant in warranty argued that since the insurance policy specifically excluded coverage should the vehicle he driven by Hans, it did not, under the policy, have to defend Vladimir in an action based on the fault of the former.

The part of the judgment dealing with the liability of the driver is omitted; it suffices to say that Hans was found to have committed a fault and to have been the cause of the accident.

Mr. Justice Puddicombe

The Court having heard the parties through their respective attorneys on the merits of the present case, examined the proceedings and exhibits of the record, having heard the evidence and on the whole deliberated, renders the following judgment:

M. H. Blakely of the district of Montreal is described in the writ of summons in the action in warranty as attorney in Canada for the Non-Marine Underwriters, members of Lloyd's London, England.

The declaration in warranty alleges that the plaintiff in warranty has been sued by the principal plaintiff in this case alleging personal and property damages as a result of a motor-vehicle occurrence of on or about February the 5th, 1967, in the district of Montreal, involving a motor vehicle of the plaintiff in warranty, allegedly driven then and there by one Hans Murovic, a principal defendant; that by a policy of automobile insurance the defendant in warranty as a representative of Lloyd's of London insured the plaintiff in warranty, the defendant in warranty having agreed, *inter alia,* to indemnify the insured, i.e. the plaintiff in warranty, against the liability imposed by law upon him arising from the ownership, use or operation of the automobile described therein, i.e. the Volkswagen, within Canada, arising from bodily injury or death to any person or damage to property, and to defend in the name and on behalf of any person insured by the policy and at the cost of the insurer any civil action which might at any time be brought against such person on account of such loss or damage to persons or property, the whole as appears from the said policy of insurance. The declaration goes on to allege that the plaintiff in warranty was called upon to take up its obligations under the said policy of insurance which it has failed to do concluding that "the defendant in warranty take up the defence of the principal defendant, Vladimir Murovic, the plaintiff in warranty, and, should the defendant in warranty fail to do so or should defendant in warranty be unsuccessful in having the principal action dismissed as against the principal defendant, Vladimir Murovic, plaintiff in warranty, that the defendant in warranty be held to indemnify the said principal defendant, Vladimir Murovic, the plaintiff in warranty for any contestation which may be pronounced against him.

In defending the action-in-warranty the defendant in warranty admitted the contract of insurance but went on to allege that the plaintiff in warranty's defence had not been taken up by the Underwriters because there was no obligation to do so. In support of this allegation it is alleged: (par. 5)

"With respect to the accident complained of the contract of insurance had no effect whatsoever vis-à-vis the assured or vis-à-vis third parties because by endorsement dated September 6th, 1966, coverage was specifically excluded if the automobile be driven by plaintiff in warranty's son Hans Murovic".

(par. 6)

"Accordingly neither plaintiff in warranty Vladimir Murovic nor his son Hans Murovic are entitled to protection or to a defence from Underwriters under the contract of insurance".

Inasmuch as the action has already been decided and the defence of Vladimir Murovic, principal defendant and plaintiff in warranty, upheld, the only question left for the Court to decide is whether or not defendant in warranty was obliged to defend Vladimir Murovic in the principal action.

Originally the insurance contract read, in part, as follows:

"...subject to the limits, terms and conditions herein stated and subject always to the condition that the insured shall be liable under the section (s) or subsection (s) of the following Insuring Agreements A, B, C...

The Insurer agrees to indemnify the Insured, ...and in the same manner and to the same extent as if named herein as the Insured, every other person who with the consent of the Insured, or the consent of an adult member of the Insured's household other than a chauffeur or domestic servant, personally drives the automobile, against the liability imposed by law upon the Insured or upon any such other person for loss or damage arising from the ownership, use or operation of the automobile... resulting from:

Bodily injury to or death of any person or damage to property..." Then the policy enunciates various additional agreements the third of which is:

"To defend in the name and on behalf of any person insured by this policy and at the cost of the Insured any civil action which may at any time be brought against such person on account of such loss or damage to persons or property and

To pay all costs taxed against any person insured ...and any interest...".

The said policy expired on April the 13th, 1967. However, on September the 6th, 1966 the policy was endorsed to the following extent:

"The Insured, named in the policy to which this endorsement is attached, hereby agrees that the automobile shall not be driven by Mr. Hans Murovic".

There follows the signature of the Insured, Vladimir Murovic, and then the following:

"Except as otherwise provided in this endorsement, all terms, provisions and conditions of the policy shall have full force and effect.

All other terms and conditions of this Policy remaining unchanged".

In my opinion the endorsement does not relieve the insurer of its obligation to defend the insured under the circumstances disclosed by the proof in the principal action in this case. The insured, Vladimir Murovic, agreed that the automobile should not be driven by his son Hans. That is all! He did not agree, nor does the policy which, save for the endorsement, remains unchanged, stipulate that the insurer would be absolved from taking up the defence of the insured against the liability imposed by law upon the latter. In this case the liability imposed by law was set forth in Section 3 of the *Highway Victims Indemnity Act.* Surely had any third party other than Hans Murovic stolen the automobile there could be no question but that the insurer was bound to defend an action taken against the insured, Vladimir Murovic. Undoubtedly the defence would have been as pleaded by the defendant and plaintiff in warranty, Vladimir Murovic, that sub-section b of the said section 3 was operative and therefore as owner Vladimir Murovic could not be held responsible.

I cannot conceive that because the insured agreed the automobile should not be driven by one of his sons this relieves the insurer from defending an action taken against the insured because despite every effort on his part, at the time of the accident it was being driven by a thief who, as it happened, was the person named in the endorsement, that is, the said son Hans Murovic.

In my opinion, therefore, the action in warranty is well taken and the defendant in warranty should have taken up the defence of the principal defendant, Vladimir Murovic, and plaintiff in warranty.

Wherefore defendant in warranty is ordered to indemnify the said principal defendant, Vladimir Murovic, the plaintiff in warranty, from any condemnation which may be pronounced against him, the whole with costs against the defendant in warranty.

* * *

The defence of Vladimir, as owner, rests on the exception as to liability contained in Section 3b, of the *Highway Victims Indemnity Act,* (1964) R.S.Q., C. 232.

M. H. Blakely, described as "attorney for Non-Marine Underwriters at Lloyd's, London, England", intervened. Having referred to the principal action the said intervenant, in his amended intervention, alleges: (par. 3)

"The automobile owned by defendant Vladimir Murovic and driven at the time of the accident by his son Hans Murovic was insured under the terms of a contract of automobile insurance number Q8445 which was in effect at the date of the accident herein above mentioned; but with respect to the accident complained of the contract has no effect whatsoever vis-à-vis the assured or vis-à-vis third parties because by endorsement dated September 6th, 1966 coverage was specifically excluded if the automobile be driven by defendant's son Hans Murovic."

The intervenant then goes on to plead that in any event the plaintiff's damages were exaggerated, that there was no *lien de droit* between plaintiff and defendant Vladimir, (par. 5), "whose automobile had been stolen by his co-defendant Hans Murovic just prior to the accident" and, finally, by paragraph 6 thereof the following:

> "Intervenant desires to set up against plaintiff any other grounds of defence which defendant may or might set up without regard to any consent or confession or judgment by defendant, the whole under reserve of Underwriter's rights to deny liability under the contract to the assured or at law to third parties including plaintiff".

Also, the defendant, Vladimir, called the above described intervenant in warranty in his quality as set forth. To the action in warranty said defendant in warranty pleaded, *inter alia,* that the contract of insurance referred to spoke for itself; that, however, plaintiff in warranty's defence had not been undertaken by the Underwriters "because there was no obligation to do so", (Plea of defendant in warranty, paragraph 3), and subsequently, to all intents and purposes, repeated the allegations contained in the amended intervention; in brief that by reason of the endorsement of the 6th, of September 1966 coverage was specifically excluded if the automobile was driven by Hans. Hence, he pleads neither of the defendants in the principal action are entitled to protection or to a defence from the Underwriters, (par. 6), and, finally, that there was no *lien de droit* between the principal plaintiff and the plaintiff in warranty, "whose automobile had been stolen by Hans Murovic just prior to the accident".

The defence of the defendant, Vladimir, that of the intervenant and of the said intervenant as defendant in warranty present considerable difficulty.

As above set forth, defendant Vladimir invokes the exculpatory clause, Section 3b, of the *Highway Victims Indemnity Act,* that is as owner of the Volkswagen, he was not responsible because, at the time of the accident, it was being driven by a third person, to wit his son Hans, who had obtained possession of it by theft.

With regard to this plea the Court finds the following facts to have been proved.

Hans had been involed in a serious accident sometime in July preceding the events giving rise to the present litigation. Consequent to this previous accident Vladimir's insurers, i.e. represented by the intervenant and defendant in warranty, had refused to insure the Volkswagen if Hans was to drive it. So Vladimir agreed to an endorsement to the insurance policy to the effect that the Volkswagen was not insured when driven by Hans. Hence Vladimir unequivocally forbade Hans thereafter to drive the Volkswagen and, for that matter, his other car. Hans, in his evidence, agreed that he had been forbidden to drive either of his father's cars. Vladimir was unaware that Hans had, on occasion, disobeyed and had taken one or other of his, Vladimir's vehicles out and driven it. He wanted Hans' driving licence cancelled but had been unable to effect this.

There were three ignition keys to the Volkswagen, one of these Vladimir kept on his person, one he placed in an unlocked drawer in his desk situated in a room reserved by him as his office in the basement

of the family dwelling house. The third key was in the possession of yet another son, Vladimir junior, who was permitted to use the Volkswagen; there is no suggestion by any of the witnesses that this third key was used by Hans on the night of the accident. (Any discrepancy between Vladimir's evidence On Discovery and at the trial as to the number of keys, particularly the one in the desk drawer, of this he was certain. His evidence.) He never disclosed to Hans the whereabouts of the ignition keys, particularly the one ni the desk drawer, of this he was certain. His office was for his own use, Hans had no business being in it.

Nevertheless, on that Sunday night, although forbidden to drive it, Hans entered his father's office in the basement and aware that one of the ignition keys of the Volkswagen was in the drawer of the desk, abstracted it, got into the vehicle with his brother, Carl, and the said girl, or girls, and himself at the wheel, drove away.

At this time Mrs. Murovic, (not heard as a witness), i.e. Vladimir's wife and Hans' mother, was on the premises albeit on a different floor from the office. Hans said he was not aware of this fact. At any rate, sometime later, before Vladimir's return, Mrs. Murovic was surprised to see Vladimir junior descending the stairway from his room. She asked him what had happened, "you did not drive the car", (Discovery, page 16). She was told then that Hans had taken it. But there was no way that they could get in touch with Vladimir, "they couldn't reach me because I am working in many clubs and so I go from club to club", (Discovery, page 16).

Vladimir, an ice-maker for various curling clubs, some of which were in different municipalities to that of his residence, was engaged in this calling on the said Sunday. He didn't return home until about 8.00 p.m. He noticed that the Volkswagen was not in the driveway, (Discovery, page 11), and, on entering the house his wife told him that, without her knowledge, Hans had taken the automobile in order to drive a girl, or girls, (there is a discrepancy in the proof), who had been visiting the Murovic residence, to their home. (A considerable amount of this was hearsay evidence, but no objection was made to it.) Of course, Vladimir, being absent when Hans left, did not, and could not have known that Hans had driven the Volkswagen away. On learning that he had, Vladimir took no overt action; he did not, for instance, notify the police that the Volkswagen had been stolen.

Vladimir had always had good relations with his son Hans; he had had no trouble with him. He was obedient, "He was always listening. Serious like, you know, in the old country, still like I am the boss, you know... and if I say, 'you don't drive the car', I thought he won't do it, I thought he won't do it... I was surprised he took the car after", (Discovery, page 13).

From this proof, can it be said that Hans was in possession of the Volkswagen at the time of the accident by theft?

The question as to what constitutes theft within the meaning of the *Highway Victims Indemnity Act,* Section 3b, has been examined on a number of occasions by this Court, at least once by the Provincial Court, but to date, as far as I am aware, not by the Appeal Court.

The judgments in the Superior Court have all, insofar as I have been able to ascertain, based the decisions on reference to the definition of

theft found in the Criminal Code, Section 269, or, in the same Code, under the heading "Offences Resembling Theft", Section 281. A possible exception is the judgment in *Frost* v. *McEwen,* ([1966] C.S. 524), but there, "[l]e demandeur ne nie pas qu'au moment où l'accident est survenu, l'automobile du défendeur était l'objet d'un vol. Il reproche seulement au défendeur d'avoir créé la tentation pour un voleur en laissant les clés dans son auto et le moteur en marche. *Cette circonstance n'affecte pas la situation juridique des parties. Quand l'automobile du demandeur a été endommagée par celle du défendeur, l'automobile du défendeur avait été volée. Le vol de son automobile par un tiers permet au propriétaire de s'exonérer de la responsabilité du dommage causé par son véhicule. L'article 3, alinéa b, de la* Loi de l'Indemnisation des Victimes d'Accidents Automobile *doit recevoir ici son application...*" (My italics).

In *Pelletier* v. *Boudreau,* ([1968] S.C. 22), it was held, inter alia, "Pour se libérer de la responsabilité édictée par l'article 3..., en invoquant que l'automobile était conduite par un tiers en ayant obtenu la possession par vol, *le propriétaire doit prouver qu'il s'agit d'un vol tel que défini par l'article 269 C.cr.*" (My italics). The facts in this case were "le défendeur dormait au moment où on lui a substilisé les clefs de sa voiture, qu'il ne permettait pas à son fils Gaétan de se servir de son automobile et que, dans le cas particulier de l'événement qui s'est produit le 20 août 1964, ledit Gaétan Boudreau n'avait pas l'autorisation de prendre l'automobile de son père et de s'en servir", (p. 26). The question was not whether Gaétan Boudreau had taken his father's automobile without permission and consent of this latter, "mais bien s'il en a obtenu la possession par vol". The judgment then cites section 269 of the Criminal Code. But the learned judge pronouncing the judgment, went on to say that having given the proof "un examen attentif", (same page), *"le tribunal ne peut se convaincre qu'une cour compétente de juridiction criminelle,* sur une plainte portée contre Gaétan Boudreau en vertu de l'article 269 du Code criminel, *aurait pu éventuellement le reconnaître coupable de l'accusation formulée, c'est-à-dire de vol."* (My italics). The judgment goes on to discuss Section 281 of the Criminal Code, finding that, in all probability Gaétan Boudreau would have been found guilty had he been charged under this section; however, this was not the law contemplated by the *Highway Victims Indemnity Act,* "la responsabilité du propriétaire dont l'automobile est ainsi soustraite à sa possession n'est pas dégagée de la responsabilité de l'accident qui peut survenir en l'occurrence," (p. 27). The judgment continue: "Si sévère que puisse être cette opinion, le tribunal croit de son devoir d'appliquer la loi telle qu'elle est formulée, sachant qu'il s'agit là d'une loi d'ordre public dont l'interprétation est restrictive et de droit strict". So, following this opinion, first the alleged theft must be that corresponding to the definition in Section 269 of the Criminal Code, the offence described in Section 281 thereof is not the criminal act contemplated in the *Highway Victims Indemnity Act;* second, in order to be relieved of the responsibility enacted by Section 3 of the said *Act,* the owner must show to the satisfaction of the Court that, had the third party been accused of theft a Court of criminal jurisdiction would have found him guilty.

The Superior Court finding in *McNamee* v. *Pancaldi,* ([1968] C.S. 630), is also based on an interpretation of Section 269 of the Criminal Code.

On the facts the Court found that an employee of a service station who had taken the tow-truck, although forbidden to do so, in order to change a tire on an automobile belonging to a customer of the service station, could not be found to have had possession of the tow-truck by theft inasmuch as at the time of the accident the owner had not been deprived of its use, on the contrary it was being used for his benefit. Hence the expulpatory clause of the *Act*, Section 3b, did not apply and the owner remained responsible. "Even if such an act is an offence resembling theft, it lacks the elements of taking fraudulently and without colour of right or converting as required by Section 269 of the Criminal Code."

The judgment in the *McNamee* v. *Pancaldi* case discussed a number of decisions concerning the aforesaid exculpatory clause. In *Plante* v. *Brabant & De Richard*, C.S. Arthabaska 17,092, (December 6, 1965) apparently unreported), it is pointed out that the lack of consent, or consent, must coincide "lors de l'accident." In *Perron* v. *The Wawanesa Mutual Insurance Co.*, ([1964] S.C. 324, at p. 330), the Court discussed theft as defined in a policy of insurance and found that the contract of insurance exacts "la plus grande bonne foi ou *uberrima fides*" not because of any ambiguity in the contract but in support of the principle laid down in *Orchard* v. *Mutual Benefit Health and Accident Association*, ([1961] C.S. 293). "Le principe d'interprétation des contrats édicté à l'article 1019 C.C. oblige, en matière d'assurance, le tribunal à interpréter contre l'assureur, qui a stipulé, et en faveur de l'assuré." The finding in the *Perron* v. *Wawanesa* contained a reference to the judgment in *Boyle* v. *Yorkshire Insurance Co.*, ([1925] 1 D.L.R. 344), the Court remarking that in the said judgment the insurance policy did not require the condemnation of a presumed thief of an automobile, but simply that there had been a theft. This judgment of the Ontario Appeal Court was followed by the Supreme Court of New Brunswick, appelate division, in *Babineau* v. *Colette and Colette*, ((1962), 32 D.L.R. (2d) 541, cited in *Perron, supra*, at p. 337), in which it was decided, in interpreting the word "theft" in an insurance policy, that "un fils qui avait pris les clés de l'automobile de son père, dans les habits de ce dernier, alors qu'il était absent au travail, et qui avait conduit le véhicule en son absence... avait agi" fraudulently and without colour of right to deprive him temporarily of it and hence had committed theft of the car as defined by Section 269, sub-section 1a, of the Criminal Code. The Court then went on to find in the *Perron* case, (it being reiterated that this had to do with "theft" as found in an insurance policy), that, as in the *Babineau* case, the elements of theft as defined in Section 269 of the Criminal Code existed. All of which, in the opinion of the undersigned, leads to the conclusion that, while the word "theft" in an insurance policy is not rigidly confined to the meaning given by Section 269 of the Criminal Code, as a wider interpretation premised on the meeting of the minds of the parties to the insurance contract must be given, nevertheless the Courts have had recourse to the definition of "theft" given in the Criminal Code, which, though narrower than that in the contract of insurance, *a fortiori*, must be included in the wider interpretation.

The judgment in the *McNamee* v. *Pacaldi* case also refers to an unreported judgment of the Superior Court, (No. 631,558, *Germain* v. *Saucier & Bélisle*, dated the 23rd, of June, 1966), wherein the action against the

owner was rejected on the grounds that he had established theft of his vehicle by a third party who was in possession thereof at the time of the accident and, hence came under the exculpatory clause, Section 3b, of the *Highway Victims Indemnity Act*. "Les agissements de Saucier correspondent au vol tel qu'il est défini à l'article 269 du Code Criminel. Ils correspondent aussi à l'infraction spéciale décrite à l'article 281 du Code Criminel." In fact, the third party, Saucier, had pleaded guilty to a charge under this latter section of the Criminal Code which, the Court found, rebutted any suggestion that he had been given even the smallest authorization to use the automobile in question. Hence, in the undersigned's opinion, this finding is not contrary to the finding in the *Pelletier* case, i.e. that "theft" must be defined restrictively as having, in the *Highway Victims Indemnity Act*, the same meaning as in Section 269 of the Criminal Code.

So, in all these decisions, both of the Quebec Superior Court, the appellate divisions of the Supreme Court of Ontario and of the Supreme Court of New Brunswick, in interpreting the word "theft", be it in Section 3b of the Quebec *Highway Victims Indemnity Act* or, with its wider interpretation, from a contract of insurance, all such Courts have referred to the definition in Section 269 of the Criminal Code.

But the judgment of the Quebec Provincial Court in *Tantalo* v. *Klaydianos & Devreeze* ([1970] C.S. 331), rejects all references to the Criminal Code in interpreting the meaning of the word "theft" in Section 3b in the *Highway Victims Indemnity Act*. "...l'article 3 de la loi doit recevoir une interprétation intrinsèque, non une interprétation empruntée à une autre matière, tel le droit pénal... Mais un usage lié à la volonté de son propriétaire... demeure, parce que mandataires et préposés sont la continuation de la personnalité juridique du mandant et du commettant ou plutôt précisément sa personnalité juridique" (at p. 336).

L'usage peut résulter d'un quasi-contrat entre le propriétaire d'une automobile et son usager... Cet usager, ce conducteur, n'est pas un tiers par rapport au propriétaire de la voiture: il y a entre eux contrat formel ou tacite ou acceptation implicite d'une partie à l'autre". This is elementary as is the following: "Le tiers dans les textes de la deuxième section de cette loi (art. 3b) est celui qui n'est aucunement partie directement ou indirectement à la volonté expresse ou implicite du propriétaire dans la conduite de sa voiture". (page 336) ...Le voleur est un tiers parfait, le prototype de l'étranger à toute manifestation d'intention ou de volonté du propriétaire ...le voleur (par) ...son acte permet au propriétaire de dégager sa responsabilité".

Up to this point the judgment is stating the obvious. But it goes on to say, and here it departs radically from the above cited judgments: "Le législateur civil n'avait pas à opérer des distinctions familières "au lexicologue" ou au droit pénal et à subir les critères d'interprétation qui régissent les textes d'exception.

Il lui suffisait de s'exprimer par un mot qui déterminât clairement sa pensée: "la possession par vol".

Il dit tout, ce mot-là: le vol grave, le vol léger... le vol prémédité, le vol-tentation. (Here the judgment refers to *Frost* v. *McEwen*, supra.)

Voler, c'est s'approprier le bien d'autrui ou "prendre ce qui appartient à autrui, contre son gré ou à son insu". Qu'il soit fait à main armée, à la tire, à la dérobée (larcin), c'est un vol" (page 337).

It matters little what a thief calls himself, according to the judgment for: "Un commun dénominateur, le vol, les lie et leur qualité de tiers les dissocie du propriétaire d'une voiture. Le vol est le réceptable qui les contient tous et le volume du mot indique l'indépendance absolue du tiers et du propriétaire de l'automobile volée, subtilisée, enlevée sans son consentement ou à son insu.

Il suffisait au législateur provincial de dire "possession par vol" pour tout dire. Toute dissertation étrangère au tiers est, à mon avis, étrangère à son propos.

L'intervention d'un tiers aussi parfait que le voleur dégage la responsabilité du propriétaire de la voiture".

To accept the criterion of this judgment in interpreting "theft" within the meaning of the *Highway Victims Indemnity Act,* Section 3b, one must postulate that "theft" in the *Act* refers to something other than a crime. Else how can one disregard the total absence of "mens rea" in a definition which says simply that "to steal is to appropriate to oneself the goods of another, or to take that which belongs to another without his consent or knowledge." Here there is no reference to good faith or rights of retention, (C.C. Article 441, for instance, where there is no question of a contract resulting in a *lien de droit*). Nor does the definition require an element of fraud. But a third party, not bound by contract to the owner, may have the right to take possession of something, at least temporarily, belonging to another without his knowledge or consent, for instance, the irate proprietor who removes the automobile of another parked in front of his driveway, the fireman who takes possession of and removes the automobile of another parked in front of a hydrant, the municipal employee who tows away the vehicle of another left on a street, or highway, in contravention of a snow-removal sign. Such takings of possession are accomplished by "colour of right" mention of which in the said definition is singularly lacking. These attributes, or rather the lack of them, are indicative of crime. Hence, when not present "theft" or "to steal", as defined by the judgment, is not a crime. The which, it is submitted, is contrary to the generally accepted purport of "theft" and "stealing". But even if one subscribes to such a theory, it does not follow that the more narrow definition of the Criminal Code may not be the criterion for, *à fortiori,* if the elements of possession without knowledge or consent by a third party, as defined, being all the essentials required by the *Tantalo* v. *Kaydianos & Devreeze* judgment are present, the presence of further elements such as "fraudulently and without colour of right" cannot alter the finding that a third party had possession by theft.

In the present case it is the intention of the Court to apply the proven facts to the criterion of the pertinent part of Section 269(1) of the Criminal Code which reads:

> "269 — (1) Everyone commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent.
>
> (a) to deprive, temporarily or absolutely, the owner of it... of the thing or of his property or interest in it".

There can be no doubt that Hans took and converted to his own use the Volkswagen on the Sunday night of the 5th, of February 1967, with the intent of depriving, at least temporarily, Vladimir of it. It must also be acknowledged that he did so after having been expressly forbidden to do so. There cannot be, therefore, any colour of right. But did he do so fraudulently? In the *Pelletier* case, (supra), the Court ruled that had Gaétan Boudreau been accused, under Section 269, it was, at any rate to the Court, inconceivable that he would have been found guilty. This despite the fact that he had possessed himself of the ignition keys of the automobile without his father's, the owner's, knowledge. Nor had his father known that he took the car which was parked in a yard near the family's residence. Gaétan had no driving licence, that he had, effectively, never driven the car and that his father didn't even know that he, Gaétan knew how to manage an automobile. Other than in its opinion a Court of competent criminal jurisdiction, on these facts, would not have found Gaétan guilty of theft, the judgment finding the owner still responsible, gave no reasons; save perhaps that the *Highway Victims Indemnity Act* was for the purpose of safeguarding the public's right to damages when injury by admittedly dangerous vehicles the very ownership of which entailed responsibility and, hence, the possibility, the Court said "probability", of acquittal must be resolved against the owner.

But one must contrast this finding with that of the New Brunswick Appeal Court in *Babineau* v. *Colette & Colette,* ((1962), 32 D.L.R. (2d) 541), in which the Court found that a son who had taken the keys of his father's automobile from his clothes while has was absent at work and who had driven the car in his absence had acted fraudulently and without colour of right to deprive him temporarily of it and hence had committed theft of the car as defined by Section 269, sub-section 1(a) of the Criminal Code. This was the finding despite the fact that the son had a learner's licence and his father, although never allowing him to drive by himself, had been giving him driving lessons.

Applying the test given in the *Pelletier* case, (supra), it seems to the undersigned that a competent court of criminal jurisdiction would have had to find Hans guilty of theft were he charged under the provisions of Section 269(1)(a) Cr. C. He took the ignition key of the Volkswagen from his father's desk where it had been placed to prevent him from having access to it. Despite his father's stern prohibition, he had taken possession of the car and, knowing that by the endorsement to the insurance policy it was not insured while driven by him, he had driven it away from the family residence. (It is noted that in the *Pelletier* case, (supra), while there was lack of permission to drive, there was no express prohibition as in the present case). Surely the abstraction of the keys was underhand and clandestine, hence fraudulent. This being granted, all the other elements of theft as set forth in Section 269(1)(a) of the Criminal Code are present.

It follows that the plea of the defendant, Vladimir Murovic, must be maintained.

ALIENATION OF AFFECTION — DAMAGES

DAME MARY LINDA WRONSKI *v.* DAME YOLANDE LEBLANC, S.C.M. 773,043, November 27, 1970, Mr. Justice G.B. Puddicombe.

Alienation of Affection — Action by aggrieved wife against paranour of husband Quantum of damages — Fault of defendant not proven — C.C. 1053.

Has an aggrieved wife, who has lost her husband to another woman, a right of action against the latter? Alienation of affection has been frequently the source of litigation but the action has, in the past, been taken by an aggrieved husband. In the present case, Plaintiff, the wife, in order to succeed, had to prove fault on the part of defendant, causality and damage.

Mr. Justice Puddicombe

By her action plaintiff claims $3,000 from defendant as damages suffered by her in that, as she alleges, defendant has completely alienated the affection of plaintiff's husband.

The facts on which plaintiff bases her action are as follows:

(a) Plaintiff and her husband, Jacques Gignac, were employed by the Canadian General Electric Co. at 5781 Notre Dame St. East, in the City and District of Montreal; defendant was also employed by the said company. Defendant and the said Gignac work in the same department the latter being a foreman. Plaintiff, however, did not work in the same department as defendant and Gignac;

(b) Some two years before the commencement of the present action, i.e. on the 3rd. of July 1969 when the writ of summons was served on defendant, plaintiff's husband, the said Gignac, and defendant, had entered into a liaison. The said Gignac would visit defendant two, three or four times a week and occasionally for weekends. He would stay with her all night or sometimes for a whole weekend. During this time he and defendant had sexual relations;

(c) Plaintiff reproached defendant with her conduct in thus consorting with the said Gignac; on one occasion on or about the 23rd of May 1969 she waited outside defendant's residence and about 6.45 a.m. saw her husband coming out therefrom. Subsequently she wrote a letter to defendant, copy of which appears as plaintiff's exhibit P-5, which in effect was putting defendant in default. Despite the letter defendant continued to receive the said Gignac.

The foregoing facts have been admitted by defendant.

Defendant did plead to the present action but after a time her Counsel asked to be relieved of the mandate inasmuch as she did not cooperate with them. The request was duly granted by the Court and plaintiff proceeded to require defendant to appoint another Counsel which she did not do. Accordingly the action was heard *ex parte* before the undersigned.

In addition to the above proof it was alleged and the defendant did not deny it that she knew plaintiff and the said Gignac were married and had children.

What has been alleged by plaintiff, but in the Court's opinion, has not been proved is first: Defendant induced plaintiff's husband to lose interest in his wife, and affection and care for his children, (Declaration, paragraph 8); second: Defendant has wilfully disrupted the entire life of plaintiff and their children, (Declaration, paragraph 10); third: As a result of the relationship between Gignac and defendant, the former has shown and is showing no interest whatsoever either as a husband to plaintiff or as a father to his children, (Declaration, paragraph 14).

I can find no proof whatsoever in the record other than the allegations made that defendant seduced Gignac, plaintiff's husband. The letter, P-5, in my view, even if defendant received Gignac thereafter makes no proof of seduction.

In respect to the allegations that Gignac no longer cared for his children there is no proof of this whatsoever; on the contrary the proof is to the effect that he has supported plaintiff and his children during the whole time in question. As a matter of fact he has never abandoned them and still remains living in the common domicile.

As to paragraph 25 of the declaration, quoted above, the damages alleged are global. There is no division between special and general damages. Some attempt has been made to establish disbursements which plaintiff alleges were due to the medical care she found necessary by reason of the anxiety occasioned by the circumstances above set forth. However, this expense must be the obligation of Gignac to pay and cannot be claimed by plaintiff against defendant under any event.

Consequently the perceivable, if not the only claim for damages are for or by reason of the allegation concerning alienation of affection. In this respect the plaintiff has alleged she has suffered ridicule, humiliation, that she has become a nervous wreck and that her social, marital and household relations with her husband have been completely destroyed.

Before considering whether an action in damages for alienation of affection can be taken by a wife against her husband's paramour the Court intends to deal briefly with the quantum should such an action exist. It has been noted above that plaintiff has not lost the financial support of her husband, Gignac, who has continued to contribute to her support and that of their children. As to the allegations of loss of health in the Court's opinion the proof insofar as it relates to the circumstances above is not sufficient. The most that can be said for it is that according to the medical evidence plaintiff's nervous condition corresponded in time with the anxiety caused by the said liaison. This in my estimation is not conclusive.

The sole question remaining then is the one of humiliation, ridicule and loss of social and marital life. Again I can find no evidence of humiliation or ridicule. On the contrary what evidence exists in this line would seem to be one of sympathy with plaintiff.

What remains then is the question of the destruction of the social and marital life. In this respect, at the most, the Court, for reasons

which will be referred to under the question of the right of action, finds that the damages are minimal and can estimate them at no more than $200.00.

The question of whether a right of action exists under the circumstances disclosed above is one of considerable complexity. Most actions for damages by reason of alienation of affection are taken by the husband against his wife's lover. Even in these some, if not considerable, doubt arises as to the right of action. In some instances the Courts have declared the right to exist for the somewhat startling consideration that a wife is the chattel of her husband, and, consequently if he is deprived of her, his action exists for much the same reason as if he had been deprived of a cow, sow or some other moveables, (*Laferrière* v. *Ribardy*, (1874), 5 R.L. 742 (C.S.); see also *Beauregard* v. *Charron*, (1934), 72 C.S. 45).

In order to condemn the adulterous accomplice of an erring wife it is necessary to prove that he was the source of the adultery and that had he not acted as he did the wife would have remained faithful, (André Nadeau, *Droit Civil*, Tome 8, p. 177, referring to the judgment of Perrier, J. apparently not reported) in *Harbec* v. *Lebrun*, dated the 4th. of May 1948, no. 242,849 of the Superior Court of Montreal.

> "Infidélité d'une épouse qui n'avait jamais eu d'affection pour son mari et abandon du foyer conjugal non provoqué par le défendeur; action rejetée sans frais."

The learned author continues to say:

> "S'il résulte des faits que la femme a trompé son mari de son plein gré et en pleine connaissance de cause, on ne voit pas comment le coauteur de l'adultère, puisse répondre en dommages à l'égard du mari, même si sa conduite est moralement répréhensible."

As mentioned above the Court can find no evidence of the seduction of plaintiff's husband by defendant. But even if it were so could the action exist? Certainly not, in the Court's opinion, if the grounds for damages given in the *Laferrière* v. *Ribardi* and *Beauregard* v. *Charron* cases are the foundation thereof. No one in our society, nor insofar as the undersigned is concerned, in any modern society of European origin, has ever suggested that, as distinct from the wife, the husband could be taken to be the chattel of his legal consort.

Nevertheless, in *Keator* v. *Welch et Binmore*, (1938), 41 R.P., 414, it was held that a wife who complains that her husband's affection has been alienated by another woman, has a valid action against the latter. Surveyer, J. in rendering his judgment quotes first article 1053 C.C. He refers to Fuzier-Herman Rép. Vo. Adultère, no. 320, after having cited article 1382 C.N., corresponding to the learned judge to article 1053, who said:

> "Or, il est évident que l'époux, victime de l'adultère, éprouve un dommage; donc il lui est dû une réparation pécuniaire."

and he goes on to say:

> "Le complice de l'adultère peut être condamné à des dommages envers l'époux auquel l'adultère de son conjoint a causé un préjudice matériel ou moral."

He then refers to the Pandectes belges, Vo. Adultère, no. 248. But it is to be noted there that M. Lelièvе refers particularly to the right of a husband saying:

> "Aucun texte spécial ne lui attribue expressément ce droit, mais les principes généraux suffisent."

The learned judge, referring to the defendant's contention that although such an action lies in favour of the aggrieved husband no such action lies in favour of the wronged wife, says:

> "No text of law justifies such distinction; that the authors either speak in general terms of the consort or mention the husband *ex eo quod plerumque fit*, but without refusing a similar answer to the wife, who has an additional grievance, since, by spending his money with a third party, the guilty husband deprives his family of so much."

With great respect I cannot agree that no text of law justifies the distinction mentioned. The codifiers of our Civil Code certainly made such a distinction apparently on an accepted text of law when by article 188 it was laid down that "a wife may demand the separation on the ground of her husband's adultery, *if he keep his concubine in their common habitation.*" (My underlining) — On the other hand article 187 C.C. states:

> "A husband may demand the separation on the ground of his wife's adultery."

One must, therefore, concede that at least at the time of the promulgation of the Code, and for that matter at the time of the date of the above judgment, the 23rd of May 1938, a very marked distinction was made between the adultery of the husband and that of his wife. It is true that in 1954 the last clause of article 188 was struck by amendment, (3-4 Eliz. II, c. 48). Again the learned judge has referred to the Pandectes françaises Vo. Adultère, no. 317, quoting with approval the following:

> "Bien que la plupart des arrêts relatifs à des actions en dommages-intérêts pour cause d'adultère soient relatifs à l'adultère de la femme, on peut concevoir que, dans les cas où la loi autorise celle-ci à faire condamner le mari pour la même cause, elle n'a pas moins droit que lui à une réparation pécuniaire de l'offense."

But does the law authorize the husband's action? From what appears above his action is founded on something approaching a right of property in his wife. In this day and age can one consider that a right of action can be allowed a husband on such a premise? The Court cannot conceive that it could be so. Consequently, a wife can no more have such a right.

In any event in strict law is adultery a fault as conceived by article 1053 of the Civil Code? That it is immoral must be conceded. That it is condemned by the Mosaic law, the 7th commandment, is also beyond question. Nevertheless, as to this latter, it might be submitted that the prohibition against adultery was not so much on strictly moral grounds as it was to insure the purety of race and descent. Under the Criminal Code adultery *per se* is not a crime although conspiracy to induce a woman to commit adultery is indictable (section 408(c)) and the participation in adultery in the presence of a child which endangers the

morals of the child is also an indictable offence, (section 157(1)). In other than the Judaic-Christian ethic adultery, i.e. the voluntary sexual intercourse of married persons with one who is not his or her lawful spouse, where concubinage is an accepted social custom, has undoubtedly a very different connotation. Husband (and wife) mutually owe each other fidelity, succor and assistance, (173 C.C.). A husband is obliged to supply his wife with all the necessities of life according to his means and conditions, (176 C.C.). But if the husband proves unfaithful surely the recourse of the offended wife is in separation as to bed and board or divorce. In law love and/or affection is required by neither party to the marriage. So, if the husband commits adultery it is difficult if not impossible to see that in doing so he has committed a fault under 1053 C.C. For that article requires the fault be to another, i.e. in the instance the wife. Such fault must be committed by positive act, imprudence, neglect or want of skill. Insofar as adultery is concerned only "positive act", applies. But adultery insofar as the offended wife is concerned is, in my opinion, the antithesis of a "positive act"; it is rather the absence of fidelity and therefore does not qualify as coming under 1053 C.C. A positive act must be one which is instantly apparent. Under our concept of the law respecting responsibility, damages must arise from the fault, *causa causans*, and not *sine qua non*. But the effect of adultery arises only if and when the fact becomes known. If it does not become public knowledge the effect is nil. Hence it is impossible to state that the act of adultery can be the direct cause of damage. This, in the Court's opinion, disposes of the possibility that adultery can be considered a positive act within the meaning of 1053 C.C.

Be that as it may, even if adultery is to be taken as a fault under 1053, the reasoning that the accomplice is also responsible, jointly and severally, for the damages, in my view, is questionable. An obligation is not presumed to be joint and several, it must be expressly declared to be so. This, however, does not prevail in cases where joint and several obligation arises of right by virtue of some provisional law, (1105 C.C.). Certainly there is no expressed declaration that adultery entails a joint and several obligation, despite the arguments to the contrary, most or all of which are founded, in my humble opinion, not on the legal but on the moral aspect. Nor is there any such right arising by virtue of some provision of law; on the contrary as submitted above, adultery by the husband and the wife were taken to be of different consequences. Where there is a common offence the obligation is joint and several, (1106 C.C.). But again, in my opinion, the offence must be one, when damages are claimed, which comes under the provisions of 1053 C.C. and adultery, as I understand it, is neither an offence or quasi-offence.

FOR THESE REASONS I am of the opinion that an action in damages for alienation of affection taken by the wife against the paramour of the husband does not exist.

Consequently the present action is dismissed, but as the defendant did not chose to continue her defence, without costs.