1928
Oct. 5.
Nov. 19.

PERCY CHARLES BONHAM AND FREDERICK R. JOHNSON....... } CLAIMANTS;

AND

HIS MAJESTY THE KING..............RESPONDENT.

AND

THE CANADA STEAMSHIP LINES LIMITED,
CREDITOR MIS-EN-CAUSE

Prescription—Commercial Transaction—Article 2260 Civil Code—Law of of the Province of Quebec

The *Sarnor,* owned by claimants and another, was requisitioned by the Crown during the war, and handed over to the C.S.S. Lines to be operated. The C.S.S. Lines advanced various sums to B. & J. amounting to $25,000 in connection with the *Sarnor,* and the said B. & J. transferred their interest of 60 per cent in the *Sarnor* to the C.S.S. Lines as collateral security for the repayment of the said sum. On the 29th September, 1924, the *Sarnor* became a hulk and was destroyed. By judgments on the Petitions of Right by the co-owners of the *Sarnor,* B. & J. bacame entitled to recover 60 per cent of $11,000, fixed as the compensation for the *Sarnor,* and the C.S.S. Lines applied to have this amount paid to them as assignee of B. & J. B. & J. denied any liability and contended that the transaction was of a commercial nature and was prescribed by five years.

Held, that it was not in the company's ordinary course of business to advance money for the repair of vessels belonging to others, and that the transaction in question was not one of a commercial nature within the meaning of sub-par. 4 of Article 2260 of the Civil Code, of the Province of Quebec, but was in the nature of a loan only prescribed by thirty years.

MOTION by the Creditor *Mis-en-cause* to be paid out of the fund in Court as assignee of the Claimants.

The motion was heard before the Honourable Mr. Justice Audette, at Ottawa.

J. A. H. Cameron, K.C., for the Claimants.

O. M. Biggar, K.C., for the Crown.

W. F. Chipman, K.C., for the Creditor *Mis-en-cause.*

AUDETTE J., now (November 19, 1928), delivered judgment.

This is a matter coming up with respect to the distribution of moneys realized as compensation for the requisition of a ship during the Great War, wherein, on the 15th May,

1928, by judgments of this Court, the amount of compensation was duly fixed in respect of the same, at the total sum of $11,000; the claimants in this case and the claimants in the case of McKay (No. 7372) making claim thereto. By such judgments it was *inter alia* provided that

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the compensation moneys would only be paid after hearing all parties claiming to be entitled to the same, or any part thereof, and the matter of the distribution of these $11,000 could be brought on before this Court by any of the parties interested making a claim thereto, upon giving notice to all interested parties.

When the matter came up before this Court upon this reserve, the interest of the claimant McKay was duly disposed of and upon application, the Canada Steamship Lines Ltd. were *mis-en-cause* as party creditors, asking to be collocated upon these $11,000 in lieu and place of the claimants in this case, under an agreement or covenant (Exhibit B.) passed between themselves and the claimants. This agreement reads as follows, viz:—

THIS INDENTURE MADE IN TRIPLICATE,
THE 22ND DAY OF FEBRUARY, 1919.

BETWEEN:—

FREDERICK R. JOHNSON, of the Town of Port Colborne. Province of Ontario, Master Mariner, and PERCY CHARLES BONHAM, of the City of Montreal, Province of Quebec, Marine Engineer and Surveyor, hereinafter called THE ASSIGNORS;

Of the First Part;

AND

CANADA STEAMSHIP LINES LIMITED, a body politic and corporate, having its principal office in the City of Montreal, hereinafter called THE ASSIGNEE;

Of the Second Part;

WHEREAS the assignors are owners of a sixty per cent (60%) equitable interest in the Steamship *Sarnor,* subject to the provisions of the Judgment of the Appellate Division of the Supreme Court of Ontario, dated January sixteenth, 1918, in an action in which A. B. MacKay, of the City of Hamilton, is plaintiff, and the assignors are defendants, and also subject to the provisions of the judgment of the Honourable Mr. Justice Latchford, in the Supreme Court of Ontario, dated June twelfth, 1918, in an action for an accounting in which the assignors are plaintiffs and A. N. MacKay is defendant;

WHEREAS said Frederick R. Johnson is registered as owner of the said steamship *Sarnor* in the Registry Office at the Port of Montreal, Province of Quebec;

WHEREAS the assignors have agreed with the assignee to assign their said interest in the steamship *Sarnor* as collateral security to secure the assignee against any loss on account of having up to date disbursed money in connection with the said *Sarnor* to the sum of twenty-five thousand dollars ($25,000), as also against all and any loss that may be suffered by

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said assignee from and in connection with any moneys the assignee may hereafter advance in connection with the said vessel either for the maintenance or the operation thereof;

NOW THIS INDENTURE WITNESSETH:—

1. In consideration of the premises, the assignors hereby assign to the assignee, their said interest in the steamship *Sarnor* as collateral security to secure the repayment to the assignee of the sum of twenty-five thousand dollars ($25,000), as also any other sum or sums which the assignee may, as hereinabove mentioned, be called upon to pay in connection with the said steamship *Sarnor* and litigation now pending in connection with the ownership of same;

2. The assignors hereby give the assignee the right or option to purchase the assignors' said interest in said steamship *Sarnor* for the sum of five thousand dollars ($5,000), of which two thousand five hundred dollars ($2,500) would be payable to the said assignors and two thousand five hundred dollars ($2,500) to one J. H. Cameron, Barrister, on account and in deduction of his bill for services in connection with the said steamship *Sarnor* provided the said Cameron will have a valid claim against the said assignors and the said vessel for said services to the extent of the said sum of two thousand five hundred dollars ($2,500);

3. The present option, which is given in consideration of the payment by the assignee to the assignors of the sum of One Dollar ($1), is to be valid and hold good up to and including the twenty-first day of February next, 1920;

4. It is hereby declared and agreed that these presents and everything herein contained shall respectively be binding upon and enure to the benefit of the executors, administrators, successors and assigns of the parties hereto respectively."

The option to purchase therein referred to was never acted upon and lapsed.

The parties then filed the following admission:—

Under reserve of allegations in pleadings herein, particularly allegations in amended defence, and for the purpose of this action only, the object being to save time and costs, I admit, on behalf of claimants:

(*a*) That not less than $25,000 was paid out by the Canada Steamship Lines, Limited, on behalf of steamship *Sarnor* up to the date of the assignment, namely, February 22, 1919;

(*b*) That subsequent to February 22, 1919, further sums were paid as aforesaid, the last payment being a payment of $500, having been made August 12, 1922.

Made in Court, October 5, 1928, by consent.

J. A. H. CAMERON,

Attorney for claimants Percy Charles Bonham and Frederick R. Johnson.

BROWN MONTGOMERY AND MCMICHAEL,

Attorneys for intervenant.

The claimants deny any liability to the Canada Steamship Lines Limited (hereinafter called the Company), asserting that the transaction between them is of a commer-

cial nature and is prescribed by 5 years under subsec. 4 of Art. 2260 C.C.P.Q., which reads as follows:

> 4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of grain or other things, whether negotiable or not *or upon any claim of a commercial nature* reckoning from maturity; this prescription does not apply to bank notes.

The question as to whether or not a transaction is of a commercial nature is rather impossible of precise definition, and the will alone of the parties will not make it so. Would it not seem that these words used in Art. 2260 should be approached and considered *as ejusdem generis* with matters therein mentioned, thus eliminating a transaction in the nature of the one subject to the present controversy.

Moreover if the delay for prescription is to be reckoned, as mentioned in the article, *from maturity,* it would seem that as long as the vessel remained in possession of the company, or was in existence, that prescription could not run and that it only began to run on the 29th September, 1924, when the vessel became a hulk and was destroyed for all practical purposes, a date determining that statement alleged in the claimants' written argument. Should not therefore the prescription, if any, run from that date? If so, the delay of five years is wanting. See Planiol, Droit Civil, vol. 2, p. 759, no. 2462.

The claimants are mariners and the company runs different lines of vessels. It is not in the nature of the claimants' occupation to purchase vessels or portions thereof, and it is not in the ordinary course of business of the company to advance moneys for the purposes of repairing vessels belonging to others. All of this occurred as a result of the Great War and was but a casual transaction, a civil loan, outside of their respective usual occupation.

The vessel, after being requisitioned, has been the subject of long, protracted and numerous litigations, before the matter of compensation came before this Court.

In the result it appears that the $25,000 and more advanced by the company was nothing but a loan to the claimants for the purposes of repairing the vessel, to put her in operation during the war. The company at no time became owner of the same. The vessel has disappeared, and there is no privilege attaching to the same for the loan so made for her repair, but the civil obligation between the

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parties to the agreement is still extant and I fail to see any justification by the claimants to repudiate to-day the obligation assumed under this indenture. This agreement (exhibit B) shows that the parties were acting in good faith and they intended the contract to be as set forth. The company did actually advance the money and the claimants received the benefit of the same. *Salvas* v. *Vassal* (1).

The claim may rest on the loan appearing in the indenture as a civil debt or obligation, outside of any privilege. *Macdonald* v. *Dillon* (2); *DeSola* v. *DeSola* (3); *Casgrain* v. *Prevost* (4); *Laliberté* v. *Godoua* (5).

The moneys advanced were in the nature of a loan which can only be prescribed by thirty years and the claim is not affected by the five years prescription under art. 2260. *Darling* v. *Brown* (6).

Therefore, the sum of $6,600 found coming to the claimants as owners of 60 per cent of the vessel, will be paid to their assignee, the Canada Steamship Lines Company, Limited, with costs of this issue in favour of the latter.

Judgment accordingly.