JAMES STEPHENSON WAUGH (DEFENDANT) ..... APPELLANT;

AND

PIONEER LOGGING CO. LIMITED (PLAINTIFF) ..... RESPONDENT.

1948
*Oct. 21, 22
1949
*Mar. 18

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Logging—Interpretation—Trust fund set up to guaranty performance—To be forfeited if covenants not carried out—Whether provision is penalty, liquidated damages or deposit.

Held: Taschereau and Locke JJ. dissenting, that the provision of an agreement to the effect that a special trust account set up by the purchaser out of the sale price of the timber, accumulating as the logging progressed but not to exceed $14,000, "to guaranty the due and proper logging by the purchaser", shall be forfeited by the default of the purchaser to carry out the covenants, is a penalty and not liquidated damages. (Judgment of the Court of Appeal (1948) 1 W.W.R. 929 maintained).

Public Works Commissioners v. *Hills* [1906] A.C. 368; *Dunlop Pneumatic Tyre Co.* v. *New Garage* [1915] A.C. 79 and *Mayson* v. *Clouet* [1924] A.C. 980 referred to.

Per Taschereau, Estey and Locke JJ.:—The clause in the agreement providing that the logging was to be carried on "except in periods when the price and market for logs is such that logs cannot be sold without loss" operated only when market conditions were such that logging operations on the Pacific Coast could not be carried on without loss.

*PRESENT: Kerwin, Taschereau, Rand, Estey and Locke JJ.

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Per Taschereau and Locke JJ. (dissenting): The purchaser of the timber was not entitled to recover the moneys paid by it into the special trust account which were in the nature of a deposit and in the terms of the agreement intended as a guarantee of the complete logging of the said lands. The evidence disclosed that the lands had not been completely logged and that the purchaser had repudiated its obligations under the contract before the expiration of the time fixed for performance. (*Wallis* v. *Smith* (1882) 21 Ch. Div. 243; *Howe* v. *Smith* (1884) 27 Ch. Div. 89 and *Sprague* v. *Booth* 1909 A.C. 576 referred to).

APPEAL from the judgment of the Court of Appeal for British Columbia (1) allowing the appeal from the decision of Wilson J.

W. S. Owen, K.C. and *D. J. Lawson* for the appellant.

John J. Robinette, K.C. for the respondent.

KERWIN J.:—Notwithstanding the form of the pleadings, there is no doubt as to the issues upon which the parties went to trial. I am willing to assume that the respondent company is in error in its construction of paragraph 6 (*g*) of the contract and to treat it as a party in default, asking for the return of its own money which comprises the special fund. On this basis, the appellant Waugh was entitled to claim damages from the company for its breach. For what, upon the record, are obvious reasons, he did not do this but claimed the money as liquidated damages. This claim is untenable as by the contract the money would be forfeited upon the slightest breach of any of its provisions and it is, therefore, a penalty: *Public Works Commissioners* v. *Hills* (2); *Dunlop Pneumatic Tyre Co.* v. *New Garage* (3).

At the trial and throughout the appeals, the appellant took the position that there was but one fund in question, and the case has been fought on that basis. The appellant has not sought to change his ground but, in view of the discussion in the reasons of my brothers Rand and Estey, I have examined the agreements of November 1, 1926, and May 4, 1940. Upon consideration I have concluded that they in nowise change the result as the moneys were never a genuine pre-estimate of damages but only a penalty.

(1) (1948) 1 W.W.R. 929.
(2) [1906] A.C. 368.
(3) [1915] A.C. 79.

Such cases as *Howe* v. *Smith* (1) and *Sprague* v. *Booth* (2) are in my opinion inapplicable. Waugh had only a right to cut and remove timber from Crown lands, which right, under the contract, passed to the respondent company's predecessor and, by subsequent agreement, to the company itself. Even if in one aspect these cases would be at all relevant, the decision of the Privy Council in *Mayson* v. *Clouet* (3) points the distinction between a deposit and instalments of purchase price of land. Here, the money in the special fund, while not part of the purchase price of the timber, was certainly not a deposit. If the contention put forward on the basis of the cases first mentioned were sound, the Hills case (4) could not have been decided as it was.

I agree with my brothers Rand and Estey as to the item $600.94. The appeal should, therefore, be dismissed with a variation as to this item and the respondents are entitled to four-fifths of their costs in this Court.

RAND J.:—Mr. Robinette's chief ground was that the trust account of $14,000 made up of the moneys now in the bank and the balance deemed to be held by the appellant, less the twenty-two hundred odd dollars admittedly to be credited to the appellant, is a penalty and not liquidated damages within the principle of *Dunlop Pneumatic Tyre Co.* v. *New Garage* (5), and on that ground I think he succeeds. Viewing the purpose of the fund as of the date of the agreement, it clearly provides for the forfeiture of the amount accumulated to any time for any breach of the provisions of the contract thereafter. This would include failure (*a*) to pay taxes, (*b*) to sell any number of logs for the best price, (*c*) to keep all equipment on the land until the logging was completed, (*d*) to log continuously subject to the conditions mentioned, and (*e*) to cut and remove all of the timber from the lands. If a default continued for ten days after notice, the agreement could at once be terminated, the moneys forfeited and other action taken as provided; but the forfeiture would relate to the default and not to the consequence of termination. There is the accumulating amount on the one hand

(1) (1884) 27 Ch. D. 89.
(1) [1909] A.C. 576.
(3) [1924] A.C. 980.
(4) [1906] A.C. 368.
(5) [1915] A.C. 79.

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and both fluctuating and static damages on the other. The range of the latter would include an insignificant amount for taxes and a minimum of unlogged timber, say a quarter of a million feet. There is no item for which the ascertainment of damages would be difficult or uncertain; for uncompleted logging it would be only a matter of obtaining an offer of stumpage, with damages limited to the rate or amount originally stipulated. There could be such variation both in specific and estimative amounts as makes it impossible for me to find the fund a genuine pre-estimate of damages.

This result does not mean, however, that a party in default is allowed in effect to demand a restitution of partial performance; setting up the fund is a collateral arrangement by which the vendor secures himself against a failure in performance by the purchaser; and finding its loss to be a penalty is, *ipso facto*, to declare it to be a security from which damages will be recouped, with the vendor a mortgagee, and the mortgagor entitled to ask that, subject to the deduction of damages, his property be returned to him: *Public Works Com.* v. *Hills* (1).

Against this it is said that the money was a "deposit" which cannot be recovered by a defaulting party. The nature of a deposit was discussed in *Howe* v. *Smith* (2) in which Fry, L.J. examined the matter historically. It is a term employed almost exclusively in the simple case of the sale of property. Whether in such a transaction a sum so called could ever be held to be a penalty it is unnecessary to decide because this is not merely a sale; the essential obligation is that the purchaser shall cut and remove the timber. But the mere employment of the term could not conclude the question. If that were so, the elaborate discussion in *Wallis* v. *Smith* (3) would appear to have been unnecessary. In the ordinary sale of property, the obligation of the purchaser is the single act of paying the price, and the deposit serves the additional purpose of part payment; it could be only in an unusual case where there would be an equitable ground for its return. In *Wallis, supra,* the purchaser was indeed to carry on a large scale land development scheme, but the deposit, so described, was

(1) [1906] A.C. 368.
(2) (1884) 27 Ch. D. 89.
(3) (1882) 21 Ch. D. 243.

to apply on the purchase price and was to be forfeited only on a substantial breach, the damages for which would be difficult of assessment; it was not a case where penalty could be found. Those circumstances sufficiently distinguish it from the contract here. In the *Hills* case, *supra,* there was no suggestion that the fund could be treated as a deposit: and in both that and the agreement here the term employed is "guarantee".

I have so far assumed that the $14,000 maintained its identity as a fund subject to the provisions of the contract and particularly clauses 4 and 7 (b), which stipulated for forfeiture. But there were two amendments, one dated November 12, 1936 and the other May 4, 1940. Under the former, the money amounting to about $6,000 then in the special trust account was paid out to the vendor and thereafter the 40c deduction was to be paid to him up to the total amount of the fund. When 15,000,000 feet remained to be logged, from the basic stumpage of $2.50 the trustee was to deduct the sum of $1.00 and pay it into a new special trust account until the fund was fully reconstituted, and thereupon the new account was to be subject to the original provisions. By the latter amendment, modifying the former, made when the new account had reached approximately $7,000, the $1.00 deduction was to be paid to the purchasers until they had received sufficient to make up with what was in the bank the total of $14,000.

I would have construed these amending agreements as having made inapplicable to the money while in the hands of the vendor and until the fund had been so reconstituted, the forfeiture provisions of the contract; but the consideration of this feature seems to be precluded by the footing on which the case was tried and carried to appeal. The case shows the trial judge as stating to Mr. Clyne, representing the vendor:—

> There is no argument as to how it was created. It is just as if the original $14,000 was there in the bank and I have to dispose of it. It isn't all in the bank, but the possession isn't essential because the defendant is obligated. If Mr. Clyne I would find against your client throughout, for instance, he would be compelled to bring that fund up to $14,000. Suppose I found against him throughout in addition to the $7,000 in the bank he paid out to Mr. Jackson's clients, would your client be compelled to bring up the fund to $14,000. Mr. Clyne: Yes, but not more.

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This understanding was accepted before us on the argument. The effect of the amendments is not, therefore, to be taken into account.

There remains the item of $600.94 arising from the sale of logs at the booming ground rather than at a mill point. Under the contract, the purchasers were to obtain the "best possible price". From that price which was to be dealt with by the respondents Tait and Marchant, there was first to be deducted the sum of $10.50 out of which were to be paid:

(*a*) Royalty and scaling fees to British Columbia;

(*b*) Two dollars and fifty cents for certain logs and $3.00 for other logs, to the vendor as a portion of the sale price;

(*c*) The sum of 60c for booming charges to a named company;

(*d*) The sum of 40c per 1,000 feet for the trust fund mentioned; and

(*e*) The balance to the purchasers "in respect of their work of logging, booming and towing of the said logs."

The difference between the price and $10.50 was to be shared equally by the vendor and the purchasers. Nothing is expressly said as to any place of sale, but for the first five years the rafts were towed by the purchasers to a mill at Victoria, and it was the price obtained upon the delivery of the logs there that was handed over to Tait and Marchant.

As the vendor was obviously interested in the excess of the sale price over $10.50 and as the latter sum was to include expenses of the purchasers in towing the logs—which could only mean from the booming ground to delivery at a mill—the price contemplated would be the best offered at a milling point. The language is wide enough to include the entire area of milling markets for Vancouver Island logs. But it is not necessary to attempt to define the range of delivery points to which the "best possible price" might be applicable. The judgment at trial allows damages to the vendor only on logs sold to Victoria mills but delivered at the booming ground and towed by the purchaser. In effect the towage charges were thus transferred from the loggers to the excess of the selling price over $10.50. The

range of price places was by the conduct of the parties for five years declared to include at least Victoria; and as that is the only destination with which we are concerned, the objection to the indefiniteness is removed. On this point, therefore, I agree with the trial judgment. But the respondent, Pioneer Company alone is bound by the provision. Neither Tait nor Marchant as individuals had anything to do with selling the logs; their duty was limited to distributing what was actually received in the manner provided. Nothing done by them as shareholders in the Pioneer Company can, in the circumstances, draw upon them personal liability.

The appeal must, therefore, be allowed as to the item for towage damages at $600.94 (the amount agreed upon) against the Pioneer Company and deducted from the moneys payable to that company. Beyond that, the appeal must be dismissed. The respondents appearing throughout by the same counsel should be allowed four-fifths of their costs in this court.

ESTEY J.:—The respondent asks a declaration that having completed on its part the terms and conditions of a logging contract, it is now entitled to the proceeds of a trust fund created under the contract as a guarantee for its due performance. At the trial respondent's claim to the proceeds of this trust fund was dismissed and the amount thereof awarded as liquidated damages to the appellant under his counter-claim. The Appellate Court (1) varied this judgment holding the fund to be a penalty and as no damages were awarded directed the amount thereof, less certain deductions, to be paid to respondent.

As a matter of convenience, the Pioneer Logging Company Limited will be hereinafter referred to as "respondent" and Messrs. Tait & Marchant, the other respondent, as "trustees."

The contract made between the appellant Waugh, as vendor, and Joseph and Louis Pedneault, as purchasers, is dated April 24, 1934. Under date of December 18, 1935, the Pedneaults assigned their entire interest to the respondent Pioneer Logging Company. This assignment was approved of by the appellant and no question arises with regard thereto. The original contract comprised three

(1) (1948) 1 W.W.R. 929.

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parcels: Lot 78 and Timber Licences 3733 and 3734 in the Renfrew District on the West Coast of Vancouver Island, British Columbia. The logging was completed on Lot 78 and the issues in this appeal are concerned only with the Timber Licences 3733 and 3734.

The contract provided:

> The Vendor gives and grants unto the purchasers the sole right, . . . until the 31st day of December, 1940, . . . to cut, remove, and carry away therefrom all of the timber . . .

This date of December 31, 1940, was by a supplementary agreement extended to December 31, 1941.

It also provided that the proceeds from the sale of the logs as received would be paid to Messrs. Tait & Marchant to be disbursed as in the agreement provided, including para. 2(A) (4) which directed payments "into a special trust account . . . the sum of forty (40c) cents per thousand feet to guarantee the due and proper logging by the purchasers of the said lands . . ." It is not questioned but that this 40c was paid into the trust fund from the respondent's share of the sale price and the ultimate disposition thereof is provided for in para. 4:

> . . . when the said lands shall have been completely logged and the sale price above provided paid to the Vendor, then the purchasers shall be entitled to all of the moneys in the said special trust account; but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the Vendor shall lawfully cancel this agreement by reason of the Purchasers' default in carrying out and performing the covenants and agreements herein contained on their part to be observed and performed, then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated damages for the non-performance or breach of this agreement.

The learned trial judge found that on December 31, 1941, the respondent was in default under the contract in that it had not logged "some 8 million feet of merchantable timber." The respondent does not contest the fact that it had not logged the 8 million feet but submits that its failure to do so did not constitute a default on its part because it could not have logged this timber except at a loss and by virtue of the provisions of para. 6 (*g*) it was in that circumstance excused from logging. Para. 6 (*g*) reads as follows:

> 6. (*g*) To carry on the logging of the said lands continuously with all of the logging equipment of the purchasers until the whole of the said lands shall be logged, save and except in weather which makes logging,

booming or towing unsafe, or in times of extreme fire hazard, or in periods when the price and market for logs is such that logs cannot be sold without loss.

It was suggested that this paragraph had no relation to any question of ultimate default such as here in question. Even on the assumption, however, that it does apply its provisions do not under the circumstances excuse the respondent. In order for the respondent to succeed under this paragraph it must be so construed that the words "when the price and market for logs is such that logs cannot be sold without loss" is a provision personal to its own conduct under this contract. In this connection it is important to observe that in para. 1 the respondent was granted the right to log, and in para. 5 it covenanted to "cut and remove all of the timber." In para. 6 (*f*) to conduct its "logging operations in a proper and workmanlike manner according to the most approved method of logging used by competent loggers of Vancouver Island . . ." Then in para. 6(*g*) to log continuously except in three events, weather, fire and market. In this context the parties in 6(*g*) were contracting with regard to contingencies beyond their control. When, therefore, they stipulated that "when the price and market for logs is such that logs cannot be sold without loss," they were providing against operating under adverse market conditions, which, as the learned trial judge has found, did not exist in the period with which we are here concerned. The evidence amply supports his finding in this regard. In fact Bestwick, a witness on behalf of the respondent, who operated the premises under a contract with the respondent, said there were 6 or 7 million feet that could be cut and removed at a profit.

On March 26, 1941, the respondent by letter notified appellant that because logging upon the premises could no longer be carried on except at a loss it would be "impossible to open up the camp and proceed with the logging this year." Thereafter throughout 1941 correspondence and conversations followed relative to the possibility of commencing logging operations and other matters under the contract but no agreement was arrived at. Even after December 31st the parties continued the negotiations until early in March the respondent concluded that the appellant intended to keep the trust fund.

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Respondent then took the position that there was no timber upon the premises that could be logged at a profit and therefore it had completed its obligations under the contract and demanded payment of the proceeds in the trust fund. When as a consequence of this formal demand the proceeds were not made available respondent on April 2, 1942, commenced these proceedings. The appellant by its defence and counter-claim treated the contract as at an end and claimed, under para. 4 *supra,* the special trust account by virtue of the respondent's default. Neither party asked for specific performance.

The appellant cites *Sprague* v. *Booth* (1) in support of his contention that because of respondent's default he is entitled to claim the trust fund by virtue of the forfeiture clause in the agreement. In the *Sprague* case (1) the purchaser had made default and the Privy Council held that the deposit was the property of the vendor under the terms of the contract and in the course of the judgment Lord Dunedin stated:

> The nature and incidents of such a deposit are accurately discussed in the case of *Howe* v. *Smith* (2).

In *Howe* v. *Smith* (2), the court emphasized that in the event of the default the disposition of the deposit depends upon the terms of the contract and both Lord Justices Cotton and Fry quoted the statement of Baron Pollock in *Collins* v. *Stimson* (3):

> According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.

The word "deposit," as explained by Lord Justice Fry in *Howe* v. *Smith, supra,* "is not merely a part payment, but . . . also an earnest to bind the bargain so entered into." Its use as such has developed from that period when parties concluded their contract by giving a sum of money, a ring or other object. It has now become a very common and well understood word between vendors and purchasers, and in their contracts the amount thereof is usually in relation to the total purchase price a relatively small sum. The courts in construing a document in which the parties have used the word "deposit" have accepted it as an

(1) [1909] A.C. 576.
(2) (1884) 27 Ch. D. 89.
(3) (1882-83) 11 Q.B.D. 142.

expression of their intention to the extent that in the language of Baron Pollock, *supra*, "the inference is . . . where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit." That it is only an inference is indicated by the remarks of the Privy Council in *Brickles* v. *Snell* (1) and *Boericke* v. *Sinclair* (2). In *Mayson* v. *Clouet* (3), the distinction between a deposit and other instalments is emphasized.

The parties to this action have neither used the word "deposit" nor treated the fund as such. It was not as a deposit paid to and received by the appellant as his own money to be retained by him in any event, either as part of the purchase price or as an amount forfeited in the event of default. The parties have described it as a "special trust account" in the name of two trustees and defined its purpose "to guarantee the due and proper logging by the purchaser" (para. 2(A) (4)), and again, it "is intended as a guarantee of the complete logging of the said lands . . ." If the matter had ended there the issue would have turned largely upon the meaning of the word "guarantee." A guarantee is ordinarily a collateral or secondary contract under which the guarantor becomes answerable for the debt or default of another's primary debt or obligation. The word "guarantee' in this case is not used in precisely that sense, but having regard to its ordinary meaning it would appear rather that the parties intended the respondent would gradually out of its income from its operations under this contract build up a fund as a guarantee or as security for its completion of the contract. So construed the trust fund would be liable only for such damages as were suffered by the appellant.

The agreement, however, goes on and provides that "when the said lands shall have been completely logged and the sale price above provided paid to the vendor" then the purchaser shall receive all of the moneys in the said special trust account "but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the vendor shall lawfully cancel this agreement . . . then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated dam-

(1) (1916) 2 A.C. 599.
(2) (1928) 63 O.L.R. 237.
(3) [1924] A.C. 980.

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ages for the non-performance or breach of this agreement."

The main issue, therefore, in this appeal, and that particularly stressed by counsel at the hearing, is whether the special trust account constituted a genuine pre-estimate of damages or a penalty. It is the terms of the contract that determine this issue. This trust fund increased as the work progressed and therefore the further the purchaser proceeded in the performance of its obligations under the contract the larger the amount. It must be obvious that at the commencement of the work and for some time thereafter the amount in the special trust account would be entirely inadequate if any substantial damages were suffered; while on the other hand, if the default occurred near the completion of the contract the amount might well be much larger than any damages that might be incurred.

Moreover, while the appellant never did cancel the agreement, he had the right to do so in the event of a number of possible defaults, and whether the parties genuinely pre-estimated damages or fixed a penalty depends upon the agreement as drawn and not upon subsequent events. In para. 5 the purchasers covenanted to "cut and remove all of the timber . . . in the manner and at the times above described." Then para. 6 contains a list of fourteen matters with regard to which the purchasers covenanted. These include: Covenant to obtain a registered timber mark for all logs; to have all logs scaled at the expense of the purchasers in the manner specified; to sell each and every raft or boom of logs at the best possible price; not to mix any of the logs; to take all fire precautions; not to remove its logging equipment. These are sufficient to illustrate the general character of the paragraph. Then in para. 7(*b*) it is provided that "if the purchasers shall at any time make default in observing or performing any of the covenants . . . the vendor shall be at liberty to give to the purchasers notice in writing of intention to determine this agreement . . . whereupon the purchasers shall be deemed to have abandoned this agreement and the vendor shall retain all sums of money . . . and all logs, timber . . ."

It will therefore be observed that in these paras. 5, 6 and 7 appellant as vendor had a right to cancel this agreement

for default in any one of a number of covenants, the damages in respect of each of which would vary and might in some cases be relatively small. It is in every case the language of the contract as a whole that must determine the intent and purpose of the parties and while the particular words used are important, the mere use of the words "liquidated damages" or "penalty" is not conclusive. In this case the language used is not particularly helpful as both the words "forfeited" and "liquidated damages" appear in the text. Lord Dunedin, in referring to similar language in *Commissioner of Public Works* v. *Hills* (1), stated:

> Indeed, the form of expression here, "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty, and not to liquidated damages.

If for the moment the fund here in question be accepted as sufficiently definite, under the forfeiture clause it would become the property of the appellant upon the breach of any of a number of covenants in which consequent damages would in regard to some be relatively small and others substantial. The case therefore comes within the oft-quoted language of Lord Justice Mellish in *In re Dagenham (Thames) Dock Co.* (2):

> I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

This same principle is embodied in the test suggested by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.* (3):

> There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone* v. *Monkland Iron & Coal Co.* (4)).

There are no circumstances in this case to rebut the foregoing presumption.

Moreover, until the sum of $14,000 was paid into the fund, which would be near the completion of the respondent's obligations, it was not a definite amount or one that could be determined with accuracy prior thereto. This

(1) [1906] A.C. 368 at 375.
(2) (1873) L.R. 8 Ch. App. 1022 at 1025.
(3) [1915] A.C. 79 at 87.
(4) (1886) 11 App. Cas. 332.

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and other features make this case somewhat similar to *Commissioner of Public Works* v. *Hills, supra.* In that case the plaintiff undertook to build three railways and lodged as security the sum of £50,000 with a third party and in addition thereto certain percentages of the contract price were withheld as further security. The plaintiff, as contractor, in that case had made default and sued for the work done and the return of the £50,000 and the percentages retained. In the reasons for judgment the Privy Council commented upon the indefiniteness of the total amount, held that these funds were penalties and directed the return to the plaintiff of the sum of £50,000 and the percentages, less any damages the defendant proved.

The parties have presented their respective contentions upon the basis that at all times there was but one fund and the provisions of the original agreement with respect thereto obtained throughout. However, an examination of the agreements made subsequent to April 24, 1934, and filed as exhibits, so far as they relate to this fund do not support the view that in fixing the sum of $14,000 the parties were pre-estimating damages. Whether under these agreements the fund, as it passed to the appellant, by him in part repaid and finally a portion ($2,230.35) paid to the respondent to assist it in financing, remained subject to the forfeiture clause or was but a fund to guarantee any damages that might be suffered need not be determined as the result of this litigation is the same whichever of these alternatives might be adopted.

It would therefore appear that this special trust account must be construed as a penalty and consequent relief against forfeiture granted. As no amount of damages have been proved it should be regarded as belonging to the respondent.

The claim against the trustees Tait & Marchant is based upon the fact that they did not notify the appellant of a change effected by the respondent in the sale of the logs at the boom rather than at the mill, which, under the particular provisions of this contract effected a loss of 30 cents per thousand feet to the appellant and a gain of the same amount to the respondent.

This new contract for the sale of the logs was negotiated in September or October 1939 by Garrison as manager of the respondent with the Songhees Timber Co. Ltd. The contract of April 24, 1934, between the parties hereto contained no specific directions as to whether the logs should be sold at the mill or the boom but because of the practice followed to date it did raise a question between the appellant and respondent but which did not involve the trustees.

This claim against the trustees is not based upon the breach of any express duty imposed upon them by the contract but rather that this duty to inform appellant was imposed upon them because at the time Garrison negotiated this contract for the sale of the logs they were substantial creditors of the respondent and benefited by this 30 cents per thousand feet. That they had some time before guaranteed the bank account (which they had not been called upon to implement), had in fact a relatively small block of capital stock and Tait himself was secretary of the respondent, was not denied. Apart from a reference to the payment of towage by the purchasers the contract of April 24, 1934, makes no mention thereof. This absence of any provision as to the place from and the distance of towage was mentioned between the trustees and the appellant as early as 1934 when the trustees stated it would demand consideration sooner or later. Now when the matter came up the trustees took the same position, as they had taken earlier with respect to towing charges and other matters arising out of the contract upon which there was some disagreement, that it was a question to be settled between the parties to that contract. It was no part of the trustees' duty to interpret or settle questions arising under the contract. They had acted in a professional capacity for both parties but had advised them long before this that in matters arising under this contract of April 24, 1934, they could not act for either party. This is not denied; in fact the appellant had employed other solicitors to act for him in such matters. Appellant deposes as to only one interview with Tait with regard to this matter and said he expected Mr. Tait to do something. He did not indicate why or upon what basis and nothing more was done as regard to these towing charges until this action was brought.

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The trustees' duties with respect to the reception and disposition of the sale proceeds were not affected by the new contract. Neither did its existence involve any conflict of interest between their duties as trustees and their personal interests. That such was the position and that the trustees were carrying on to the satisfaction of the appellant is evidenced by the fact that when appraised of all the facts, the appellant on May 4, 1940, when the trustees had acquired a majority of the stock, had increased their guarantees and were in active management of the respondent, executed a supplementary agreement which dealt with the towing charges from there on but left the trustees in the same position and with the same duties with respect to the sale price. That trustees cannot take advantage of their position as trustees to attain a personal benefit is well established, but here the new contract was not negotiated by the trustees, and while it involved a possible question between the contracting parties, it did not affect the trustees' position and any benefit that accrued was indirect and remote and not because of any conduct in relation to the new contract on the part of the trustees. Under these circumstances it cannot be regarded as a case in which the facts justify the imposition of liability on the trustees for the amount claimed.

The appellant also claims this amount of 30 cents per thousand feet from the respondent. The contract, as already intimated, does not specifically provide whether the logs should be sold at the mill or at the boom. There is a covenant, however, requiring the respondent to sell at the "best possible price" and also a provision that the purchasers would receive a portion of the purchase price "in respect of their work of logging, booming and towing of the said logs." The agreement of June 20, 1935, between Waugh, Pedneault Bros. and Wilfret set up a mill for the sawing of the fir logs from the premises here in question and provided "upon delivery of each boom of logs to the mill . . ." This provision plainly indicates that the logs were to be delivered at the mill. By an agreement dated December 18, 1935, the Pedneaults assigned to and the respondent did "agree to assume and carry out and perform all of the covenants" of the said agreement of the 20th June, 1935. This agreement of June 20, 1935, was replaced

by an agreement dated October 1, 1936, between the respondent, the Esquimalt Lumber Co. Ltd. and appellant and its provisions contemplated that the logs should be sold at the mill. Moreover, this contract was entered into in 1934 and up until 1939 the logs had been sold at the mill and the towing charges paid by the respondent. Under these circumstances, and particularly because of the foregoing provision relative to towing charges, I think it but reasonable that the parties contemplated that the ordinary towing charges as distinguished from those that might arise in respect of logs at distant points, would be paid by the purchasers, and that a term to that effect should be implied. The respondent therefore in breach of this implied covenant sold the logs at the boom, and having regard to the directions for the disposition of the selling price by the trustees, it did better its position to the extent of 30 cents per thousand feet and deprived the vendor of a like amount. This 30 cents per thousand feet totalled $600.94 and the judgment of the Court of Appeal (1) should be varied by allowing this amount of $600.94 as a deduction, along with the items of $972.20 and $2,230.35 as therein specified.

The appellant has not succeeded in his main contentions upon this appeal. The respondent and trustees have filed but one factum and appeared by the same counsel. Under these circumstances, the respondent and trustees should have four-fifths of their costs in this court.

The dissenting judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—The principal question to be determined in this appeal depends upon the construction to be placed upon the terms of an agreement in writing made between the appellant and Joseph Pedneault and Louis Pedneault carrying on business in partnership under the firm name of Sooke Harbour Logging Company, dated April 24, 1934, the benefit of which was, with the appellant's consent, assigned to the respondent company. By its terms the appellant granted to the purchasers the right until December 31, 1940, to enter into and upon and to cut, remove and carry away therefrom, *inter alia,* all of the timber suitable for the manufacture of lumber on Lot 78

(1) (1948) 1 W.W.R. 929.

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in the Renfrew District of British Columbia and two adjoining timber licences numbered 3733 and 3734. The right thus granted was stated to continue "so long as the purchasers are not in default in the observance of any of the covenants or agreements herein contained on their part to be observed or performed until the 31st day of December, 1940." Lot 78 was, by agreement, thereafter eliminated from the contract. As to the two timber licences the price to be paid by the purchasers was a stumpage of $2.50 per thousand feet board measure for all timber taken from them and 50 per cent of the surplus realized from the sale of logs over and above a deduction of $10.50 per thousand feet. To ensure the proper distribution of the moneys realized from the sale of logs, it was provided that as booms were sold the purchasers would be directed to pay the purchase price to the respondents Tait and Marchant, a firm of solicitors practising in Victoria who were directed to dispose of them by deducting from the sale price a sum equal to $10.50 per thousand, and to pay thereout the royalty and scaling fees, the stumpage payable to the vendor, booming charges and:—

> To pay into a special trust account, in the name of J. S. Waugh and Sooke Harbour Logging Company, the sum of forty cents per thousand feet to guarantee the due and proper logging by the purchasers of the said lands as hereinafter mentioned.

any balance of the $10.50 remaining was to be paid to the purchasers and any remaining surplus of the purchase money was to be paid into a trust account to be divided equally between the vendor and the purchasers.

The principal issue is as to ownership of the moneys accumulated by the payment of forty cents per thousand feet above referred to, and the exact terms of the further provisions of the agreement dealing with these moneys are of importance. Paragraph 4 of the agreement read:—

> 4. The sum of forty cents per thousand feet to be paid into a special trust account as provided in sub-paragraph (A) (4) of paragraph 2 hereof shall be deducted and paid only from the proceeds of the logging of the first thirty-five million feet of the timber on the said lands, and is intended as a guarantee of the complete logging of the said lands; and if and when the said lands shall have been completely logged and the sale price above provided paid to the vendor, then the purchasers shall be entitled to all of the moneys in the said special trust account; but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the vendor shall lawfully cancel this agreement by reason of the purchasers' default in carrying out and performing

the covenants and agreements herein contained on their part to be observed and performed, then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated damages for the non-performance or breach of this agreement.

By paragraph 5 the purchasers agreed that they would cut and remove all of the timber from the lands and would pay to the vendor the stumpage price provided for in the manner and at the times described, and by sub-paragraph 6 (*g*):

To carry on the logging of the said lands continuously with all of the logging equipment of the purchasers until the whole of the said lands shall be logged, save and except in weather which makes logging, booming or towing unsafe, or in times of extreme fire hazard, or in periods when the price and market for logs is such that logs cannot be sold without loss.

A further term provided that if the purchaser should make default in performance of any of the covenants, terms, provisions or conditions of the agreement, the vendor should be at liberty to give the purchasers notice in writing of an intention to determine the agreement at the expiration of ten days from the giving of such notice, and that if such default should not be remedied within that time the purchasers' rights under the agreement should at the option of the vendor cease and determine.

It is, I think, unnecessary to examine into the manner in which the fund of $14,000 was eventually constituted, and sufficient to say that at the time of the commencement of the action, either in the hands of the appellant or in a special trust account in the Royal Bank of Canada at Victoria, this amount had been accumulated out of payments made for the purposes defined by the agreement.

Joseph and Louis Pedneault entered on the property and commenced logging operations in the year 1934. In December 1935 they assigned their interest in the agreement with the appellant to the respondent company, by which operations were carried on during the years 1935 and 1936. The market price of logs was very low at the time the agreement was made but by 1936, when the Pedneaults sold their share interest in the company to one Garrison, the market had substantially improved and, according to Joseph Pedneault, they made money from 1934 to 1936. Thereafter, according to the account of the respondent company, the operations were unsuccessful:

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in 1937 there was a small loss and substantial losses were made in the years 1938, 1939 and 1940, so that in the latter year the company had become hopelessly insolvent. The respondents Tait and Marchant of whom Garrison had sought help advanced money to the company and, according to the respondent Tait, the losses were extremely heavy. Garrison abandoned the undertaking in the spring of 1940 and left the country transferring all of his shares in the company, which were sufficient to control it, to Tait and Marchant. On May 4, 1940, a further agreement was negotiated between the defendant company and the appellant whereby, *inter alia,* the time for logging the entire tract was extended to December 31, 1941, and the company agreed to log at least five million feet in the season of 1940. The company made an arrangement with one Bestwick to take out logs under which a considerable quantity were logged and sold during the year 1940, Bestwick being paid a flat price of $7.00 a thousand for logs delivered to Victoria but in October of that year he refused to operate further without an increase in the amount to be paid him and the operation was closed down. According to Bestwick, when he ceased operations in 1940, there were six or seven million feet left standing upon the limits which it would have been profitable to log at that time. In the spring of 1941 all the equipment of the respondent company had been removed from the limits and sold to Bestwick. While the time for removal of all the timber had been extended to December 31, 1941, nothing more was done by the purchasers after Bestwick ceased his operations. Upon conflicting evidence the learned trial judge accepted that given by Eustace Smith, a very experienced timber cruiser, who said that when he cruised the property for the appellant in 1942 he found 8,254,000 feet of economically accessible timber remaining upon the licences.

By its Statement of Claim the respondent company asserted that it had cut and logged all the timber which could be logged without loss, that the limits had been completely logged and that it had complied with all the requirements of the agreement entitling it to receive payment of what it, not inaccurately, designated as the Guarantee Trust Fund. The plaintiff's obligation under paragraph 1 of the agreement was to "cut, remove and

carry away therefrom all of the timber suitable for the manufacture of lumber" and not merely that which could be logged without loss. The plaintiff invoked the provisions of subparagraph 6(*g*), however, which as noted relieved it of the obligation of carrying on the logging of the said lands continuously under certain circumstances. While admittedly there was a substantial stand of timber suitable for the manufacture of lumber remaining upon Timber Licence 3734 when Bestwick ceased to operate in October 1940, the attitude taken by the plaintiff was that since this could not be logged in 1941 without incurring losses its obligations under the agreement had been discharged.

The case of the respondent company is that the words "when the price and market for logs is such that logs cannot be sold without loss" should be interpreted as referring to the logs cut from these properties, while the appellant contends that its proper meaning is that continuous logging is excused only when market prices are such that logging operations generally cannot be carried on on the Pacific Coast without loss. I think the appellant's contention is correct. The agreement as a whole was intended to ensure that all merchantable timber upon these limits would be cut and removed and the Pedneaults, after examining the property and therefore well knowing that there was on the upper levels of Timber Licence 3734 several million feet of rather small merchantable timber which they would be required to remove, undertook that obligation and the respondent company later assumed it. The guarantee trust fund was in the words of the agreement "intended as a guarantee of the complete logging of the said lands." If the respondent company's contention were correct, its obligation to completely log the limits could be avoided by showing that to log the remaining eight million feet would result in a loss to it, irrespective of the state of the log market. This was a risk which the purchasers assumed when they entered into the contract and I think they are not relieved from their obligation by the proviso. No attempt was made to establish that logging operations generally on the Pacific Coast could not be carried on without loss in the year 1941. The respondent company endeavoured at the trial to avail

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itself of the proviso by showing that its own operations in the years 1937 to 1940 inclusive had resulted in a loss and, in a letter written by it to the appellant of March 26, 1941, the opinion was expressed that there would be a loss of not less than $3.00 per thousand in completing the logging of the limit. The learned trial judge being of the opinion that the proviso should be interpreted in the manner contended for by the appellant did not make any finding as to whether the respondent company could have cut and removed the remaining timber without loss. He did, however, find that the contention that an increase in logging costs during the period had resulted in a loss to the respondent company had not been proved. In the reasons for judgment of Sidney Smith, J.A. in delivering the judgment of the Court of Appeal (1), it is said:

> The purchasers found they could not continue logging these lands without loss, and paragraph 6(*g*) then began to operate in their favour.

With great respect, I think this finding is not supported by the evidence. Bestwick, a practical logger, expressed the opinion that the timber remaining when he discontinued operations in October 1940 could be profitably logged and Eustace Smith considered that in each of the years 1936 to 1941 inclusive operations could have been carried on without loss. As opposed to this, the respondent Tait gave evidence that certain capital expenditures were required and that, in his opinion, the operations would result in a loss. No practical logging operator was called by the respondent company to establish this fact, while on cross-examination Bestwick expressed the opinion above referred to. If it were the fact that the remaining timber could not be taken out by the plaintiff company without incurring loss, the onus of establishing this rested upon it and, in my opinion, that burden was not discharged: on the contrary, in the absence of a finding by the trial judge, I think the evidence of Bestwick and Eustace Smith should be accepted. I am, therefore, of the opinion that even if the respondent company's contention as to the interpretation of clause 6(*g*) were correct, the claim is not supported by the evidence.

If the Statement of Defence had merely put in issue the allegations made in the Statement of Claim, this would be decisive of the question as to the Guarantee Trust Fund.

(1) [1948] 1 W.W.R. 929.

The defendant, however, while traversing these allegations alleged affirmatively various defaults by the respondent company in carrying out the terms of the agreement including, *inter alia,* its failure to cut and remove all the merchantable timber from the said lands, and that accordingly the moneys deposited in the special trust account had become forfeited "and now absolutely belong to the defendant as liquidated damages for the non-performance and breach of the original agreement" and by counterclaim asked a declaration that the moneys were so forfeited as liquidated damages. The respondent company replied and joined issue and by this pleading set up for the first time that the provision in the agreement providing for the forfeiture of the moneys was in the nature of a penalty and asked relief from the penalty. This plea was incorporated by reference in the reply to the counterclaim and in this manner the question was properly put in issue.

In considering this aspect of the matter, it is to be borne in mind that a cruise made of the two limits in 1944 by Eustace Smith had shown a little over forty-one million feet of merchantable timber upon the two limits and that by the agreement the fund to be accumulated by the payments of 40 cents per thousand feet were to be paid only from the proceeds of the logging of the first thirty-five million feet of the timber. This would provide a fund of $14,000 and, assuming the accuracy of the cruise, the stumpage payable upon the remainder of the timber computed at $2.50 a thousand would amount to $15,000. By paragraph 4 which stated that the fund was intended as a guarantee of the complete logging of the lands, it was provided that if and when the lands had been completely logged and the sale price (meaning the stumpage) paid, the purchasers would be entitled to receive the money. It was upon the basis that it had complied with this part of the clause that the action was launched. In my opinion, the pleader properly appreciated the position of the plaintiff in framing the Statement of Claim. The contention that the clause provides for a penalty is based upon the theory that the amount of the guarantee trust fund which, it is said, might be forfeited for a number of trifling defaults is so large that the court in the exercise of its equitable jurisdiction should grant relief. It may be noted in passing

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that in the result the trust fund was inadequate to provide against the situation which arose when the respondent company announced its intention of leaving the remaining 8,254,000 feet upon the limit uncut. The stumpage upon this quantity of timber would have been something in excess of $20,000 while the fund then accumulated was some $6,000 less. It is, however, said that the fund would equally be liable to forfeiture if the respondent company had cut all but an insignificant amount of the timber, and as paragraph 4 which provided for the forfeiture for failure to complete the logging of the lands further provided for forfeiture if "the vendor shall lawfully cancel this agreement by reason of the purchasers' default in carrying out and performing the covenants and agreements herein contained on their part to be observed and performed", this would mean that if default were made in paying the stumpage of $2.50 on one thousand feet board measure of logs the fund would be forfeited. It is of importance to remember that this is not a case in which the plaintiff asks specific performance or asserts his willingness to complete his part of the agreement and asks relief from an alleged forfeiture. On the contrary, this plaintiff commenced the action by asserting that it had fulfilled all the terms of the contract and that it was entitled under the terms of the agreement to recover the moneys. The correspondence produced makes the attitude of the respondent company perfectly clear. By a letter dated March 26, 1941, addressed by the respondent company to the appellant, the latter was informed that an investigation as to the possibility of logging the remaining timber had been made and that it was found that there would be heavy losses and concluded:—

> We accordingly have no course but to advise you that it is impossible to open up the camp and proceed with the logging this year.

According to Mr. Tait, there was at this time ample time to complete the logging before December 31, 1941. Further evidence of the intention of the respondent company not to proceed is shown by the fact that in the spring of 1941 it removed all of the logging equipment from the property and sold it to Bestwick. It appears that following this there were some negotiations between the parties for the purchase of the remaining timber but nothing came of this

and on March 6, 1942, shortly prior to the commencement of the action, the solicitors for the respondent company wrote the appellant saying that under the contracts their client was only required to log timber which could be logged at a profit, that there was no longer any timber of that sort on the lands, so that the company was entitled to the guarantee funds and demanded payment of $14,000.

In my opinion, the letter of March 26, 1941, amounted to a repudiation of its obligations under the contract by the respondent company. The test as to what amounts to such repudiation is stated by Lord Coleridge, C.J. in *Freeth* v. *Burr* (1):

> The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

language which was expressly approved in the House of Lords in *Mersey Steel Company* v. *Naylor* (2) and *General Billposting Company* v. *Atkinson* (3).

There is no distinction to be made between the position arising from the fact that the plaintiff misconceived its liability under the contract and that which would result from a wilful refusal to discharge its obligations under it. The argument for the plaintiff must, therefore, be that while failing to fulfil its covenant to cut and remove all of the timber and, in breach of another of its covenants, having removed its logging equipment without the consent of the appellant while there remained several million feet of merchantable timber standing and having, some eight months in advance of the expiration of the period, wrongfully repudiated its obligation to cut and remove the remaining timber, it is entitled as against the appellant to recover the accumulated fund of $14,000 which, in the words of the agreement, was payable to it "if and when the said lands shall have been completely logged and the sale price above provided paid to the vendor", leaving the appellant to his remedy in damages. While we have had the advantage of hearing a most careful and thorough argument on behalf of the respondent on the question as to the right of the respondent company to these moneys on the footing that to permit the appellant to recover them would be to enforce a penalty, we were not referred to any authority which, in my opinion, supports the position which the

(1) (1874) L.R. 9 C.P. 208 at 213
(2) (1884) 9 A.C. 434.
(3) [1909] A.C. 118, 122.

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plaintiff must sustain if it is to succeed. The principles upon which the courts have proceeded in determining whether sums to be paid upon the breach of one or more covenants in an agreement are to be regarded as in the nature of penalty or as liquidated damages are summarized in the judgment of Lord Dunedin in *Public Works Commissioners* v. *Hills* (1) and in *Dunlop Pneumatic Tyre* v. *New Garage* (2). It was on the footing that these principles were applicable that the judgment of the Court of Appeal (3) proceeded in finding that the portion of the agreement, which provided that should the purchaser fail to complete the logging in accordance with its terms or if the vendor should lawfully cancel the agreement by reason of the purchaser's default in performing its obligations the moneys should be forfeited and belong to the vendor as liquidated damages, was in the nature of a penalty against which the court should relieve. It must, however, be borne in mind that in none of these cases was there, as in the present case, a fund set up to be deposited in a bank in the joint names of the parties or otherwise as a guarantee for the fulfilment by the purchaser of its obligations under the contract, which was to be forfeited if the purchasers failed to complete their bargain. The distinction is pointed out by Jessel, M. R. in *Wallis* v. *Smith* (4) where, after referring to the cases where the question is as to whether or not the sum to be paid or the obligations imposed is in the nature of a penalty, it is said:—

> I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply and that the bargain of the parties is to be carried out.

In the present case the purpose of establishing the fund was, in the language of the agreement, "to guarantee the due and proper logging by the purchasers of the said lands." I am unable to see any distinction in the legal position of a deposit thus established for a definite purpose during the course of the performance of the contract and one which is paid in a lump sum at the time an agreement is negotiated. Unless they are to be distinguished the matter is, in my view, concluded by the authorities.

(1) [1906] A.C. 368.
(2) [1915] A.C. 79 at 86.
(3) (1948) 1 W.W.R. 929.
(4) (1882) 21 Ch. D. 243 at 258.

In *Hinton* v. *Sparkes* (1), an agreement for the purchase of a public house with fixtures, etc. contained the following stipulations:—

> And, as earnest of this agreement, the purchaser has paid into the hands of the vendor £50, which is to be allowed in part payment of the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following damages: and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other £50, hereby mutually agreed upon to be the damages ascertained and fixed, on breach hereof.

Instead of depositing the £50 the purchaser gave an I.O.U. for the amount: thereafter he failed to complete the purchase and the vendor sold the public house for ten pounds less than the purchaser agreed to pay for it and brought an action against the purchaser for breach of the agreement and upon the I.O.U. It was held that the fact that an I.O.U. had been given for the deposit did not affect the matter.

Boville, C.J. said that the intention of the parties, as he gathered it from the agreement, was that this was to be taken as the ordinary case of payment of a deposit, to be forfeited on the purchaser's failure to complete the contract and that there was no answer to the action, and in dealing with the numerous cases to which he had been referred as to the distinction between penalty and liquidated damages held that they had no application to a contract in the form of that in question.

In *Ex parte Barrell* (2), the facts were that by a contract for sale of real estate it was stipulated that a portion of the purchase money should be paid immediately and the residue of this on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt and his trustee disclaimed the contract under the provisions of the Bankruptcy Act and called upon the vendor to repay the deposit. Sir W. M. James, L.J. said that the trustee had no legal or equitable right to recover the deposit; that the money had been paid to the vendor as a guarantee that the contract should be performed; that

(1) (1868) L.R. 3 C.P. 161. (2) (1875) L.R. 10 Ch. App. 512

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the position of the trustee was that while refusing to perform the contract he demanded back the deposit, and Sir George Mellish, L.J. agreeing with this conclusion said that even where there was no clause in the contract he could not have back the money, since the contract had gone off through his own default.

In *Howe* v. *Smith* (1), a purchaser paid £500 which was stated in the contract to be paid "as a deposit and in part payment of the purchase money." The contract provided that the purchase should be completed on a day named and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase price and after repeated delays the vendor resold the property for the same price. On the purchaser bringing an action for specific performance, it was held that he had lost this right by delay: as to the deposit, although it was to be taken as part payment if the contract was completed, it was held to be also a guarantee for the performance of the contract and that the plaintiff having failed to perform his contract within a reasonable time had no right to its return. Cotton, L.J. after referring with approval to what had been said by Lord Justice James in *Ex parte Barrell* (2) said that a deposit was a guarantee that the contract should be performed and that if the purchaser repudiated the contract he could have no right to recover the deposit. Fry, L.J. said in part (p. 101):—

> Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

In *Sprague* v. *Booth* (3), the contract provided in terms that the deposit was paid as security for the due carrying out of its terms and that in the event of default it should be forfeited as liquidated damages. There the deposit was

(1) (1884) 27 Ch. D. 89.
(2) (1875) L.R. 10 Ch. App. 512.
(3) [1909] A.C. 576.

a sum of $250,000 on account of a purchase price of $10,000,000 for shares in Canada Atlantic Railway Company. In addition to the shares, certain bonds were to be issued by the company and delivered at a named date but, owing to what was held to be a default of the proposed purchaser, they were not ready for delivery. The plaintiff to whom the rights of the latter had been assigned repudiated liability to complete and claimed the return of the deposit. Counsel for the appellant contended, as has been done in the present case, that the forfeiture of the deposit was a penalty from which the court would relieve, that it was not one of liquidated damages, for the purchaser was exposed to it equally upon a refusal to perform, the slightest delay, or, in the absence of any delay, by reason of a deficiency in the smallest portion of the price, and relied upon the decisions In *re Dagenham (Thames) Dock Co., Ex parte Hulse* (1); *Cornwall* v. *Henson* (2); *Public Works Commissioners* v. *Hills* (3). In rejecting this contention Lord Dunedin (4), after reciting the facts, said in part (p. 580):

> When therefore the parties have agreed that the furnishing of the corpus of the bonds should be entrusted to Webb, and when Webb failed to produce the bonds in time to be signed by June 1, it seems to their Lordships that it stopped the mouth of Webb or his assignee from saying that Booth was in default in not having signed the bonds. It therefore follows that the non-payment of the money was not excused by any default of Booth, and was therefore default on the part of Webb or his assignee. This result seems to follow equally whether time was or was not of the essence of the contract. If it was, the result must follow. If it was not, it might still be that, by offering the money, Webb or his assignee might have been entitled to be given specific performance on terms as to the actual date of payment and delivery of the bonds. But to consider themselves absolved by the mere non-production of the bonds, the completion of which they themselves had by their conduct prevented, and then—without even proposing to offer the money—to treat this as a basis for repetition of the deposit and a claim of damages for non-performance, was, in the opinion of their Lordships, out of the question.

As in the present case the trustee in *Ex parte Barrell* (5) and the plaintiff in *Sprague* v. *Booth* (6) while wrongfully repudiating their own obligations under the contract sought to recover the moneys deposited, as here, to guarantee its performance. As pointed out by Lord Dunedin (4) in the passage quoted from his judgment, this differentiates that case from those in which while there has been default the

(1) (1873) L.R. 8 Ch. App. 1022.
(2) (1899) 2 Ch. 710.
(3) [1906] A.C. 368.
(4) [1909] A.C. 576.
(5) (1875) L.R. 10 Ch. App. 512
(6) [1909] A.C. 576.

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purchaser seeks to remedy such default and to carry out his contract and asks relief. Here the plaintiff seeks to be placed in the same position as the plaintiff in *Steedman* v. *Drinkle* (1). The equitable principle upon which the court acted in granting relief in that case has no application to the facts of the present case, in my opinion. The appellant is entitled to a declaration that he is entitled to the moneys accumulated in the trust fund, whether in his hands or in those of the Royal Bank.

As to the claim for $600.94 advanced against the respondent company and Tait and Marchant, I agree with my brother Rand and would allow the appeal as against the company.

The appeal as to the guarantee trust fund and as to the last mentioned claim against the respondent company should be allowed: the appeal from the dismissal of the said claim as against Tait and Marchant should be dismissed. The appellant should have his costs throughout as against the respondent company. The defendants by counterclaim, Tait and Marchant, were found liable to the appellant at the trial for a further sum of $972.90 and costs and did not appeal from that finding: they are, however, entitled to succeed, in my view, in respect of the claim of $600.94 and should have their costs in the Court of Appeal and in this court.

Appeal dismissed.

Solicitor for the appellant: *H. J. Davis.*

Solicitors for the respondent: *Burns & Jackson.*

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(1) (1916) 1 A.C. 275.