McGillivray & Co

Legal opinion re estate of McG & Co.

1826

Dupin's opinion on q. 1st question — "Le Séminaire de Montréal a une existence légale — nous répondrons très affirmativement: oui, il a une existence légale — he refers (p. 5) — to q. Edits & Ord: Vol. 1. p. 80, cont. lett. pat. of Louis XIV Mai 1667, creating them "une communauté Séminaire d'Eccl. dans la Ste. isle de Mont." — & further (p. 7) says — the conquest did not operate any change in this order of things.

If this opinion be correct — why do the Seminary now seek by the proposed Ordinance to be made a body corporate?

Frd.k Pissis Esqr

Stephen Sewell Esq.

Montreal 15 march 1832

dear Sir,

Referring to the opinion which you some time ago gave me on the subject of "Societies en Commandite," and the few words you told me on the same subject afterwards. I would now beg of you to state whether the trading of such a company with the mother country, can give rise to a state of things which would render the non-liability (beyond the amount of the sums subscribed by them,) of the associés commanditaires doubtful.

If such a state of things be likely or possible, I wish you to make it known, to me what it is, and at the same time to point out how it is to be avoided in carrying on the proposed commerce.

Suppose the case that a partnership be formed in England between the active and ostensible partners ~~[illegible]~~ of the "Société en Commandite" now forming here, and an English house. How would the dormant partners here be affected by the failure of such house in England?

Suppose again that one of the active and ostensible partners of our "Société en Commandite," establish a house in England, and carry on trade there, and that he fail. Can any process at law taken against him in England thereupon, (or in the first above supposed case) have the effect of making the dormant partners here

here liable to the English creditor beyond the amount of the sums they had subscribed to and placed ~~in the~~ en commandite in the said Company?

I beg of you to examine the matter in all its bearings, that ~~[illegible]~~ all reasonable doubts on the subject be satisfied: and to give me your written opinion thereon when matured.

I have the honour to be

Dear Sir

Your respectful and very

obedient Servant

F. Aut. LaRoque

as difficulty of interpreting Stat & Real & personal
See 1 Bouvier's 466 quoting Pyle v. Pyle
See also pp. defendant's Instructions &c
pp 446—452, 3: 6: 7: 9. 460, 4, 5, 6:
9. 470:— 1, 2 Seq

Stephen Scovell Esq

Case

Question

"To what extent will that part of the English "Commercial law in force in this country operate "on, or affect the Société en Commandite, as "recognized by the Ancient Laws of the Country"

Answer —

I am of Opinion that ~~as~~ the English Commercial law ~~of England~~ does not in any wise operate against or affect the Société en commandite recognized by the Old laws of the Country and the grounds of my Opinion are that the British Statute of 14th George 3rd Cap 83 It was enacted that in all matters of controversy relative to property & civil rights recourse should be had to the laws of Canada as the Rule of decision of the same and that all causes thereafter to be instituted for & — Are of the Laws of Canada ~~when it exist~~ in force when it was under the French Government ~~that~~ that related to the Société en Commandite the Enquiry whether any

law has been passed since the 14th Geo 3d which in any wise affects that law and throughout the Statute Book there is to be found nor has any judgments of the Courts ~~which~~ to my knowledge which operate agt it. neither could they be regarded as law if they ~~have~~ had been any —

The only law of the province subsequent to the 14th Geo 3d is the Ordnce of the 25. Geo 3d Cap. 2. the 10th Sect — of which ~~is as~~ enacts that "In proof of all facts concerning Commercial Matters throughout shall be had in all the Courts of civil jurisdiction in this province of the rules of Evidence laid down by the Laws of Engd —

~~The~~ ~~Co~~ partnerships are Contracts and there is a wide difference between to contract itself — and the proof of it

~~If~~ English ~~books~~ Cases are cited in our Courts ~~in Prog~~ only to illustrate cases where we voluntarily borrow in the Laws of Eng & Fr

which in principle ~~is the~~ are almost
always identically the same — for it
is a fact that ~~Lego~~ the whole body of the
law of Commerce through Europe has resulted in the first
instance not from Leg. Ms: but from what
merchants in their intercourse ~~have~~ together
have deemed most expedient ~~to~~ which
were established among them selves or in
case of difference by Arbitrators and it is
another curious fact that in France then
were Courts or Com: Conv. the century &
upwards before one author ever to
be found in Engl. Hence the similarity
between them so frequently found to be — there
are exceptions and one is the the case
of the Lonte in Commander which Engl
Judges have not adopted

Montl. 23d Jany 1832.

François A. Lakorque Esquire

Sir

I received

Quebec
Court of Con
Mandate

For
Jn Antoine Lafrique Esq.

Recd January 1832

We have given the best consideration to the Subject submitted for our opinion, which is one that embraces a portion of law ~~which is~~ admitted by the best writers to be ~~the~~ more difficult of interpretation than any other & as the object of the Company is important, & the interest of the parties concerned maybe ~~very much~~ exposed we ~~have~~ consider it proper in ~~giving~~ given our opinions on the ~~the~~ points referred ~~to us~~ also to give the authorities which have led us to the conclusions ~~of our~~ which they are founded ~~minds~~ and this we do expressly that in case ~~those~~ conclusions be wrong they may be examined & corrected ~~and~~ as the Company ~~deems the~~ be fit, and the Company ~~obtain~~ may be ~~thereby~~ afraid of ~~a~~ legal rule of action which will not entail damage on any of its members — and proceeding to our opinion we will first state as ~~a~~ clear position ~~that in case the~~ of law ~~in our minds~~ so that ~~the~~ if such a partnership as is stated in the first question be formed in England every ~~the~~ person who shall be a partner of that concern be he, an Ostensible Anonyme or En Commandite or what in England is termed ~~a~~ dormant — ~~such partner~~ would be by unanimous law liable for its debts

1st Boulenois Tr de la personalité 466

Case as stated by Mr. Larrogn-

~~2 1.~~ Referring to the opinion of

Encl. 1

2. 2

to what ~~the~~ ~~extent~~ extent will be ~~herein~~ ~~more~~ fully examined in the sequel —

2 Que les conventions (as Boulenois says) faites pour se precautionner contre la contrariete des Statuts personels, sont valables, pourvu qu'elles fussent autorisées par les Loix du lieu auquel la personne est soumise au moment qu'elle contracte ou qu'elle aliene.

2d Boulenois Traite de la personalité 546 ~~see also~~ 521 & seq.

3 That the Laws of the place at which a person voluntarily contracts, and at which place he also promises to pay, are the laws ~~by~~ which he submits ~~the~~ to be bound whatever may be the difference of opinion of writers ~~that in cases wherein~~ when the place of contract and of payment ~~be~~ not the same.

2d Boulenois 445. 446. Lacombe Rec. de jurisp: 218 col. Edit. 1753 Tit: Statut No 4. & citations from Dumoulin. 3 Chitty's Commercial law 107. 2 Boulenois 475 comment.

4 That the Law of England is different from that of Lower Canada as relates to dormant partners. By the law of England, it is no security to a Dormant partner ~~that he had~~ when called on to pay, voluntarily that he had stipulated that his copartner should carry on the trade at his own seperate risk & that he should not be answerable for any ~~of the~~ joint debts or engagements of the partnership, — ~~but~~ his liability depends

Gow on partnership 162 Ellis Law of Creditor & Debtor 184. 5 Walton on partnership 159. see also Waugh vs Carver 2 H Bla. 235 Perkins vs Blanchard 4 Pick. 146 see also Mouse vs Wilcox 4 Term R. 353

1 Comyns on Contracts 286. 2 Kent Com 1004 Grant 2 Smith Mercantile Law of partnership 156

on the fact ~~that he of his~~ that he is a partner at the time the contract is made, that is that his profits are contingent & indefinite & depending on the accidents of trade ~~either~~ and that, either, an assembly or Dormant partner ~~to such~~ and a dormant partner cannot set up the plaintiffs ignorance at the time of the contract of his being a partner to corrate such liability

2 Boulenois & de la personalite 489. Gilly's Commercial Law 108 cites as showing the general principle 1 Kent. 258 Robinson vs Bland. ~~Lord~~ Other authorities

5 When a contract is entered into between two parties and a suit thereon is brought in a foreign Court, it must be decided by the ~~same~~ principles ~~which govern the courts of~~ law ~~which prevail~~ of the country ~~according~~ in which the contract was entered into ~~made~~, & as some authors say it ~~to be specified~~ payment is to be made ~~in a certain~~ for

2 Boulenois 458: 9.

6. ~~It is held by some authors that when the laws of a country in which a contract is made for the sale of an~~ It may be added here as a general rule that the persons entering into contracts are to be governed by ~~are to be decided according to~~ the laws ~~in which they made~~ of the country, altho it ~~is~~ agreed that the ~~parties~~ have ~~to~~ consummate ~~praised them~~ Boulenois says ~~Matter then~~ This rule depends on ~~the consideration of many~~ circumstances ~~of the cases~~ & he is supported by Dumoulin ~~but he admits that almost all~~ who is ~~agreed to it being~~ received as a general rule

as an instance of this it is decided that interest according to the ~~law~~ law of the place where the Contract is made is to be paid.

2 Bouhnot's Commentaries 514 — 2d Black. Reports — Robinson's Blaud Pr. 258. Q.

Where a person contracts a debt in one Country and promises to pay it in another it seems that in this case the law of the latter place is to govern the parties

E

Erskine's Principles of Scotland 288 No 19.

Dr Erskine says By the Common consent of all nations all personal obligations granted according to the law of that Country where they are signed are effectual every where

Rep de Jurisp. art 16. p 403.

Q. and the Repertoire de Jurisp. also says Dans l'ordre Statutaire on distingue deux sortes de Statuts ceux qui concernent l'instruction et ceux qui limitent la decision: pour les premiers lois ordinatoires on suit la loi du lieu ou l'on plaide pour les autres lois decisoires on suit la loi qui regit les personnes ou les biens selon que l'un ou l'autre est l'objet principal de la contestation

19th It had not been added in that the

rule of
principles ~~are known~~ which govern
the "Rights of Nations" are learned &
do not depend on Legislative authority
but are founded on the best sense of mankind &
that they are to be found in the
Civil ~~of law~~ of Rome & text of which is
that of all ~~Europe Christian~~ Europe
also authors have defined the
minor points of this indisputable
~~and are founded on the best sense of mankind~~

To apply the foregoing principles
to the case referred to us —

In Lower Canada a trading Company formed
~~the object of which is commerce with the~~
the Merchants of Gt Britain; in L.C.
~~the~~ partners may be admitted ~~to be~~
into such a Company whose losses
in the course of its trade are not
to exceed the amount they pay
to the ~~partn~~ concern, this is a legal
valid Regulation in L.C. The
Company in giving the Power of
its establishment, and their Agents
of Great Britain who ~~there~~ make
Contracts for goods with the Merchants

of that country payment forewhile
is as in all such cases to be made ~~in~~
~~England~~ ~~Lest~~ Great Britain
in great Britain. The ~~Rule~~ 1st general
position here laid down ~~is in force~~, that is,
shews that no stipulation ~~cannot~~ be
tween partners for diminishing their losses in
the trade of the ~~partner~~ concern of
which they are a partner, will affect their creditors. The Rule
of the English law ~~cannot be better~~ was
well defined by Chief Justice Pegrey
in the case of Grace vs Smith who is
reported to have said "The only Question
"is, what constitutes a secret partner,
"Every man who has a share of the
"profits of a trade ought also to bear
"his share of the loss, and if any one
"takes part of the profit he takes a
"part of that fund on which the
"creditor of the trader relies for his
"payment" and as to ~~the property~~
what the secret partner is bound to
pay he this state is held for the
whole amount. For an action may
be maintained against dormant partners alone
unless they plead in abatement; and ~~it is~~
the

2d Black Repts. ~~996~~ 1000

the right to proceed against a dormant partner is elective in the creditor — but is not compulsory.

There are conflicting laws but the inevitable conclusion from the premises is, that the partners in an Anonymous or Lower Canada Company they have in the profits of the trade with the benefits of Great Britain, ~~they~~ must also pay the debt incurred — No private agreement however between the country partners & their creditors & the indorsing & giving absolute effect the transactions of partners can effect the creditors in England. In short, the trading of the Company, must be considered quoad the persons they contract with in Great Britain and promise to pay there, as it were another ~~export~~ concern which can only be regulated by the laws of that country and from the positions before laid down it does not appear to us to be profitable to avoid the effects of such conclusions by any mode of conducting the business in England that

As to Scotland the inter-plea is, that all the partners are bound in solidum by the obligation of any one of them after & after goods are bought on the Company credit one of the partners should fail the rest cannot escape the whole profits on pretence that they are the whole firm. Either principle of Law of Scotland 294 296 — the rule must be the same as the English law

if the Sent partner in this country due
share in any portion of the profits
of the result from the trade to be carried
on to Great Britain in the way before
supposed. As to the mode of the
instrument has of obtaining payment
of the Sent partner in this country
we are not aware of any other mode
than by such a law. In our courts
we do suppose that this appearance
in England can not be compelled by
subpoena as they do not reside in
Canada — or any other process

We have ventured slightly suggested that
in a suit in Quebec by an English
merchant against one of this country who
was an absent in Canada the
latter was held to pay no more
than he had of stock in the copartnership
we know nothing of such a suit &
can only say that a similar judgt
was given it is decidedly in
our opinion contrary to law
for which we would be the decision
in Great Britain be to the this country

No contracts such as before supposed
by which we are supported by all the
Authors

Secret

+ Should it be ~~deemed~~ advisable to the ~~Trust to~~ practicable ~~with the~~ trust

Interest of all ~~the~~ concerned which we would suggest ~~but~~ not any only to be adopted on further and full consideration perhaps the legal advice taken in England — Although Company and it is this;

What we have said refers to a partnership in which the ~~Government~~ partners are to share in the profits of the Entire power ~~not~~

There is one Mode of effecting the object of the company ~~to practice~~ are relation to the ~~partner~~ Gentlemen ~~Government~~ ~~had~~ ~~Next~~ + ~~which is~~ to form two totally distinct and separate Copartnerships one ~~two~~ one in England ~~and~~ Canada to be composed of the ~~General~~ partners ~~Non~~ equally participating in the profits and ~~equally liable to the~~ losses of that concern — the other in Lower Canada to be composed of all the partners the attainable Secret to share only in the profits of the trade in this country and to receive legal interest according to the law of England which is 5 per cent for the capital loaned to the London House —

Such a scheme appears to us feasible ~~It would~~ would accord with the views & interest of the partners but we do not recommend it being acted until it is fully matured — and if ~~done~~ adopted we would strongly recommend that a Code of Laws in England be given of the ~~two~~ partnerships which ~~will be~~ ~~and to name of the partners~~ ~~Trust Commissioners of the~~

This was written in Office of Mr. Colquhoun and sent to Mr. Simpson P. Rand 27th 1832

in the London Gazette and the present
of the house means to trade in England
& Ireland in the principal Ports in
Edinburgh - Glasgow Dublin &
Cork ‡ ~~in these advertisements~~ ~~the~~ ~~of~~ ~~persons who have money to the~~
~~English house~~ ~~and be mentioned~~ ~~the~~ ~~in~~ ~~to~~
~~of the secret partners~~ ~~not~~
~~be given but~~ ~~not merely~~ ~~that~~
~~the Agents of the~~ English house
in Montreal consists of the persons
~~who are General partners~~ ~~and~~
~~giving the names of the~~ General
partners and ~~that~~ stating that there are
certain ~~and~~ Sent partners in the company
~~their names~~, called in the Law
of S.C. Agents ~~Commanditaires~~. In
Commandite ~~or Commanditaires~~, who
are liable only for losses to the extent
in each case provided for, by Law
It may be added that ~~the~~ two houses
are wholly distinct and not liable for each
other ‡‡ ~~distinct~~ in the firms would
be different as A B C & Co
A B
C D & Co.

‡ and in relation to the Montreal House it will be matter for consideration whether advertisement should be published in the same Newspaper ~~but must~~

‡‡ to this it would be more legal to send circulars to every person with whom the Comp. the Engl. House may deal

note ~~Advertisement of the dissolution in the~~ London Gaz. is sufficient as to all persons with whom the Partnership has not but separate Notice of the dissolution must be given to every person with whom it has dealt Compare on Contr. vol 1st page 324 - 325