Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kent and Others, Liquidators of La Banque Ville-Marie v. *La Communauté des Sœurs de Charité de la Providence and others, from the Court of King's Bench for the Province of Quebec (Appeal Side), delivered the 20th March* 1903.

Present at the Hearing:

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The action out of which this Appeal has arisen was commenced on the 29th November 1899 by the Appellants, Ambrose L. Kent and two others, in their character (qualité) of Liquidators of the Bank Ville-Marie, against the Respondents, La Communauté des Sœurs de Charité de la Providence, to recover the sum of $20,000 alleged to be owing by the Respondents to the Bank on a promissory note. The Bank Ville-Marie was and is a corporation having power to sue, and it formerly carried on business in Montreal and other places, but on the 10th August 1899 the Bank was ordered to be wound up under the provisions of the Canadian Winding-up Act of 1886 (Revised Statutes of Canada, c. 129), and the Appellants were duly appointed the Liquidators thereof.

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By an Order of the Superior Court of the 26th September 1899 the Liquidators were authorized to sue (amongst other persons) the Respondents for the before-mentioned sum of $20,000.

By their defence the Respondents admitted the debt claimed, but alleged that it was extinguished by compensation or set-off, except as to a small balance, which they offered to pay. They did not by their defence or at the bar in the course of the trial take any exception to the form of the action, and as their Lordships were informed no objection was suggested from the Bank during the trial to the right of the Liquidators to maintain the action in its present form. Mr. Justice Pagnuelo, by whom the action was tried, reserved judgment, and it appears to have then occurred to him that the action should have been in the name of the Bank itself, and he accordingly ordered the case to be set down again for argument on that point. The Appellants thereupon moved for leave to amend the summons and declaration by adding after their own description the words, "et pour "et au nom de la dite Banque Ville-Marie et "la dite Banque Ville-Marie en autant que "besoin et aux fins des présentes," the Bank submitting to be bound by the evidence already taken on either side. The learned Judge dismissed the motion, and also dismissed the action, but without costs, holding that the Liquidators were "sans qualité" to bring the action in their own name. This judgment was affirmed on both points by the Court of King's Bench on the 25th February 1902 and the present Appeal is from the judgment of the latter Court.

The first point made by the Appellants was that the Liquidators were entitled to sue in their own names as Liquidators. The relevant article

of the Code of Civil Procedure is Art. 81 which is in the following terms :—

"A person cannot use the name of another to "plead except the Crown through its recognised officers.

"Tutors, curators, and others representing "persons who have not the free exercise of their "rights plead in their own name in their "respective qualities."

"Corporations plead in their corporate name."

It was argued that by the winding-up the corporation was deprived of the free exercise of its rights and the case therefore fell within the second clause of this Article. In order to test the validity of this argument the Canadian Winding-up Act, 1886, should be referred to. By Section 15 of that Act it is provided that the Company from the time of the making of the winding-up Order shall cease to carry on its business except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof and transfers of shares and any alteration in the status of the members of the Company after the commencement of the winding-up shall be void, but the corporate state and all the corporate powers of the Company shall continue until the affairs of the Company are wound up. And by Section 31 the liquidator is empowered with the approval of the Court and upon certain notices to creditors and others (amongst other things) to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the Company, as the case may be. The Company therefore retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The words which have been quoted from the 31st Section

do not, in the opinion of their Lordships, confer upon the liquidator or the Court a discretion as to the mode in which he shall sue, but enable him to bring the action either in his own name or in that of the Company as may be appropriate to the particular action. The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the Company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as *e.g.*, to impeach some act or deed of the Company before winding-up which is made voidable in the interest of the creditors and contributories. But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property the title to which is in the Company, the action should be brought in the name of the Company.

It was suggested that the liquidators were in fact the holders of the promissory notes, and as such were entitled to sue upon them in their own name. But the declaration is framed on the theory that the Bank, and not the Liquidators, are the holders of the notes, and leave to amend for the purpose of raising this point was asked for. The next question is whether leave to amend should have been given. The powers of amending pleadings are contained in Chapter XXIII. of the Civil Procedure Code. The learned Judges in the Court of King's Bench seem to have thought that the language of the sections contained in this chapter was insufficient to authorize the amendment sought by the Appellants. But it was not denied by learned Counsel for the Respondents at their Lordships' Bar that the power was sufficient for the purpose, and it was argued only that it was a discretionary power and their Lordships should not overrule

the discretion exercised by the Court below. In the opinion of their Lordships the powers of amendment given by the Code are full and ample, and the Court had power under Section 516 to give leave to amend the summons or declaration in any way the Court might think proper. Indeed it may be doubted whether the defect in the present case was really more than an irregularity of form which might have been cured by amendment by the Judge *mero motu* under Section 518. The substance of the action was to recover a debt alleged to be due to the Company in liquidation which the Liquidators were the only proper persons to receive and give a discharge for. No defence was available against the Company which was not equally available against the Liquidators, and the parties were content to fight the case out with the Liquidators, who were their real opponents, and the case was in fact fought out with the Liquidators without any exception to their right to sue, and was ripe for judgment. It is impossible to say that the proposed amendment changes the nature of the demand or can in any way cause a prejudice to the Respondents. In short the Liquidators are *domini litis* and it was not improper to make them Plaintiffs, but they ought to have joined with themselves the Company, or, in other words, the Liquidators had the right to sue, but sued in the wrong form. It would seem therefore that Article 521 of the Code is applicable to the case. Their Lordships would always hesitate before interfering with the exercise of a discretion by the Court below, but in the present case the learned Judges seem to have proceeded on an erroneous construction of the Code. Their Lordships will only add that their decision will not be a precedent for substituting one Plaintiff for another in other circumstances, and no such injustice as the Chief

Justice apprehended need be feared. All they decide is that the proposed amendment could, and in the particular circumstances of this case ought to, have been allowed in the sound exercise of a judicial discretion.

Their Lordships were asked to hear the case upon its merits, but it is not the practice of this Board to sit as a Court of First Instance. No judgment has been delivered by the Court below and they could not, without injustice to the parties, take that course and give a decision from which there would be no appeal.

Their Lordships will therefore humbly advise His Majesty that the Judgments of the Superior Court dated the 1st April 1901 and of the Court of King's Bench dated the 25th February 1902 be reversed, except so far as the Judgment of the Superior Court dismissed the Intervention with costs, and instead thereof it be ordered that the Plaintiffs in the action be at liberty to amend their writ of summons and declaration and all necessary documents in the cause in the manner asked for by their Notice of Motion dated the 29th March 1901, on the Bank Ville-Marie by its Liquidators submitting to be bound by all the proceedings in the action up to and including the trial and to the admission of all the evidence properly given on one side or the other, and not requiring any further trial, and that on such amendment being made the action be referred back to the Superior Court for judgment. There will be no costs of the Appeal to the Court of King's Bench or of this Appeal. The costs of the action will of course be disposed of by the Superior Court, but the costs of the motion for leave to amend, which was an indulgence, should be paid by the Appellants.