1899
March 6.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

HENDERSON BLACK, AND HENDERSON BLACK AND MARY JANE BLACK, BENEFICIARY HEIRS OF JOHN BLACK, DECEASED ..... DEFENDANTS.

Postmasters' bond — Validity — Breach — Primary obligation — Release of sureties — Laches of government officials — Estoppel — Effect of — 33 Henry VIII, chap. 39, sec. 79 — Trial — Adjournment — Terms.

In a case arising in the Province of Quebec upon a postmaster's bond, it appeared that the principal and sureties each bound themselves in the penal sum of $1600, and the condition of the obligation was stated to be such that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof, the obligation should be void. The bond also contained a provision that it should be a breach thereof if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum, and that the sureties were therefore not bound to anything under the law of the Province of Quebec.

Held; (1) That there was a primary obligation on the part of the principal insomuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody. (2.) That as the bond conformed to the provisions of *An Act respecting the security to be given by officers of Canada* (31 Vict. c. 37; 35 Vict. c. 19) and *The Post Office Act*, (38 Vict. c. 7.) it was valid even if it did not conform in every particular to the provisions of Art. 1131, C. C. L. C.

It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the Post Office Department: *Held*, that it was part of the duties of the postmaster to receive the savings bank deposits and that the sureties were liable to

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make good all the moneys so coming into his custody and not accounted for.

The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond was in force the postmaster was guilty of defalcations, and that such defalcations were not discovered or communicated to the sureties owing to the negligence of the Post Office authorities. Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, and upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemnifying themselves.

The Crown is not bound by the doctrine of *Phillips* v. *Foxall* (L. R. 7 Q. B. 666) inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of the principal's wrong-doing amounts to fraud, and fraud cannot be imputed to the Crown.

The statute 33 Hen. VIII c. 39, s. 79, respecting suits upon bonds is not in force in the Province of Quebec.

Where defendants, expecting certain witnesses, whose evidence was material to defence, would be called by the Crown, did not subpœna such witnesses and they were not in court, an adjournment of the hearing was allowed after plaintiff had rested, so that such witnesses might be subpœnaed by the defendants, upon terms that plaintiff have costs of the day, and that the same be paid before the case with on adjournment.

INFORMATION at the suit of the Attorney-General for the Dominion of Canada upon a postmaster's bond.

The facts of the case are stated in the reasons for judgment.

December 14th, 1898.

The case, having been entered for trial by plaintiff, was called this day.

E. L. Newcombe, Q.C. for the plaintiff, produced the bond and rested his case.

J. A. C. Madore, for defendants, said he was taken by surprise: that he had expected the Crown would call certain witnesses, officers of the Government, on whose testimony he was relying, and those witnesses

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not being present in court, he moved for an adjournment until January 10th, 1899.

Mr Newcombe opposed the motion.

Adjournment granted upon terms that plaintiff have costs of the day, and that the same be paid to plaintiff before the case be proceeded with.

January 10th, 1899.

The hearing of the cases was now proceeded with.

E. L. Newcombe, Q.C. (with whom was *F. H. Gisborne*), for the plaintiff;

W. D. Hogg, Q.C. and *J. A. C. Madore*, for the defendants.

Mr. Newcombe contended that even if the facts showed that the post office authorities ought to have known of the defalcations, and ought to have communicated them to the sureties, the latter were not thereby discharged. Even between subject and subject the mere omission by the obligee to make inquiry into the conduct of the principal will not excuse the sureties. (Cites *Shepherd* v. *Beecher* (1). Fraud cannot be imputed to the Crown; nor is the Crown responsible for the laches of its servants in not discovering the postmaster's defalcations.

Mr. Hogg relied upon upon *Phillips* v. *Foxall* (2), and argued that clearly upon the facts of this case the sureties were discharged by the Crown withholding from them knowledge of the postmaster's first act of wrongdoing, and so preventing them from releasing themselves from further liability on their bond. He also cited *Enright* v. *Falvey* (3).

Mr. Madore took the following grounds for the defendants: First, the bond was a nullity, because it

(1) 2 P. Wm. 287.

(2) L. R. 7 Q. B. 666.

(3) 4 L. R. Ir. 397.

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was neither in conformity with *The Post Office Act*, sec. 49, nor fulfilled the requirements of Art. 1131 C. C. L. C. Secondly, there was no primary obligation in the bond, and it was a mere gaming contract within the meaning of Art. 1927 C. C. L. C. Thirdly, the bond did not cover defalcations in the Savings Bank Branch of the Post Office Department, because it only mentioned the duties of a postmaster. Fourthly, there was no evidence of any defalcations being communicated to the sureties, although they were known to the officers of the Crown.

Mr. Newcombe, in reply, contended that the defendants were liable for the full penalty in the bond. *The Queen* v. *Finlayson* (1); *Phillips* v. *Foxall* proceeds upon the theory that it is fraudulent to withhold from the surety a knowledge of the principal's breach of trust.* Clearly such a doctrine cannot be applied to the Crown. He also cited *United States* v. *Van Zant* (2); *United States* v. *Nicholl* (3); *United States* v. *Boyd* (4).

THE JUDGE OF THE EXCHEQUER COURT now (March 6th, 1899,) delivered judgment.

The information is exhibited to recover from the defendant, Henderson Black, the sum of sixteen hundred dollars, and from the defendants, Henderson Black and Mary Jane Black, beneficiary heirs of John Black, deceased, a like sum of sixteen hundred dollars, for which by a bond dated the ninth day of September, 1882, John Black and Henderson Black, as sureties for one James McPherson, "severally and not jointly

(1) Ante p. 202.
(2) 11 Wheat. 184.
(3) 12 Wheat. 505.
(4) 15 Pet. 187.

*REPORTER'S NOTE: See judgment of Quain, J. at pp. 673, 674 of L. R. 7. Q. B.; and the passage from Story's Commentaries on Equity Jurisprudence there cited.

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"or each for the other," bound themselves to Her Majesty, her heirs and successors. The bond was given as security to the Crown for the due performance by McPherson of the duties appertaining to the office of postmaster at Saint Johns, in the Province of Quebec; to which office he had then lately been appointed, and which he continued to hold until his death, on the 26th of August, 1896. At the date of his appointment to the office and during the time that he held it, it was one of his duties, as such postmaster, to receive deposits for remittance to the Central Savings Bank established as a branch of the Post Office Department at Ottawa. (38 Vict. c. 7, s. 60; and R. S. C. c. 35, s. 66.) After his death it was discovered that he was in respect of such deposits a defaulter in sums amounting in the aggregate to four thousand two hundred and eighty-eight dollars. The earliest of these defalcations occurred on the 3rd of November, 1890, and the latest on the 9th of July, 1896. There were discovered in all twenty-eight instances in which the whole or part of the deposit had been misappropriated by McPherson, one in the year 1890, four in 1891, eight in 1892, five in 1893, five in 1894, two in 1895, and three in 1896. The system on which the Post Office Savings Banks is carried on is such, that the ordinary inspection of a post office where such deposits are received affords little if any opportunity for the discovery of such defalcations as those referred to. For that the post office authorities depend in general, not on an inspection of the office, but on the vigilance and activity of the depositor, and the direct communication of the latter with the head or central office at Ottawa. On several occasions, however, the ordinary inspection of the post office at Saint John's found McPherson short in his accounts. On the 16th day of February, 1891, he was found to be short in the sum

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of $539.85, of which one item was a Savings Bank deposit of $100, as to which the inspector had been asked to make a special enquiry. The inspector says that on this occasion he advised the sureties through Henderson Black, who said he would tell his brother John Black. This, Henderson Black denies. On the 30th day of May, 1895, the inspector found McPherson to be short in his cash in the sum of $19.61, including a Savings Bank deposit of $10; on the 6th of November, 1895, in the sum of $298.97, including Savings Bank deposits of $241; and on the 22nd of May, 1896, in the sum of $135.72, including Savings Bank deposits of $42. In all these cases his excuses were accepted, and he was allowed to make good the shortages, and to remain in office. There was also an investigation of the affairs of the office in June, 1894, when the postmaster was found to be short in his accounts, the blame for which appears, however, to have been thrown upon a clerk in his employ. In this case also McPherson made good the amount; and no notice appears to have been given to the sureties. When in August, 1896, McPherson died, Mr. Gervais, a deputy inspector of post offices, was placed in charge of the post office at Saint John's. With the exception of a small sum afterwards deducted from the salary due to the postmaster at his death, the cash and stamps were found to be correct, and the ordinary accounts and affairs of the office satisfactory. This fact was communicated to the defendant, Henderson Black, by Mr. Gervais. The latter did not discover the defalcations now in question. As explained it was not possible by any such inspection as is ordinarily made to discover them. They were not found out until later, when the suspicion of the Superintendent of Post Office Savings Banks at Ottawa having been aroused, all the books of depositors who had made deposits at the Saint John's

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Post Office were called in. It was then that the number and magnitude of the defalcations became known, and the means that the postmaster had taken to avoid discovery. In the meantime, however, his widow, as his legal representative, had been paid the balance of his salary after deducting the amount by which his cash was short at his death, and also a sum of $1,406.37 on two policies of insurance on her husband's life, and had distributed these amounts and had left Canada. The defendant, Henderson Black, believing that if anything had been wrong with McPherson's accounts the inspectors of the Post Office Department would have found it out, and relying upon Gervais' assurance that everything was all right, took no steps to make the sums mentioned available as a protection against any possible liability on the bond now in suit, as otherwise he might have done. When the defalcations were discovered it was too late for him to do anything.

For the defendants it is argued:

1. That the bond is bad, in that it is not in conformity with Article 1131 of the Civil Code;

2. That even if it is good, it does not cover the misappropriation of Savings Bank deposits;

3. That the postmaster having, without the consent of the sureties, been continued in office after it had been discovered that he had been guilty of dishonesty, the sureties are discharged as to any subsequent losses arising from his dishonesty; and

4. That the sureties are, under the circumstances that have been stated, entitled to relief to the amount of the salary and insurance money paid to and distributed by the postmaster's widow.

These matters of defence are not all raised by the pleadings as they stand, but if good in law, it would be right on proper terms, to allow any necessary amendment to

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be made. But before considering these matters it will, I think, be convenient to look for a moment at the provisions of the Acts in force with respect to official bonds at the time the one now in question was given. By 31st Victoria, Chapter 37, section 2, (1) certain public officers were required to give security for the due performance of the trust reposed in them, and for duly accounting for all public money intrusted to them or placed under their control. By the 7th section of the Act (2) it was, among other things, provided that any surety to the Crown for the due accounting for public moneys or for the proper performance of any public duty, by any such public officer, might, when no longer disposed to continue such responsibility, give notice to his principal and to the Secretary of State of Canada, and that all accruing responsibility on the part of the surety should cease at the expiration of three months from the receipt of such notice by the Secretary of State, or on the acceptance by the Crown of the security of another surety, whichever should first happen. By the 12th section of the Act (3) it was further provided that no neglect, omission or irregularity in giving or receiving the bonds or other securities, or in registering the same within the periods or in the manner prescribed by th Act should vacate or make void any such bond or security, or discharge any surety from the obligations thereof. The Act referred to was amended in 1872, by 35th Victoria, chapter 19, intituled "An Act further "to amend an "Act respecting the security to be "given by Officers of Canada."" The latter Act (4) prescribed a form of official bond, and provided that certain words given in column one of the schedule should have the meaning set out at length

(1) R. S. C. c. 19, s. 5.
(2) R. S. C. c. 19, s. 14.
(3) R. S. C. c. 19, s. 19.
(4) R. S. C. c. 19, ss. 6-9.

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in the second column (s. 2); and among other things that any additions made in the first column should be taken to be made in the corresponding form in the second column (s. 3). In 1882 *The Post Office Act of* 1875 (38 Vict. c. 7) with some amendments not material to the question now under discussion was in force (1). By the 43rd section of that Act, postmasters were required to give bonds with good and approved security for the faithful discharge of their duties; and provision was made whereby a surety could by giving the Postmaster-General notice relieve himself from future liability; and it was also provided that no suit should be instituted against any surety of a postmaster after the lapse of two years from the death, resignation or removal from office of such postmaster, or from the date of the acceptance of a new bond from such postmaster. By the 78th section of the same Act (2) it was enacted that any bond or instrument of guarantee which might after the passing of the Act be given to Her Majesty by any person or body corporate, and whether under the Act 31st Victoria, chapter 37, and the Acts amending the same, or otherwise, as security for the due performance of the duties of his office by any officer, employee, clerk or servant employed by or under the Postmaster-General, might be expressed to extend to and include as a breach of the conditions thereof any theft, larceny, robbery, embezzlement loss or destruction by such officer, employee, clerk or servant, of money, goods, chattels, valuables or effects, or any letter or parcel containing the same that might come into his custody or possession as such officer, employee, clerk or servant.

The bond now in question purports to be given in pursuance of the Act 35 Vict. chap. 19, and conforms thereto with an addition such as that provided for by

(1) R. S. C. c. 35, s. 117. (2) R. S. C. c. 19. ss. 6-9.

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the 78th section of *The Post Office Act*, 1875. The principal and sureties are each bound in the penal sum of sixteen hundred dollars, and the condition of the obligation is stated to be such that if "the principal" faithfully discharges the duties of the office and duly accounts for all moneys and property which may come into his custody by virtue thereof the obligation shall be void, and then follows a provision that it shall be a breach of the bond if the postmaster commits any offence such as that mentioned.

The objection urged against the validity of the bond is that there is no proper primary obligation, the principal himself being bound in a penal sum. In Article 1131 of the Civil Code it is declared that "a penal "clause is a secondary obligation by which a person, "to assure the performance of a primary obligation, "binds himself to a penalty in case of its inexecution." If there is no primary obligation, the surety is not bound to anything. As stated in Pothier (1): "As the obligation of sureties is, according to our "definition, an obligation accessory to that of the "principal debtor, it follows that it is of the essence "of this obligation that there should be a valid "obligation of a principal debtor; consequently if "the principal is not obliged, neither is the surety, as "there can be no accessory without a principal obli-"gation, according to the rules of law, *cum causa prin-"cipalis non consistit, ne ea quidem quae sequuntur locum "habent.*" Now, by the bond in question the principal and the sureties are each bound in a penal sum of sixteen hundred dollars, and this it is argued is fatal to the validity of the bond. That, however, is not, it seems to me, the result. For in the first place there is the primary obligation on the part of the principal faithfully to discharge the duties of the office to which

(1) Obligations: (Evan's Ed.) vol. 1, p. 300.

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he had been appointed and duly to account for all moneys and property which might come into his custody, by virtue of the said office. And in the second place the bond was given in accordance with the Acts of Parliament to which reference has been made, and if good within their provisions, as I think it is, it must be held to be valid notwithstanding that it does not conform in every particular to the Article of the Civil Code relied upon by the defendants.

Then in regard to the second objection, it seems clear that it was part of the duties of the postmaster of Saint John's, Quebec, to receive Savings Bank deposits, and as these moneys came into his custody by virtue of his office and have not been duly accounted for, they are within the terms of the obligation, and the sureties are liable.

That brings us to the third and principal ground of defence, namely: That the sureties are in whole or in part discharged from liability because without their consent the principal was continued in office with the knowledge that he had been guilty of acts of dishonesty in matters relating to his office.

In *Story's Equity Jurisprudence*, section 215 (1), it is said that if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into a contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist. So if a party knowing himself to be cheated by his clerk, and concealing the fact, applies for security in such a manner and under such circumstances as holds the clerk out to others as one whom he considers as a trustworthy

(1) Vol. 1, p. 234.

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person, and another becomes his security acting under the impression that the clerk is so considered by his employer, the contract of suretyship will be void; for the very silence under such circumstances becomes expressive of a trust and confidence held out to the public equivalent to an affirmation. The principle thus stated and illustrated by Story is recognized both by the law of England and by the law of Quebec, by which the rights of the parties are in the present case to be determined. In England the principle has been carried even further. In *Phillips v. Foxall* (1) a majority of the court (Cockburn, C. J., and Lush and Quain, JJ.) state it to be their opinion that in the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant without the knowledge or consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. From this proposition Mr. Justice Blackburn dissented. Agreeing that the concealment of known acts of dishonesty on the part of the servant before the obligation was entered into, would be evidence in support of a plea of fraud, he declined to go further. "I cannot concur" he says "in the conclusion "from these premises that therefore there is a condition "implied by law on every contract of suretyship for a "servant that it shall become void if the servant after- "wards commits a fraud, and the principal on hearing "of it does not inform the surety of it. It is quite clear "that misconduct of the servant does not alone put an

(1) L. R. 7 Q. B. 672.

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"end to the contract, for the very object of the surety-"ship is to afford protection against the misconduct of "the person for whom good conduct is guaranteed" (1). He agreed, however, with the majority in the result of the judgment, but for a different reason, which he states as follows:—

"But there is a ground on which I think he may "have a ground for being discharged in equity, which "I will now state. A surety, as soon as his principal "makes default, has a right in equity to require the "creditor to use for his benefit all his remedies against "the debtor; and as a consequence, if the creditor has "by any act of his deprived the surety of the benefit "of any of those remedies, the surety is discharged. "The authorities for this, as far as known to me, are "collected in the judgment to *Bailey v. Edwards* (2) and "this equitable principal has at least in the case where "time has been given to the principal without the con-"sent of the surety, been adopted to some extent at least, "although whether to its full extent, has been doubted: "See *Pooley* v. *Harradine* (3). But it is not now "material to decide that. Now the law gives the "master the right to terminate the employment of a "servant on his discovering that the servant is guilty "of fraud. He is not bound to dismiss him, and if he "elects, after knowledge of the fraud, to continue him "in his service, he cannot at any subsequent time dis-"miss him, on account of that which he has waived "or condoned. This right the master may use for his "own protection. If this right to terminate the em-"ployment is one of those remedies which the surety "has a right to require to have exercised for the "surety's protection, it seems to follow that, by waiv-"ing the forfeiture and continuing the employment

(1) P. 679. (2) 4 B. & S. 770; 34 L.J.Q.B. 41.
(3) 7 E & B. 431; 26 L. J. Q. B.156.

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"without consulting the surety, the principal has "discharged him." (1).

No case or authority has been cited, and I am not aware of any, that would tend to show that the rule of law established by *Phillips* v. *Foxall* finds any place in the law of Quebec. And if such a rule were adopted or followed there, it would, I think, be on the ground upon which Mr. Justice Blackburn rests his judgment, and not upon that given by the majority of the court. His reasons are, it seems to me, more consistent than theirs with the principles of the civil law. In *Sanderson* v. *Aston* (2), the court applied the rule established in *Phillips* v. *Foxall* to a case where the default of the clerk to account for the moneys did not of necessity involve dishonesty, but only such a breach of duty as would entitle the employer to dismiss him. That case has, however, been the subject of some adverse criticism. In the *Watertown Insurance Co.* v. *Simmons* (3), the court say that they are not able to agree with the decision in *Sanderson* v. *Aston*, deeming it to be in conflict with the general current of authorities and not "sustained by *Phillips* v. *Foxall*, which was a case of "criminal embezzlement by the servant" (4).

But assuming that the decision of *Phillips* v. *Foxall* on one ground or the other represents the law of the Province of Quebec in cases of this kind between subject and subject, the question arises at once as to whether or not the decision is applicable to cases in which the principal is a public officer or servant of the

(1) P. 680.

(2) L. R. 8 Ex. 73.

(3) 131 Mass. 85.

(4) See also *The Atlantic and Pacific Telegraph Co.* v. *Barnes*, 64 N. Y. 385; *Enright* v. *Falvey*, 4 L. R. (Ir.) C. L. 397; *Roper* v. *Cox*, 10 L. R. (Ir.) C. L. 200; and *The Mayor of Hull* v. *Harding*, L.R. 2 Q. B. D. 494; and for cases earlier than *Phillips* v. *Foxall*: *Shepherd* v. *Beecher*, 2 P. Wm. 287; *Wright* v. *Simpson*, 6 Ves. Jr. 733; *Dawson* v. *Lawes*, Kay, 280; *The North British Assurance Co.* v. *Lloyd*, 10 Ex. 523; *Lee* v. *Jones*, 17 C. B. N. S. 482; and *Burgess* v. *Eve*, L. R. 13 Eq. 450.

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Crown; and on principle, it would appear to me to be very clear that it does not. Taking the rule of law as stated by Story, "that if a party taking a guaranty "from a surety conceals from him facts which go to "increase his risk and suffers him to enter into the "contract under false impressions as to the real state "of the facts, such a concealment will amount to a "fraud, because the party is bound to make the dis-"closure; and the omission to make it under such cir-"cumstances is equivalent to an affirmation that the "facts do not exist" (1) it is clear, I think, that the rule is not applicable to cases arising upon bonds given for the faithful performance of their duties by officers or servants of the Crown; because fraud cannot be imputed to the Crown, and the Crown is not to suffer loss because a public officer contrary to his duty conceals the truth or fails to disclose it. And it is obvious that the Crown would suffer loss equally by losing its remedy upon the bond in such a case, as it would by being held liable in an action brought against it for the negligence or wrongful conduct of its officer or servant. For like reasons the decision in *Phillips* v. *Foxall*, on whatever ground it may be supported, is not applicable to bonds given to the Crown for the performance by its officers or servants of their duties and for the due accounting for moneys that come into their possession by virtue of their office or employment.

With reference to authority, I am not aware of any decisions in England or in Quebec or France bearing upon the point immediately under discussion. None have been cited and I have not found any. There are, however, two Irish cases in which it was held that the rule in *Phillips* v. *Foxall* is not applicable to such obligations: *Lawder* v. *Lawder* (2), and *Byrne* v. *Muzio*

(1) Story Eq. Jur. s. 215. (2) 7 L. R. (Ir.) 57.

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(1). In the case of *The Corporation of Adjala* v. *McElroy* (2) Mr. Chancellor Boyd said that he had no reason to doubt that the principles of law now well established by *Phillips* v. *Foxall* and *Sanderson* v. *Aston* are applicable to municipalities and to all cases where the master or employer has the power to dismiss the servant or official employed; and I think it may be said that the cases of *Frontenac* v. *Breden* (3); *Corporation of East Zorra* v. *Douglas* (4); *Peers* v. *Oxford* (5) and *Meaford* v. *Lang* (6) proceed upon the view that such principles are applicable to cases in which the officer or servant is in the employ of a municipal body. In the United States the general current of authority is the other way, but however that may be in cases arising upon the bonds of officers and servants of municipal bodies, there is a long and consistent line of decisions by the highest courts in that country that the principle stated is not applicable to public officers and servants of the State. The earlier case of *The People* v. *Jansen* (7) was to the contrary, but that case has been overruled, and it is well settled that the principle of *Phillips* v. *Foxall* is not applicable to a bond given to the State for the due performance by a public officer of the duties of his office (8).

To refer to one of the later cases, Waite, C J., delivering the judgment of the court, says: (9) "The Govern-

(1) 8 L. R. (Ir.) C. L. 410.
(2) 9 Ont. R. 580.
(3) 17 Gr. 645.
(4) 17 Gr. 462.
(5) 17 Gr. 472.
(6) 20 Ont. R. 42.
(7) 7 Johns. 331.
(8) *The People* v. *Berner*, 13 Johns. 382; *The People* v. *Foot*, 19 Johns. 57; *United States* v. *Kirkpatrick*, 9 Wheat, 735; *Locke* v. *Postmaster General*, 3 Mason 446; *United States* v. *Vanzandt*, 11 Wheat. 189; *United States* v. *Nicholl*, 12 Wheat. 509; *Dox* v. *Postmaster General*, 1 Pet. 326; *The People* v. *Russell*, 4 Wend. 571; *United States* v. *Boyd*, 15 Pet. 208; *Looney* v. *Hughes*, 26 N. Y. 514; *McKecknie* v. *Ward*, 58 N. Y. 549; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 318; *Frownfelter* v. *State*, 66 Md. 80; *Palmer & Seawright* v. *Woods*, 75 Iowa 402.
(9) *Hart* v. *United States*, 95 U. S. 318.

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" ment is not responsible for the laches or the wrong-
" ful acts of its officers..... ....Every surety upon an
" official bond to the Government is presumed to
" enter into his contract with a full knowledge of
" this principle of law, and consent to be dealt with
" accordingly. The Government enters into no con-
" tract with him that its officers shall perform their
" duties. A Government may be a loser by the negli-
" gence of its officers, but it never becomes bound to
" others for the consequences of such neglect unless it
" be by express agreement to that effect. Here the
" surety was aware of the lien which the law gave as
" security for the payment of the tax. He also knew
" that in order to retain this lien the Government must
" rely on the diligence and honesty of its agents. If
" they performed their duties and preserved the
" security, it enured to his benefit as well as that of
" the Government; but if by neglect or misconduct
" they lost it the Government did not come under
" obligations to make good the loss to him, or, what is
" the same thing, release him *pro tanto* from the obli-
" gation of his bond. As between himself and the
" Government, he took the risk of the effect of official
" negligence upon the security which the law pro-
" vided for his protection against loss by reason of the
" liability he assumed."

It may happen, of course, in the Province of Ontario and other provinces where the Act 33 Henry VIII, c. 39, s. 79 is in force, that a question may arise as to whether or not the court should give relief upon a bond given to secure the performance of his duty by a public officer where under like circumstances in an action between subject and subject the defendant would be discharged (1); *Reg.* v. *Bonter* (1); *Reg.* v.

(1) 6 U. C. Q. B. (O. S.) 551.

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THE QUEEN v. BLACK.

Reasons for Judgment.

Pringle (1); and *The Queen* v. *Hammond* (2), but the power of the court to give relief in such cases depends upon a statute not in force in the Province of Quebec and cannot be invoked in the present case.

For like reasons it seems equally clear that the fourth defence referred to, namely, that the sureties, under the circumstances that have been stated, are entitled to relief on the ground of the postmaster's salary and insurance money being paid to and distributed by the postmaster's widow will not avail the defendants, for the defence must rest upon one or two grounds; either that the Crown is liable for the laches or neglect of the post office authorities in not discovering the postmaster's defalcations, or upon the ground that the Crown is estopped by the assurance given by Inspector Gervais that everything in the postmaster's office at Saint John's was correct, and it is clear that the Crown is neither bound by the laches of its officers nor estopped in such case by their representations.

I am of opinion, therefore, that the Crown is entitled to judgment against the defendant Henderson Black for the sum of sixteen hundred dollars, and against the defendants Henderson Black and Mary Jane Black, beneficiary heirs of John Black, deceased, for a like sum of sixteen hundred dollars. In the information the Crown asks for interest upon these amounts, but that demand was abandoned at the hearing. The costs, as usual in such cases, will follow the event.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendants: *Madore, Guerin & Perron.*

(1) 32 U. C. Q. B. 308. (2) 1 Hannay, 33.