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LECOMTE v. O'GRADY.

Brodeur, J.

In the group of suretyship cases there are three decisions:—*Yates* v. *Evans* (1892), 61 L.J.Q.B. 446; *Kirkwood* v. *Smith* [1896] 1 Q.B. 582; *Kirkwood* v. *Carroll*, [1903] 1 K.B. 531.

The document on which those decisions were based was in the form of a joint and several promissory note by a principal debt and a surety with a proviso that time may be given to either without the consent of the other, and without prejudice to the rights of the holders to proceed against either party.

In the *Yates* case, which was the first decided, the court held that the clause was a mere consent or license that time may be given to the principal debtor and that if time may be so given the surety will not avail itself of that as a defence.

In *Kirkwood* v. *Smith*, it was held that the documents were not valid promissory notes.

But in 1903, in *Kirkwood* v. *Carroll*, the Court of King's Bench decided that those additions to the promissory notes did not qualify them; and it was declared that *Kirkwood* v. *Smith* could not any longer be regarded as an authority.

In those documents the makers did not stipulate any conditions in their favour; the words added to the promissory notes were simply licenses in favour of the holders; and they are in that respect very different from the lien cases and the present case, where the makers practically said: I am ready to pay at such a date, but provided you give me a full title to the machine sold, or provided you give me my stock certificates.

It is a condition which is imposed upon the creditor of the debt and in favour of the maker of the alleged promissory note.

The payment of the money and the surrender of the stock certificates are to be contemporaneous acts.

Anson, Contracts, 7th ed., p. 299, says:—

> It is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions.

Applying these principles to the present case I come to the conclusion that the document in question is a conditional one, and that it does not constitute a valid promissory note as defined by s. 176 of the Bills of Exchange Act.

I would adopt the views as expressed by the Court of King's Bench and by Fullerton, J., in the Court of Appeal.

Cassels, J.

CASSELS, J.:—I concur with Anglin, J. *Appeal dismissed.*