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*Jan. 31, Feb. 1, 6, 7, 8, 9 Mar. 22

D. HUBERT COX .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

HUGH PATON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Counts of conspiracy to defraud and conspiracy to steal involving six separate transactions—Whether count of conspiracy to defraud bad as being contrary to s. 492(1), Criminal Code—Whether facts that jury returned verdict of guilty on both counts and that this verdict was recorded fatal to maintenance of either conviction—Charge of making, circulating or publishing false prospectus—Criminal Code, 1953-54 (Can.), c. 51, ss. 322(1), 343(1), 492, 497, 500(1)(a), 592.

The two accused obtained control of B P Ltd. Their net outlay for the acquisition of such control was nil. They so arranged the transaction and so manipulated matters that the moneys invested by bondholders in B P Ltd. became the source of the funds wherewith the accused purchased shares and acquired control of the company. In an indictment containing five counts the accused were charged, *inter alia,* with conspiring to steal and conspiring to defraud B P Ltd. of approximately $460,000, and that they did "unlawfully make, circulate or publish" a false prospectus "with intent to induce members of the public to advance monies to Brandon Packers Limited". They were convicted at trial on all five counts. The Court of Appeal for Manitoba, the Chief Justice dissenting, affirmed the convictions for conspiracy to defraud and issuing a false prospectus, but unanimously quashed the other convictions, including that for conspiracy to steal. The accused appealed to this Court from the convictions for conspiracy to defraud and issuing a false prospectus.

Held: The appeals should be dismissed.

The conspiracy to defraud count charged a single conspiracy, existing over a considerable period of time, the object of which was to defraud B P Ltd. of large sums of money by such fraudulent means as presented themselves from time to time. It was not necessary to decide whether each of the six transactions referred to in the particulars was in itself an indictable offence separate from the other five or whether the evidence proved in regard to every one of these items that a crime was actually committed. What the count alleged was that they were all planned in the course of carrying out the single conspiracy and there was evidence to justify the jury in so finding. It was the guilty agreement and not the several acts done in pursuance thereof which constituted the offence charged.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

It was sufficient to consider the first of the six transactions set out in the particulars. This transaction constituted an offence under s. 323(1) of the Criminal Code and there was ample evidence on which the jury could find the accused guilty of conspiracy to defraud as charged.

The convictions for conspiracy to steal and conspiracy to defraud could not both be supported, not because they were mutually destructive, but because if both were allowed to stand the accused would in reality be convicted twice of the same offence. It was the same conspiracy which was alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence. The Court of Appeal had power under Part XVIII of the *Criminal Code,* particularly s. 592(1)(b)(i) and 592(3), to decide that the conviction on the conspiracy to steal count should be quashed and that on the conspiracy to defraud count should be affirmed.

Section 343(1)(c) creates only one offence, the essence of which is an attempt to induce persons to advance moneys to a company by means of a prospectus known to the accused to be false in a material particular. The making, circulating or publishing of such a prospectus are not separate offences, but are modes in which the one offence may be committed. A prospectus may be "false in a material particular" within the meaning of s. 343(1) if it contains a material statement as to the purpose for which the proceeds from the sale of the securities offered in the prospectus are to be used and it is found that the person making the statement had never any intention that the proceeds should be used for that purpose. The test is not whether the statement amounted strictly speaking to a "false pretence" but rather whether the conduct of the accused in making it was fraudulent. The expression "any person" includes all persons of the class to whom the prospectus was intended to be given although at the time the false prospectus was made the identity of none of these persons was known.

R. v. Carswell (1916), 10 W.W.R. 1027; *Archer v. The Queen,* [1955] S.C.R. 33, referred to; *Heinze et al v. State* (1945), 42 A. (2d) 128; *R. v. Mills,* [1959] Criminal Case and Comment 188; *Kelly v. The King* (1916), 54 S.C.R. 220; *R. v. Ingram,* [1956] 2 All E.R. 639, considered; *R. v. Dent,* [1955] 2 Q.B. 590, distinguished; *R. v. Graham* (1954), 18 C.R. 110; *R. v. Rose* (1946), 3 C.R. 277, approved.

APPEALS from decision of the Court of Appeal for Manitoba dismissing appeals by accused against their convictions by Monnin J. and jury on charges of conspiracy to defraud, contrary to s. 323(1), *Criminal Code,* and publishing a false prospectus, contrary to s. 343(1)(*c*). Appeals dismissed.

H. Monk, Q.C., for the appellant Cox.

H. Walsh, Q.C., and *J. J. Robinette, Q.C.,* for the appellant Paton.

A. S. Dewar, Q.C., and *K. G. Houston,* for the respondent.

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The judgment of the Court was delivered by

CARTWRIGHT J.:—The appellants Hugh Paton and D. Hubert Cox were tried before Monnin J. and a jury on an indictment containing the following five counts:

1. That they the said Hugh Paton and D. Hubert Cox between the first day of January in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully conspire together each with the other to commit an indictable offence, to wit: to steal the monies, valuable securities or other property of Brandon Packers Limited to the value of approximately Four hundred and sixty thousand ($460,000.00) Dollars.

2. That they the said Hugh Paton and D. Hubert Cox between the first day of November in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully steal the monies, valuable securities or other property of Brandon Packers Limited to the value of approximately Four hundred and forty-eight thousand ($448,000.00) Dollars.

3. That they the said Hugh Paton and D. Hubert Cox between the first day of January in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully conspire together each with the other to commit an indictable offence, to wit: by deceit, falsehood or other fraudulent means to defraud Brandon Packers Limited of monies, valuable securities or other property to the value of approximately Four Hundred and sixty thousand ($460,000.00) Dollars.

4. That they the said Hugh Paton and D. Hubert Cox between the first day of November in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, by deceit, falsehood or other fraudulent means, defrauded Brandon Packers Limited of monies, valuable securities or other property to the value of approximately Four hundred and forty-eight thousand ($448,000.00) Dollars.

5. That they the said Hugh Paton and D. Hubert Cox between the first day of June in the year of our Lord one thousand nine hundred and fifty-six and the first day of June in the year of our Lord one thousand nine hundred and fifty-seven both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully make, circulate or publish a prospectus dated July 14th, 1956 for a four hundred thousand ($400,000.00) Dollar issue of five and one-half (5½%) per centum sinking fund bonds of Brandon Packers Limited, they the said Hugh Paton and D. Hubert Cox knowing the said prospectus to be false in a material particular with intent to induce members of the public to advance monies to Brandon Packers Limited.

Before the accused had pleaded to the indictment their counsel moved to quash count 3 on the ground that it was

void for uncertainty and to quash count 5 on the ground that it disclosed no offence known to the law since it did not charge an intent to induce an ascertained person or ascertained persons to advance moneys but charged an intent to induce "members of the public" to advance moneys. Both of these motions were dismissed by the learned trial judge.

In the course of the argument of these motions, which took place in the absence of the members of the jury panel and before the jury had been selected, counsel for the Crown stated that counts 3 and 4 were "in effect alternative charges to counts 1 and 2"; but this was not at any stage of the trial pointed out to the jury.

No order, such as is contemplated by s. 497 of the *Criminal Code,* that the prosecutor should furnish particulars was made; but it appears from the transcript of the argument on the motions referred to above that counsel for the Crown had orally given particulars at the preliminary inquiry and these he repeated in his opening address to the jury at the trial. The particulars stated that the amount of "approximately $460,000" referred to in counts 1 and 3 was made up as follows:

1. Investment by Brandon Packers Limited preferred shares of Fropak Limited;	$200,000.00
2. Reimbursement to the accused for out-of-pocket expenses;	4,219.41
3. Payment for office space and services in Toronto;	8,000.00
4. Payment of real estate agent's commission in respect of purchase of plant at Lakehead;	4,000.00
5. Management fees;	208,750.00
6. Loans to companies controlled by accused. ..	38,500.00
	$463,469.41

The particulars also stated that the amount of "approximately $448,000" referred to in counts 2 and 4 was made up of the same six items except that in the case of the management fees, item 5, the amount actually collected from Brandon Packers Limited was $196,715.24.

At the end of the case for the Crown, counsel for the appellants moved to quash counts 1 and 3 on the ground that the evidence disclosed that each of them applied to at least six separate and distinct transactions and not a single transaction. The motion was denied.

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Towards the end of his charge to the jury the learned trial judge instructed them that they might find a verdict of guilty or not guilty on each of the five counts.

At the conclusion of the charge counsel for the accused made the submission, amongst others, that counts 1 and 2 were alternatives to counts 3 and 4 and that the jury should be instructed that they could not convict on both count 1 and count 3 or on both count 2 and count 4. Counsel for the Crown opposed this submission and the learned trial judge did not give the direction asked for.

The jury returned a verdict of guilty against each of the appellants on all five counts. The learned trial judge imposed sentences of seven years imprisonment on each count, the sentences to run concurrently.

The appellants appealed to the Court of Appeal for Manitoba. The appeals were heard by a Court composed of Miller C.J.M., Schultz, Freedman and Guy JJ.A. and Bastin J. (*ad hoc*). The Court unanimously decided that counts 1, 2 and 4 should be quashed and that a verdict of acquittal should be entered on each of them. The majority of the Court (Miller C.J.M., dissenting) dismissed the appeals against the convictions on counts 3 and 5; the sentences were reduced to imprisonment for four years on each of these counts, the sentences to run concurrently.

Miller C.J.M. dissenting as to counts 3 and 5 would have quashed the convictions and directed verdicts of acquittal to be entered on both of these counts.

In the formal judgment of the Court of Appeal it is recited that the Chief Justice dissented "on the following grounds in law":

1. That Count 5 in the Indictment is void for uncertainty in that it charges more than one offence, namely, three separate offences of making, circulating or publishing a false prospectus which form of charge in a single count in the Indictment is prohibited by section 492 of the *Criminal Code*.

2. That the learned trial Judge erred in failing to direct the jury to bring in a verdict of acquittal on Count 5 in the Indictment when an application for a directed verdict was made by defence counsel at the close of the evidence for the Crown since there was absolutely no evidence adduced that the Appellants made, published or circulated a prospectus, or that the prospectus was false in a material particular to the knowledge of the Appellants.

3. That there was no evidence adduced at the trial that the Appellants made, published, or circulated a prospectus.

4. That there was no evidence adduced that the prospectus was false in a material particular to the knowledge of the Appellants.

5. That the verdict of guilty by the jury on Count 5 in the Indictment was perverse.

6. That Count 3 in the Indictment while alleging a single transaction involved six separate and distinct transactions and that the learned trial Judge erred in failing to quash the said Count 3 or direct the jury to bring in a verdict of acquittal thereon.

7. That the learned trial Judge erred in directing the jury that they could consider the charging of management fees by Great West Saddlery Company Limited to Brandon Packers Limited in the sum of $208,750.00 as indicating a conspiracy to defraud on the part of the Appellants, when there was no evidence of fraud with respect to the said management fees and when the charging and collection of the said management fees did not amount to a crime.

8. That the verdict of the jury was inconsistent and uncertain in bringing in a verdict of guilty on both Counts 1 and 3 in the Indictment when these were alternative Counts, each containing six separate transactions and that the verdict of the jury was therefore confusing and uncertain in that it could not be ascertained on which item or items the jury had based its finding.

9. That the verdict of the jury was inconsistent and uncertain and could not be allowed to stand as a conviction on Counts 1 or 3 in the Indictment since it could not be said that the jury convicted the Appellants either of conspiracy to steal or conspiracy to defraud, in connection with the item of $200,000.00 referred to in the particulars of the Counts supplied by the Crown.

10. Counts 1 and 3 in the Indictment each related to more than a single transaction and as a result the verdict of the jury was ambiguous, inconsistent and improper in that no one knows upon which of the various transactions the jury convicted and upon which of the various transactions the jury acquitted.

11. Since the jury by its verdict in Counts 1 and 3 found that each Count contained more than a single transaction, some being theft and some fraud, and this being contrary to Section 492 of the *Criminal Code* all of the said Counts 1 and 3 must be quashed.

12. The verdict of guilty brought in by the jury on both Counts 1 and 3 in the Indictment is fatal to the maintenance of both convictions.

By orders of this Court made on October 29, 1962, leave was granted to both of the accused to appeal from the judgment of the Court of Appeal on the following ground:

Does Count 5 in the indictment disclose any offence known to our law since it does not charge that the appellants published a prospectus with intent to induce an ascertained person or ascertained persons to advance monies but charges an intent 'to induce members of the public to advance monies'.

The notices of appeal to this Court served by both of the accused were founded on the ground on which leave was granted and on

the grounds in law set forth by Miller C.J.M. in his dissent from the judgment of the said Court of Appeal which said grounds of dissent in

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law are more particularly set out in the reasons for judgment of the said Miller C.J.M. and in the certificate of judgment of the said Court of Appeal.

By orders of this Court made on October 29, 1962, leave was granted to the Attorney-General of the Province of Manitoba to appeal from the judgment of the Court of Appeal, in so far as it quashed the conviction on count 4. The grounds upon which this leave was granted in the case of each accused were:

> 1. Did the Court of Appeal err in holding that there were six separate and distinct transactions involved in the offence set forth in count 4 of the indictment?
>
> 2. Did the Court of Appeal err in holding that count 4 in the indictment offended against subsection (1) of section 492 of the Criminal Code in that it did not in general apply to a single transaction?
>
> 3. Did the Court of Appeal err in not affirming the conviction on count 4 in the indictment when it was satisfied that the evidence disclosed that the respondent had by deceit, falsehood or other fraudulent means, defrauded Brandon Packers Limited of monies, valuable securities and other property?

At the conclusion of the argument in this Court counsel for the Crown stated, in answer to a question from the bench, that in the event of the appeals of the accused as to either count 3 or count 5 being dismissed he did not wish to press the appeals of the Crown as to count 4.

In the course of the trial which occupied thirty-nine days more than six hundred exhibits were filed. The lengthy and complex history of the transactions out of which the charges against the appellants arose is outlined in the reasons of Miller C.J.M. and more briefly in those of Freedman J.A. and of Guy J.A. I shall endeavour to state the relevant facts as briefly as is consistent with making clear the questions which arise on these appeals. I will deal first with the circumstances under which the appellants obtained control of Brandon Packers Limited.

Brandon Packers Limited was incorporated under the *Companies Act* of Manitoba in 1936. In that year it had sold a debenture issue of $200,000 falling due on December 1, 1956. The indebtedness remaining on this issue in 1956 was $79,100. Joseph C. Donaldson was the principal shareholder in Brandon Packers Limited. He and Miss Minnie E. Peary held 12,535 common shares, of the par value of $5, out of a total issued of 14,530; and Donaldson held 58,120

preferred shares of the par value of $1. Donaldson had been president and a director of the company from its inception and Miss Peary had been a director and secretary-treasurer for a number of years.

Early in 1956 Donaldson was considering selling his shares. It was clear that a new bond issue would have to be sold to provide the $79,100 required to pay the bonds maturing in December and the company, while solvent, was in need of additional working capital. Through one Allan Bass, who was acting as agent for Donaldson, the two accused became interested as possible purchasers of Donaldson's shares; in March 1956, they went to Brandon, inspected the company's plant and had a discussion with Donaldson as to the sale of his shares and the issue of bonds by Brandon Packers Limited.

Following negotiations, to which it is unnecessary to refer in detail, an agreement under seal dated June 11, 1956, was entered into between Donaldson as optionor and Paton Corporation Limited as optionee, whereby in consideration of $10,000 paid in cash the optionor granted an option, irrevocable up to September 30, 1956, to purchase all the shares of Brandon Packers Limited "owned or controlled by the optionor" namely, 12,535 common shares at a total price of $188,000 and 51,748 preferred shares at a total price of $51,748. If the option was exercised the transaction was to be closed on or before December 2, 1956. The common shares were to be paid for as follows: the $10,000 paid for the option was to be credited on the purchase price, $78,000 was to be paid in cash on closing, and $100,000 "in bonds to be issued by Brandon Packers Limited on the date of closing". (It was later arranged between the parties that $178,000 should be paid in cash to Donaldson on closing and that he should use $100,000 thereof to purchase $100,000 of the bonds). The preferred shares were to be paid for on or before December 2, 1957.

The option agreement contained the following paragraph:

> It is the stated intention of the optionee to procure that Brandon Packers Limited will issue bonds to the extent of $400,000.00 for sale and the optionor agrees to use his best endeavors to promote the sale of such bonds of the Company.

The evidence is clear that both of the accused were acting together in taking this option and in the various trans-

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actions which followed. At all relevant times the appellant Paton owned or controlled all the shares in Paton Corporation Limited, and similarly the appellant Cox controlled Leomar Investment Corporation Limited which was described as his personal holding corporation. The $10,000 payable at the time of the signing of the option agreement was paid by a cheque of Leomar Investment Corporation Limited.

On September 27, 1956, the appellants exercised their option under the agreement of June 11, 1956. The transaction was closed on November 21, 1956. In July, under circumstances to be mentioned later, a prospectus regarding the issue of $400,000 5½ per cent sinking fund bonds of Brandon Packers Limited had been signed and filed and by November 21, 1956, about $275,000 of the bonds had been sold. Prior to this date the appellants had obtained supplementary letters patent amending the charter of Fropak Limited, a company controlled by them, to permit it to issue preferred shares. On the evidence it was open to the jury to conclude that Fropak Limited had no assets of any value.

The purchase of Donaldson's shares was completed in the following way.

On November 20, 1956, the appellants met with Donaldson at Brandon in order to close out the transaction.

On November 20, 1956, Donaldson made out a cheque of Brandon Packers Limited for $200,000 payable to the Imperial Bank of Canada. This cheque was signed by Donaldson and Miss Peary.

On November 21, 1956, Brandon Packers Limited executed a contract to which the seal of the company was affixed, whereby Brandon Packers Limited agreed to purchase from Fropak Limited 2,000 preference shares of the par value of $100 each. This agreement was signed by the appellants on behalf of Fropak Limited and by Donaldson and Miss Peary on behalf of Brandon Packers Limited.

On the afternoon of November 21, 1956, the appellants and Donaldson met with John English, manager of the Imperial Bank at Brandon, in his office. At this meeting Donaldson turned over the $200,000 cheque of Brandon Packers Limited to English with a letter stating that the cheque was in payment of 2,000 preferred shares of Fropak

Limited. This cheque for $200,000 was deposited to the credit of an internal account in the bank, known as a remittance account. English then drew a cheque on the remittance account for $183,560, in favour of Donaldson which was endorsed by Donaldson, and deposited to the credit of his account. The balance in the remittance account, $16,440, was remitted by the bank to the Imperial Bank at Toronto to go to the credit of the account of Fropak Limited.

The difference between the amount of $183,560 and the $178,000 which, under the option agreement, was to be paid on closing is accounted for by the fact that on November 21, 1956, Donaldson held a total of 12,904 common shares of Brandon Packers Limited, having acquired an additional 369 shares after June 11, 1956. The purchase price of the 12,904 shares at $15 per share was $193,560. The sum of $10,000 had already been paid as a deposit, leaving a balance of $183,560.

While at the office of English on November 21, 1956, Donaldson drew a cheque on his account for the sum of $100,000 payable to Imperial Bank of Canada and delivered it to English to be used in payment for the bonds of Brandon Packers Limited purchased by Donaldson in accordance with the agreement referred to above. Later these bonds were delivered to Donaldson.

English was given a letter signed by Donaldson and Miss Peary authorizing the bank to turn over to Paton Corporation Limited and Leomar Investment Corporation Limited the 12,904 common shares of Brandon Packers Limited on receipt of the said sum of $183,560, and on November 21, 1956, English delivered these shares to the appellants.

Some time after November 21, 1956, 2,000 preference shares in Fropak Limited were issued to Brandon Packers Limited and the share certificates were delivered.

Paton Corporation Limited and Leomar Investment Corporation Limited each signed a promissory note dated November 21, 1956, for $91,780 in favour of Fropak Limited making up the sum of $183,560 which Fropak Limited had advanced to the said two corporations and with which Donaldson's shares were purchased.

It is to this transaction that the first item of the particulars of count 3 furnished by the Crown refers. Its true

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substance and effect are described by Freedman J.A. in the following passage in his reasons, which I wish to adopt:

> Paton and Cox obtained control of Brandon Packers Limited. Their net outlay for the acquisition of such control was exactly nil. Indeed their corporation, Fropak Limited, emerged from the transaction with a net gain of $6,440, being the difference between $200,000 invested by Brandon Packers Limited in preferred shares of Fropak Limited, less $193,560 paid to Donaldson. The daylight loan from the bank was the apparent but not the actual source of the funds making possible the implementation of the scheme. The real source was the monies in the hands of Brandon Packers Limited that had been obtained from the sale of bonds. It was the existence of these monies which guaranteed the immediate repayment to the bank of its loan so as to enable its advance safely to be made in the form of a daylight loan. In short, the two accused so arranged the transaction and so manipulated matters that the monies invested by the bondholders in Brandon Packers Limited became the source of the funds wherewith the accused purchased Donaldson's shares and acquired control of Brandon Packers Limited.
>
> Brandon Packers Limited did acquire preferred stock of Fropak Limited having a purported value of $200,000. Implicit in the entire transaction was the representation of the accused that this was a legitimate, *bona fide* investment for Brandon Packers Limited to make. In fact, however, Fropak Limited was not an operating company and it was entirely without assets. Its charter, which had lapsed, was admittedly revived by the accused for the purposes of this very transaction. At the same time supplementary letters patent were obtained, creating the preferred shares which were required in the implementation of the accused's scheme. For its $200,000 Brandon Packers Limited obtained shares whose worth was negligible.

We were informed that the phrase "daylight loan" denotes a loan which is made and repaid on the same day.

I do not find it necessary to deal in detail with the facts in regard to the remaining five items in the particulars shewing how it was alleged that the total of $460,000 mentioned in count 3 was made up. It is sufficient to say that as to items 2, 3, 4 and 5, the theory of the Crown was that the appellants, who were then in control of Brandon Packers Limited, expressly or by necessary implication represented that these sums were owing by that company to the appellants or to companies controlled by them and obtained payment thereof when they knew that in fact Brandon Packers Limited was not under liability to make any of the payments; and that as regards item 6 the loans made to companies controlled by the appellants were not merely unlawful in the sense that they were unauthorized but that the moneys "loaned" were paid over without any intention on the part of the appellants that they would be repaid.

Turning now to the grounds on which Miller C.J.M. dissented as to the conviction on count 3, I would first observe that, in my opinion, the appellants are entitled to rely on the particulars given orally by counsel for the Crown to the same extent as if they had been furnished pursuant to an order made under s. 497 of the *Criminal Code*. On this point I agree with the statement of Beck J.A. in *R. v. Carswell*[1]:

> S.859 (a predecessor of s.497) empowers the trial judge to order particulars.
>
> If he does so it must be clear that the prosecutor is bound by the particulars which he gives in accordance with the order.
>
> If without order he gives particulars he must be equally bound.

The grounds of dissent as to count 3 are those numbered 6 to 12 inclusive in the formal judgment of the Court of Appeal quoted above. It appears to me that these, other than number 7 which will be considered separately, raise in different words the following two questions of law:

> 1. Was count 3 bad on the ground that it charged not one offence but six separate offences contrary to s.492(1) of the *Criminal Code*?
>
> 2. Were the facts that the jury returned a verdict of guilty on both count 1 and count 3 and that this verdict was recorded fatal to the maintenance of either conviction so that as a matter of law both must now be quashed?

On the first of these questions I am in agreement with the reasons of Freedman J.A. and will not repeat them at length.

Count 3 charges a single conspiracy, existing over a considerable period of time, the object of which was to defraud Brandon Packers Limited of large sums of money by such fraudulent means as presented themselves from time to time. It is not necessary on this appeal to decide whether each of the six transactions referred to in the particulars was in itself an indictable offence separate from the other five or whether the evidence proved in regard to every one of these items that a crime was actually committed. Assuming that each was separate from the others and that count 4 was therefore bad, what count 3 alleged was that they were all planned in the course of carrying out the single conspiracy and there was evidence to justify the jury in so finding. It was the guilty agreement and not the several acts

[1] (1916), 10 W.W.R. 1027 at 1038.

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done in pursuance thereof which constituted the offence charged in count 3.

I agree with Freedman J.A. that for the purpose of dealing with the appeal as to count 3 it is sufficient to consider the first of the six transactions set out in the particulars. I have already quoted his summary of the effect of that transaction. I share the view which he expressed (with the concurrence of Schultz J.A. and, on this point, of Bastin J.) and which Guy J.A. expressed in separate reasons that this transaction constituted an offence under s. 323(1) of the *Criminal Code* and that there was ample evidence on which the jury could find the accused guilty of conspiracy to defraud as charged in count 3.

In the course of argument on this branch of the appeal counsel for the appellants submitted that there was no evidence that the appellants defrauded Brandon Packers Limited or that they intended to do so because, as it was said, there was no evidence of any false representation made to the company or of any official of the company having been deceived into parting with the moneys referred to in the particulars furnished. Assuming, without deciding, that there was a dissent on this point within the meaning of s. 597(1) of the *Criminal Code,* I would reject this argument. I will examine it only in connection with the transaction relating to the $200,000 which is the first item in the particulars. I have already indicated my agreement with the statement of Freedman J.A. that "implicit in the entire transaction was the representation of the accused that this was a legitimate *bona fide* investment for Brandon Packers Limited to make" and with his view that there was ample evidence to warrant a finding that this representation was false to the knowledge of the accused. If it deceived Donaldson, who was still nominally at least in control of the company, into paying over the $200,000 to Fropak that would be a fraud on the company. If, on the other hand, it is suggested that Donaldson was not deceived but paid the money over knowing that the transaction was not *bona fide,* that the Fropak shares were worthless and that their purchase was merely a step in a scheme to enable the accused to buy the shares of Brandon Packers Limited with its own money, that would simply be to say that Donaldson was *particeps criminis.* If all the directors of a company should join in

using its funds to purchase an asset which they knew to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty under s. 323(1) of defrauding the company of those funds. Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept), I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by "other fraudulent means".

I turn now to the second question whether the recorded verdict of guilty on both counts 1 and 3 requires that both verdicts be quashed.

It has already been pointed out that counts 1 and 3 were expressly stated by counsel for the Crown to be alternative. In my respectful opinion the learned trial judge should have so instructed the jury in his charge and when the jury returned their verdict, instead of having it recorded he should have sent them back to reconsider it, with definite instructions that they must not return a verdict of guilty on both counts 1 and 3.

On this ground counsel for the appellants rely particularly on the following decisions: *Commonwealth v. Haskins et al.*[1]; *Heinze et al. v. State*[2]; and *R. v. Mills*[3].

The principle stated in the first two of these cases is summarized in the following passage in the reasons of Delaplaine J., who delivered the judgment of the Court of Appeals in Maryland in *Heinze et al. v. State,* at p. 130:

> It is unquestioned that a finding of guilty on two inconsistent counts is invalid. Thus where a defendant is charged in one count with larceny and in another count with receiving stolen goods, and it plainly appears that the property alleged to have been stolen is that also alleged to have been received, a general verdict of guilty is fatally defective, because in law a thief cannot be guilty of the crime of receiving stolen goods which he himself has stolen, and a guilty receiver of stolen goods cannot himself be the thief, and hence the defendant could not be guilty on both counts.

R. v. Mills is a decision of the Court of Criminal Appeal in England composed of Byrne, Slade and Salmon JJ. The

[1] (1880), 128 Mass. 60.
[2] (1945), 42 A. (2d) 128.
[3] Referred to in [1959] Criminal Case and Comment 188.

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note is brief and I have not been able to find a fuller report. The whole note reads as follows:

> M. was tried at quarter sessions on an indictment containing four counts, namely, (i) larceny of a motor-car, (ii) taking and driving away the car without the owner's consent, (iii) receiving the car knowing it to have been stolen, and (iv) larceny of two number plates of the car. He was acquitted of the first two offences and convicted of the last two. The original number plates on the motor-car had been taken off and false number plates substituted. On appeal to the Court of Criminal Appeal:
>
> *Held,* that the two verdicts of guilty were really mutually destructive. If M. had, as the jury found (owing perhaps to the deputy-chairman's unfortunate failure to give a sufficient direction with regard to possession), received the motor-car, then plainly he had received it with the substituted plates upon it, and he could not be found to have received the motor-car knowing it to have been stolen and at the same time to have stolen the two original number plates, for the two things stood together. Accordingly, the appeal would be allowed.

In my opinion, these cases rightly decide that the convictions of an accused (i) of stealing an article and (ii) of receiving the same article knowing it to have been stolen cannot both stand. But in so far as they hold that an Appellate Court has no power to uphold either conviction they appear to be at variance with the judgments of the Court of Appeal for Manitoba and of this Court in *Kelly v. The King*[1]. In that case the jury rendered a verdict of guilty on count 1, theft of money belonging to the King, count 2, unlawfully receiving money belonging to the King knowing the same to have been stolen and, count 4, obtaining money by false pretences from His Majesty. The convictions on these three counts were upheld by a majority judgment of the Court of Appeal.

It appears from p. 228 of the report in this Court that counsel for the accused argued that the accused could not be guilty of all three of these offences that he could not, indeed, be guilty of any two of them and that consequently the whole conviction was bad. This Court was unanimous in dismissing the appeal.

Anglin J., in whose judgment Fitzpatrick C.J. and Davies J. concurred, said at pp. 261 and 262:

> Although the conviction of the appellant on three distinct counts in an indictment—No. 1, for theft, No. 2, for receiving, and No. 4, for obtaining money by false pretences—was upheld by a majority of the learned judges of the Court of Appeal for Manitoba, the Chief Justice, as we

[1] (1916), 54 S.C.R. 220.

understand with the concurrence of Mr. Justice Perdue and Mr. Justice Cameron, said (35 West L.R. 57):—

> It is difficult to see how the accused should for one crime be found guilty on the first, second and fourth counts. That he has committed a crime seems by the evidence to be clearly established, and it is perhaps best established under the fourth count.
>
> I assume that the trial judge in pronouncing sentence will consider that the accused was found guilty of but one crime, and in considering the maximum sentence allowed by law I think he should be guided by the lowest maximum fixed by law for either of the three crimes set forth in the first, second and fourth counts.
>
> This course being taken, I do not think such substantial wrong or miscarriage was occasioned at the trial as would justify a new trial under sec. 1019 of the Code.
>
> There seems no necessity to interfere with the finding of guilty on the inconsistent counts. He was certainly guilty of one of them and as he will be punished on one only, I would follow the course taken in *Rex v. Lockett* (1914) 2 K.B. 720, at p. 733.

The formal judgment of the court, however, does not direct that the penalty to be imposed shall be so limited; but Mr. Coyne, while vigorously insisting that the conviction on all three counts should be sustained, stated at bar in this Court that, as counsel representing the Crown he submitted to the judgment of the Court of Appeal being dealt with as if it contained a provision under section 1020 of the Criminal Code limiting the penalty as indicated by the learned Chief Justice.

Having regard to all the circumstances of the case, and especially to the possible embarrassment which may have been caused by the trial together of five separate counts, and to the fact that the learned trial judge, while he carefully defined each of the offences charged, deemed it advisable to abstain from instructing the jury as to the facts in evidence bearing upon each branch of the indictment, we think the position taken by counsel for the Crown eminently proper and that "we ought to treat the verdict as a verdict on the lesser charge," namely, that of obtaining money by false pretences.

In the result the convictions on all three counts were allowed to stand. It seems clear that this Court was of opinion that the conviction on count 4 could be upheld in spite of its inconsistency with the convictions on counts 1 and 2.

If, however, it be assumed that the three cases relied on by the appellants were correctly decided they do not appear to me to be applicable to the circumstances of the case at bar. I incline to agree with the view expressed by Freedman J.A. that in the case of each of the six transactions referred to in the particulars the crime, if crime there was, was fraud rather than theft. But suppose it were otherwise and that some of the items particularized constituted fraud and others theft, there may well be a single conspiracy to com-

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mit a number of different offences; the cases of *R. v. Graham*[1] and *R. v. Rose*[2], referred to by Freedman J.A., are apt illustrations. The reason that the convictions on counts 1 and 3 cannot both be supported is not that they are "mutually destructive", as was said of the counts in *R. v. Mills, supra,* but rather that if both were allowed to stand the accused would in reality be convicted twice of the same offence. It is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence.

In my view, the Court of Appeal has power under Part XVIII of the *Criminal Code,* particularly s. 592(1)(*b*)(i) and s. 592(3), to decide that the conviction on count 1 should be quashed and that on count 3 affirmed.

It remains to consider the ground of dissent numbered 7 set out in the formal judgment of the Court of Appeal and quoted earlier in these reasons.

This ground is based on the premise that there was no evidence on which it was open to the jury to find that the moneys paid over as management fees were obtained from Brandon Packers Limited by fraud. In my opinion, there was evidence to support a finding that the appellants represented that these fees were owing when to their knowledge Brandon Packers Limited was under no liability to pay them. It was open to the jury to take the view that the services for which the fees purported to be paid were negligible and that the disproportion between the services rendered and the amount paid was so great as to shew that the transaction was fraudulent. The premise on which this ground is based is not established and it should be rejected.

I would accordingly dismiss the appeals as to the conviction on count 3.

The grounds on which the conviction on count 5 is attacked may be summarized as follows:

1. That the count is void in that it charges not one offence but the three separate offences of (i) making, (ii) circulating, and (iii) publishing a prospectus knowing the same to be false in a material particular with the intent specified in clause (*c*) of s. 343(1).

[1] (1954), 18 C.R. 110, 108 C.C.C. 153, 11 W.W.R. (N.S.) 565.
[2] (1946), 3 C.R. 277, 88 C.C.C. 114.

2. That there was no evidence that the appellants made, circulated or published the prospectus.

3. That there was no evidence that the prospectus was false in a material particular to the knowledge of the appellants.

4. That the count does not disclose any offence known to the law since it does not charge that the appellants published a prospectus with intent to induce an ascertained person or ascertained persons to advance moneys but charges an intent "to induce members of the public to advance moneys".

As to the first ground it will be observed that the count follows the wording of s. 343(1)(*c*) of the *Criminal Code* and it is necessary to consider the effect of s. 492(2)(*b*) and of s. 500(1)(*a*):

> 492(2) The statement referred to in subsection (1) may be
>
> * * *
>
> (*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, . . .
>
> 500(1) A count is not objectionable by reason only that
>
> (*a*) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indicable offence the matters, acts or omissions charged in the count . . .

In my opinion, it is clear since the judgment of this Court in *Archer v. The Queen*[1] that these provisions do not render a count good if the words of the enactment which are adopted in framing the count describe more than one offence, and the question to be decided is whether the words of s. 343(1)(*c*) describe one offence or more than one.

I have reached the conclusion that s. 343(1)(*c*) creates only one offence, the essence of which is an attempt to induce persons to advance moneys to a company by means of a prospectus known to the accused to be false in a material particular and that the making, circulating or publishing are not separate offences but are modes in which the one offence may be committed. I would reject this first ground of appeal.

Ground 2 may be shortly dealt with. There is evidence that the issue and sale of the bonds was an integral part of the scheme of the appellants from its inception, that the

[1] [1955] S.C.R. 33, 110 C.C.C. 321, 2 D.L.R. 621.

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portion of the prospectus which the Crown claims to be false was drafted by the appellant Paton and approved by the appellant Cox, that it was sent by Paton to Donaldson with the intention that it be incorporated in the prospectus which was filed and circulated and that it was so incorporated. This was sufficient evidence to support a finding that both appellants took part in making the prospectus. I would reject this second ground of appeal.

As to the third ground the portion of the prospectus claimed by the Crown to be false in a material particular is that reading as follows:

PURPOSE OF ISSUE

The proceeds to be received by the Company from the sale of $400,000 of First Mortgage Bonds offered by the Prospectus, will be used by the Company for the redemption of outstanding debentures of $79,000, the expansion of its existing business and additions thereto, particularly with respect to the erection of a quick freezing and cold storage plant and for other corporate purposes.

If in fact at the time they arranged to have this statement incorporated in the prospectus the appellants had already formed the intention of using a large portion of the proceeds of the sale of the bonds not for any of the purposes stated (other than the redemption of the outstanding bonds) but for the purpose of providing themselves with the funds to purchase the shares of Brandon Packers Limited then, in my opinion, the prospectus was to their knowledge false in a material particular. There was evidence on which it was open to the jury to so find. That such a false statement was likely to induce and was intended to induce persons to purchase the bonds is obvious. As to this ground I am in general agreement with the views expressed by Freedman J.A.

Before concluding the examination of this ground of appeal it is necessary to consider the argument of counsel for the appellants that even if at the time of drafting the statement as to the purpose of the bond issue, quoted above, the accused had formed the intention of using a large portion of the proceeds of the sale of the bonds for the purpose mentioned in the preceding paragraph of these reasons, this circumstance did not render the prospectus "false in a material particular" within the meaning of that phrase as used in s. 343(1). It is said that an offence under this section is created only if the material particular in which the pros-

pectus is false amounts to a false pretence, that is to say is a representation of a matter of fact either present or past; that, whatever may be the rule in civil cases, a statement of present intention about future conduct does not amount to a false pretence in criminal law.

In support of this argument reliance is placed upon the decision of the Court of Criminal Appeal in *R. v. Dent*[1], and particularly the following passage in the reasons of the Court, delivered by Devlin J. and concurred in by Lord Goddard C.J. and Donovan J., at p. 595:

> The case for the prosecution is that when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out, whereas in fact he had no such intention. It is, of course, undisputed that to constitute a false pretence the false statement must be of an existing fact. The prosecution contend that a statement of present intention, although it relates to the future, is a statement of existing fact. That was the view expressed by Bowen L.J. in his celebrated dictum in *Edgington v. Fitzmaurice*:
>
> > There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.
>
> *Edgington v. Fitzmaurice* was an action for deceit. Whatever the position may be in civil cases, we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

The charges on which the accused were convicted in *R. v. Dent* were all of obtaining moneys by false pretences; the convictions were quashed.

This judgment may be contrasted with that of the Court of Criminal Appeal in the following year in the case of *R. v. Ingram*[2]. The Court was composed of Lord Goddard C.J., Streatfield and Donovan JJ. The accused was convicted on six counts of obtaining credit by fraud contrary to s. 13(1) of the *Debtors Act* (1869) which reads as follows:

> 13. Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year with or without hard labour; that is to say,
>
> (1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud;

[1] [1955] 2 Q.B. 590.

[2] [1956] 2 All. E.R. 639.

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Donovan J. delivered the judgment of the Court. He said at p. 640:

> The appellant is an electrician, and the fraud alleged against him was this: that he obtained contracts from a number of shopkeepers to erect or renovate electric neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature. He was in financial difficulties, and none of the advance payments was returned.
>
> The jury were properly directed that they could not convict the appellant unless they were satisfied, inter alia, that in obtaining these advance payments and then failing to do the work he was acting fraudulently, that is to say, that he never had any intention to do the stipulated work at the time when he received payments in advance. The jury, influenced no doubt by what appeared to be a systematic course of conduct on the appellant's part, convicted him, and it must accordingly be taken that they found that when he received part payments at the outset he had no intention to do the work he had undertaken to do. On any view, therefore, his conduct was fraudulent, but he argues that it involved no obtaining of credit and thus no offence under s. 13(1) of the *Debtors Act*, 1869.

The Court then examined and rejected the argument that the conduct, though fraudulent, did not involve obtaining credit and the convictions were affirmed.

Since two members of the Court which decided *R. v. Ingram* had taken part in the judgment in *R. v. Dent* given in the previous year, it can safely be assumed that they were of the view that there was no inconsistency between the two judgments. The reconciliation is found in the circumstance that in *R. v. Dent* to support the conviction it was necessary to find that there had been a false pretence while in *R. v. Ingram* it was sufficient to find that, although there had been no false pretence, there had been "other fraud".

It will be observed that s. 343(1) does not use the phrase "a false pretence". I have reached the conclusion that a prospectus may be "false in a material particular" within the meaning of the section if it contains a material statement as to the purpose for which the proceeds from the sale of the securities offered in the prospectus are to be used and it is found that the person making the statement had never any intention that the proceeds should be used for that purpose. The test is not, in my opinion, whether the statement amounted strictly speaking to a "false pretence" but rather whether the conduct of the accused in making it was fraudulent.

I would reject this third ground of appeal.

As to the fourth ground of appeal which has been set out above it could not be successfully argued that the use of the words "to induce members of the public" instead of the words of s. 343(1)(*c*) "to induce a person" misled or embarrassed the defence; but counsel argued that this is of no importance, that the offence created by the section is statutory and that conduct which does not fall within the words as well as within the spirit of the section is not an offence at all. The defence contends that on its true construction s. 343(1)(*c*) creates an offence only in a case where the intent of the accused is to induce an ascertained person to advance something to a company; emphasis is laid on the circumstance that the words "whether ascertained or not" which appear in clauses (*a*) and (*b*) of the subsection are omitted in clause (*c*). Counsel also contrasts the wording of clause (*c*) with that of s. 323(1) of the Code where the expression is used "defrauds the public or any person whether ascertained or not . . .".

Section 343(1)(*c*) is penal and must be strictly construed in favour of the accused, but in construing it, it is the duty of the Court to endeavour to give effect to the intention of Parliament as expressed in the words used. The construction contended for by the defence would render clause (*c*) virtually inoperative. The evil sought to be prevented is the use of a false prospectus to induce persons to advance moneys to a company. The occasions must be very rare in which a false prospectus is prepared with the purpose of inducing an ascertained individual to advance moneys. The primary purpose of a prospectus is to raise moneys from the public. In my opinion on its true construction s. 343(1)(*c*) makes it an offence for anyone to make, circulate or publish a prospectus which he knows is false in a material particular with the intent to induce any person to advance moneys to the company on whose behalf the prospectus is issued and the expression "any person" includes all persons of the class to whom the prospectus is intended to be given although at the time the false prospectus is made the identity of none of those persons is known. I conclude that count 5 does disclose an offence against s. 343(1)(*c*) and that this ground of appeal should be rejected.

In the result I am of opinion that all the grounds of appeal which are open to the accused on the appeals to this

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Court must be rejected and that the appeals against the convictions on both count 3 and count 5 must be dismissed.

In view of the statement of Crown counsel, mentioned above, that, in the event of the appeals of the accused failing, the Crown did not wish to press the appeals in regard to count 4 those appeals will be dismissed.

Appeals and cross-appeal dismissed.

Solicitors for the appellant Cox: Monk, Goodwin, Higenbottam & Goodwin, Winnipeg.

Solicitors for the appellant Paton: Walsh, Micay & Company, Winnipeg.

Solicitor for the respondent: Deputy Attorney-General for the Province of Manitoba.