1967

CANADA

LAW REPORTS

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DU CANADA

Supreme Court of Canada
Cour Suprême du Canada

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Ottawa, 1968

94063—1

JUDGES

OF THE

SUPREME COURT OF CANADA

The Honourable ROBERT TASCHEREAU, P.C., *Chief Justice of Canada.*

The Honourable JOHN ROBERT CARTWRIGHT, P.C., *Chief Justice of Canada.*

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

The Honourable EMMETT MATTHEW HALL.

The Honourable WISHART FLETT SPENCE.

The Honourable LOUIS-PHILIPPE PIGEON.

ATTORNEYS GENERAL OF CANADA

The Honourable LUCIEN CARDIN, Q.C.

The Honourable PIERRE ELLIOTT TRUDEAU.

SOLICITOR GENERAL OF CANADA

The Honourable L. T. PENNELL, Q.C.

MEMORANDA

On the 1st day of September, 1967, the Honourable Robert Taschereau, P.C., Chief Justice of Canada, resigned from the bench.

On the 1st day of September, 1967, the Honourable John Robert Cartwright, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of Canada.

On the 21st day of September, 1967, Louis-Philippe Pigeon, one of Her Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

JUGES

DE LA

COUR SUPRÊME DU CANADA

L'honorable ROBERT TASCHEREAU, C.P., *juge en chef du Canada.*

L'honorable JOHN ROBERT CARTWRIGHT, C.P., *juge en chef du Canada.*

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

L'honorable WILFRED JUDSON.

L'honorable ROLAND A. RITCHIE.

L'honorable EMMETT MATTHEW HALL.

L'honorable WISHART FLETT SPENCE.

L'honorable LOUIS-PHILIPPE PIGEON.

PROCUREURS GÉNÉRAUX DU CANADA

L'honorable LUCIEN CARDIN, C.R.

L'honorable PIERRE ELLIOTT TRUDEAU.

SOLLICITEUR GÉNÉRAL DU CANADA

L'honorable L. T. PENNELL, C.R.

MEMORANDA

Le 1er septembre 1967, l'honorable Robert Taschereau, C.P., juge en chef du Canada, a résigné.

Le 1er septembre 1967, l'honorable John Robert Cartwright, juge puîné de la Cour suprême du Canada, a été nommé juge en chef du Canada.

Le 21 septembre 1967, Louis-Philippe Pigeon, un des conseillers juridiques de Sa Majesté, a été nommé juge puîné de la Cour suprême du Canada.

94063—1½

ERRATA
in—dans le
volume 1967

Page 133, last line of caption. Read "c. 29" instead of "c. 21".

Page 135, last line of caption. Read "c. 29" instead of "c. 21".

Page 238, line 2 from bottom. Read "Englander" instead of "Enplander".

Page 425, line 10 from bottom. Read "defendant" instead of "plaintiff".

Page 469, line 7 from bottom, between the words "mishandled" and "by" insert: "after it had been placed in the basement".

Page 470, line 7 from end of headnote, between the words "manipulée" and "par" insert: "après avoir été placée dans le sous-sol".

Page 503, line 9 of headnote. Read "réponse affirmative" instead of "réponse négative".

Page 133, dernière ligne de l'en-tête. Lire «c. 29» au lieu de «c. 21».

Page 135, dernière ligne de l'en-tête. Lire «c. 29» au lieu de «c. 21».

Page 238, ligne 2 à compter du bas de la page. Lire «Englander» au lieu de «Enplander».

Page 425, ligne 10 à compter du bas de la page. Lire «defendant» au lieu de «plaintiff».

Page 469, ligne 7 à compter du bas de la page, entre les mots «mishandled» et «by» il faut insérer: «after it had been placed in the basement».

Page 470, ligne 7 à compter de la fin du jugé, entre les mots «manipulée» et «par», il faut insérer: «après avoir été placée dans le sous-sol».

Page 503, ligne 9 du jugé. Lire «réponse affimative» au lieu de «réponse négative».

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

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Les jugements suivants rendus durant l'année ne seront pas rapportés

Allen v. Richard (Que.), [1966] Q.B. 268, appeal dismissed with costs, February 3, 1967.

Barkman Development Ltd., Barkman Concrete Products Ltd., Barkman Mfg. Ltd. v. Minister of National Revenue (Ex.), [1967] C.T.C. 325, appeal dismissed with costs, November 8, 1967.

Cameron v. The Queen (Ont.), 62 D.L.R. (2d) 328, appeal quashed, June 6, 1967.

Campbell v. The Queen (Ont.), [1967] 2 O.R. 1, appeal dismissed, December 7, 1967.

Canadian Propane (Sask.), Ltd. v. Rosetown Service Garage Ltd. (Sask.), 56 W.W.R. 45, appeal dismissed with costs, November 1, 1967.

Caplan v. Alexis Nihon Co. Ltd. (Que.), [1966] Q.B. 377, appeal dismissed with costs, May 9, 1967.

Consumers' Gas Company v. Minister of National Revenue (Ex.), [1966] Ex. C.R. 46, appeal dismissed with costs, June 22, 1967.

Dalrymple v. Sun Life Assurance Co. of Canada et al. (Ont.), [1966] 2 O.R. 227, 56 D.L.R. (2d) 385, appeal dismissed with costs, February 14, 1967.

Dirassar et al. v. Kelly, Douglas & Co. Ltd. (B.C.), 59 D.L.R. (2d) 452, appeal dismissed with costs, October 18, 1967.

Duhamel et Fils Inc. v. Dominion Acoustic Tile Ltd. (Que.), [1966] Q.B. 905, appeals dismissed with costs, April 28, 1967.

Eagle Creek, Rural Municipality of v. Bozak et al. (Sask.), 52 W.W.R. 472, appeal dismissed with costs, March 21, 1967.

Grenkow v. The Queen (Man.), appeal dismissed, November 3, 1967.

Hamel v. La Reine (Que.), [1967] Q.B. 102, appeal dismissed, June 14, 1967.

Hill v. Hill (B.C.), appeal dismissed with costs, February 16, 1967.

International Pediatric Products Ltd. et al. v. Lambert et al. (B.C.), 46 C.P.R. 279, appeal dismissed with costs, February 16, 1967.

Jackson v. Leigh (Ex.) (Admiralty), [1966] Ex. C.R. 485, appeal dismissed with costs, October 18, 1967.

Jacques-Cartier, Cité de v. La Reine (Ex.), [1966] Ex. C.R. 1020, appeal dismissed with costs, May 3, 1967.

Lacombe v. Reid (Que.), [1966] Q.B. 917, appeal dismissed with costs, November 24, 1967.

Langlois v. Procureur général de Québec (Que.), [1965] Q.B. 1032, appeal dismissed with costs, May 9, 1967.

Lloyd's et al. v. Bourgeois (Que.), [1967] Q.B. 428, appeal dismissed with costs, December 5, 1967.

Looyenga v. Smith and Cumming (Sask.), 48 C.R. 299, [1966] 4 C.C.C. 188, 56 W.W.R. 111, appeal dismissed with costs, March 7, 1967.

Metropolitan Toronto and Region Conservation Authority v. Claremont Investment Corporation Ltd. (Ont.), appeal dismissed on question of jurisdiction, May 12, 1967.

Metropolitan Toronto and Region Conservation Authority v. Valley Improvement Co. Ltd. (Ont.), [1965] 2 O.R. 587, appeal quashed with costs of a motion to quash, Judson J. dissenting, February 10, 1967.

Minister of National Revenue v. Federal Farms Ltd. (Ex.), [1966] Ex. C.R. 410, appeal dismissed with costs, November 15, 1967.

Minister of National Revenue v. Pevato (Ex.), [1966] Ex. C.R. 305, appeal dismissed with costs, February 9, 1967.

Montecatini Societa Generale per l'Industria Minerarie & Chimica v. E.I. Dupont de Nemours & Co. et al. (Ex.), [1966] Ex. C.R. 959, appeal dismissed with costs, May 15, 1967.

Morris v. Minister of National Revenue (Ex.), [1963] C.T.C. 77, appeal dismissed with costs, June 21, 1967.

Morrow v. Leonard (Que.), [1966] Q.B. 887, appeal dismissed with costs, February 27, 1967.

Neary et al. v. Moskal et al. (Man.), appeal dismissed with costs, May 25, 1967.

Nineteenhundred Tower Ltd. et al. v. Cassiani, Harris Steel Corpn.; Franklin Electrical Supply et al. (Que.), [1967] Q.B. 787, appeals dismissed with costs, December 1, 1967.

Philco Corporation v. Radio Corporation of America (Ex.), [1967] Ex. C.R. 450, appeal dismissed with costs, June 21, 1967.

Poole Engineering (1958) Ltd. et al. v. Public Trustee for Alberta et al. (Alta.), appeal dismissed with costs, October 25, 1967.

Queen, The v. Harris (B.C.), appeal dismissed, February 20, 1967.

Quessy v. Compagnie de Transport Provinciale (Que.), [1967] Q.B. 70, appeal dismissed with costs, June 9, 1967.

Quiring Construction Ltd. v. Humphries (Man.), appeal dismissed with costs, June 2, 1967.

Reine, La v. Gagné (Ex.), [1967] Ex. C.R. 263, appeal dismissed with costs, November 23, 1967.

Silhouette Products Ltd. v. Prodon Industries Ltd. (Ex.), [1965] 2 Ex. C.R. 500, appeal dismissed with costs, February 15, 1967.

Southam Business Publication, Ltd. v. Minister of National Revenue (Ex.), [1966] Ex. C.R. 1055, appeal dismissed with costs, May 10, 1967.

Syndicat National des Débardeurs de la Baie des Ha! Ha! v. Saguenay Terminals Ltd. (Que.), [1964] Q.B. 210, appeal dismissed with costs, February 2, 1967.

Texaco Development Corporation v. Schlumberger Ltd. (Ex.), [1967] Ex. C.R. 459, appeal dismissed with costs, December 13, 1967.

Trushire Investment Corporation et al. v. Dell Realties Ltd. et al. (Que.), [1967] Q.B. 434, appeal dismissed with costs, November 29, 1967.

Vineland Quarries & Crushing Stone Ltd. v. Minister of National Revenue (Ex.), [1966] Ex. C.R. 417, appeal dismissed with costs, October 5, 1967.

Walker et al. v. Minister of National Revenue (Ex.), [1963] C.T.C. 441, appeal dismissed with costs, March 3, 1967.

Williamson v. Sabel et al. (Man.), 61 D.L.R. (2d) 234, appeal dismissed with costs, November 10, 1967.

Woolworth (F.W.) Co. Ltd. v. O'Brien (Nfld.), appeal dismissed with costs, November 16, 1967.

MOTIONS—REQUÊTES

Applications for leave to appeal granted are not included in this list.

Cette liste ne comprend pas les requêtes pour permission d'appeler qui ont été accordées.

Backlin v. The Queen (Man.), leave to appeal refused, May 4, 1967.

Berends et al. v. Taylor (Ont.), leave to appeal refused with costs, February 6, 1967.

Bingham v. The Queen (Ont.), leave to appeal refused, December 18, 1967.

Blustein v. North York (Ont.), leave to appeal refused with costs, May 1, 1967.

Brydges v. The Queen (Ont.), leave to appeal refused, April 25, 1967.

Burke v. Toronto Star Ltd. (Ont.), leave to appeal refused with costs, February 7, 1967.

Butler v. Byrne (Que.), [1967] Q.B. 481, leave to appeal refused without costs, June 19, 1967.

Cameron v. The Queen (Ont.), 62 D.L.R. (2d) 328, leave to appeal refused, June 7, 1967.

Canadian Finance and Investments et al. v. Bank of Western Canada et al. (Man.), leave to appeal refused with costs, December 8, 1967.

Carborundum Co. v. Norton Co. (Ont.), 33 Fox Pat. C. 148, motion to quash granted with costs, June 19, 1967.

Chalmers et al. v. The Queen (Alta.), 57 W.W.R. 692, leave to appeal refused, February 6, 1967.

Chudzik v. The Queen (Man.), leave to appeal refused, December 11, 1967.

Close v. Globe and Mail Ltd. (Ont.), 66 C.L.L.C. 11707, leave to appeal refused with costs, February 7, 1967.

Colonial Coach et al. v. Ontario Highway Transport Board et al. (Ont.), [1967] 2 O.R. 243, leave to appeal refused with costs, November 7, 1967.

Continental Casualty Co. v. Combined Insurance Co. of America (Que.), 35 Fox Pat. C. 92, leave to appeal refused with costs, April 25, 1967.

Continental Casualty Co. v. Combined Insurance Co. of America (Que.), 35 Fox Pat. C. 92, motion to quash granted with costs, April 25, 1967.

Craig v. Lockhart et al. (Alta.), 59 W.W.R. 73, leave to appeal refused with costs, May 17, 1967.

Cyr et al. v. Tardif et al. (Que.), [1967] Q.B. 303, leave to appeal refused with costs, February 20, 1967.

Dankwardt v. The Queen (Ont.), leave to appeal refused, April 25, 1967.

Dawybida v. City of Winnipeg (Man.), leave to appeal refused with costs, November 6, 1967.

Demco v. Law Society of Alberta (Alta.), 60 W.W.R. 705, leave to appeal refused, November 7, 1967.

Derochie v. The Queen (Ont.), leave to appeal refused, March 22, 1967.

Derome v. Barreau de Montréal (Que.), [1967] Q.B. 291, motion for re-hearing refused with costs, February 13, 1967.

Derome v. Barreau de Montréal (Que.), [1967] Q.B. 291, leave to appeal refused with costs, October 5, 1967.

Eaton v. The Queen (Ont.), leave to appeal refused, October 3, 1967.

Farlinger v. Powell Equipment et al. (Ont.), leave to appeal refused with costs, January 24, 1967.

Foran v. Kukurudza (Man.), leave to appeal refused with costs, April 25, 1967.

Gin v. The Queen (Ont.), leave to appeal refused, December 11, 1967.

Goy v. The Queen (Ont.), leave to appeal refused, May 1, 1967.

Hamilton et al. v. The Queen (Ont.), leave to appeal refused, April 25, 1967.

Hammer v. The Queen (Ont.), leave to appeal refused, March 20, 1967.

Hicks v. The Queen (Sask.), leave to appeal refused, February 7, 1967.

Higgins v. The Queen (Ont.), leave to appeal refused, December 18, 1967.

Johnston v. The Queen (Ont.), leave to appeal refused, February 6, 1967.

Jones v. The Queen (Ont.), motion to quash granted, December 11, 1967.

Kent Steel Products v. Arlington Management Consultants Ltd. (Man.), 59 W.W.R. 382, leave to appeal refused, June 1, 1967.

King v. Legal Adviser Yukon Territories (Yukon), 60 W.W.R. 577, leave to appeal refused, October 30, 1967.

Laurin v. The Queen (Que.), [1967] Q.B. 600, leave to appeal refused, April 25, 1967.

Maurantonio v. The Queen (Ont.), leave to appeal refused, December 11, 1967.

Maurantonio v. The Queen (Ont.), motion to quash granted, November 27, 1967.

Meikle v. The Queen (Ont.), leave to appeal refused, November 21, 1967.

Metropolitan Toronto v. Valley Improvement (Ont.), [1965] 2 O.R. 587, motion to quash granted with costs, February 10, 1967.

Metropolitan Toronto et al. v. Valley Improvement (Ont.), [1965] 2 O.R. 587, leave to appeal refused, February 10, 1967.

Mitton v. The Queen (Alta.), leave to appeal refused, October 3, 1967.

Mocon v. The Queen (Ont.), leave to appeal refused, October 26, 1967.

Morris v. Minister of National Revenue (Ont.), (Ex.), [1963] C.T.C. 77, motion for re-hearing refused with costs, October 23, 1967.

Mortimer v. The Queen (Ont.), leave to appeal refused, June 19, 1967.

McAuslane v. The Queen (Ont.), leave to appeal refused, November 29, 1967.

McKinnon (D. A.) v. The Queen (Ont.), leave to appeal refused, March 22, 1967.

McKinnon (D. N.) v. The Queen (Ont.), leave to appeal refused, March 22, 1967.

McRae et al. v. The Queen (Man.), 59 W.W.R. 36, leave to appeal refused, February 27, 1967.

National Bowling Centers Ltd. v. Brunswick of Canada Ltd. (Que.), [1967] Q.B. 369, leave to appeal refused with costs, August 24, 1967.

Nelson v. The Queen (Man.), leave to appeal refused, October 4, 1967.

Nugent v. The Queen (Ont.), leave to appeal refused, December 18, 1967.

O'Neill v. The Queen (Ont.), leave to appeal refused, January 24, 1967.

Ouvriers Unis des Textiles d'Amérique v. Commission des Relations de Travail du Québec et al. (Que.), leave to appeal refused with costs, June 19, 1967.

Paratte et al. v. Optométristes et Opticiens de Québec (Que.), [1967] Q.B. 645, leave to appeal refused with costs, January 24, 1967.

Park Hotel (Sudbury) Ltd. v. The Queen (Ont.), [1966] 2 O.R. 316, leave to appeal refused, January 24, 1967.

Parker v. The Queen (B.C.), leave to appeal refused, March 20, 1967.

Parkway Taxicab Reg'd. v. Licari et al. (Ont.), leave to appeal refused with costs, November 28, 1967.

Poole v. The Queen (B.C.), motion for re-hearing granted November 20, 1967.

Prandial et al, v. Clarkson Co. et al. (Ont.), motion to quash granted with costs, February 22, 1967.

Quebecair v. Attorney General of Canada et al., (*N.B.*), leave to appeal refused with costs, December 5, 1967.

Queen, The v. Beamish Construction et al. (Ont.), motion to quash granted, November 27, 1967.

Queen, The v. Nord-Deutsche Versicherungs Gessellschaft et al. (Ex.), leave to appeal refused with costs, November 20, 1967.

Queen, The v. Rufiange (Que.), 46 C.R. 332, leave to appeal refused, December 18, 1967.

Quinnell v. Telegram Publishing Co. Ltd. (Ont.), leave to appeal refused with costs, February 7, 1967.

Rossignol v. The Queen (*N.B.*), leave to appeal refused with costs, January 24, 1967.

Ruco Enterprises Inc. v. Shink (Que.), [1967] Q.B. 638, leave to appeal refused with costs, February 7, 1967.

Senkiw et al. v. Utility Glove (1961) Ltd. (Man.), 67 C.L.L.C. 11200, leave to appeal refused with costs, October 30, 1967.

Serial Realties Ltd. v. The Queen (Ont.), leave to appeal refused with costs, June 12, 1967.

Silhouette Products Ltd. v. Prodon Industries Ltd. (Ex.), motion for re-hearing refused with costs, May 23, 1967.

Syndicat Professionnel des Instituteurs de Jonquière et al. v. Commissaires d'Écoles Cité de Jonquière (Que.), [1967] Q.B. 697, leave to appeal refused with costs, November 6, 1967.

Taxi LaSalle v. La Cour Municipale de Montréal et al. (Que.), [1967] Q.B. 729, leave to appeal refused with costs, March 22, 1967.

Teskey v. The Queen (Ont.), leave to appeal refused, March 22, 1967.

Tomkulak v. The Queen (B.C.), leave to appeal refused, March 20, 1967.

Williamson v. Sabel et al. (Man.), 58 W.W.R. 718, motion to adduce new evidence refused with costs, November 10, 1967.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ARRÊTS

DE LA

COUR SUPRÊME DU CANADA

SUR

APPEL DE DÉCISIONS

DES

TRIBUNAUX FÉDÉRAUX ET PROVINCIAUX

94055—1

THE HAMILTON STREET RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

1966
* Oct. 19
Oct. 28

AND

DERICK NORTHCOTT (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour—Dispute over pay guaranteed to employees under collective agreement—Issue referred by union and company to arbitration board—Declaration of entitlement—Alternative procedure for recovery of wages—The Labour Relations Act, R.S.O. 1960, c. 202, s. 34(9)—The Rights of Labour Act, R.S.O. 1960, c. 354, s. 3(3).

In a dispute over the pay that a spare operator was guaranteed under a collective agreement between the union and the street railway during each regular fourteen-day period, the union claimed that if the spare operator worked at all during this period, he was guaranteed a minimum of seventy hours' pay. The company disputed this and on this issue the parties went to arbitration under art. VIII of the agreement. The union was successful in getting a declaration favourable to the interpretation which would give the employees their money, but the arbitration board did not state in its reasons how much each was entitled to because they were not parties to the grievance procedure under art. VIII.

The employees then sued in the Division Court for their unpaid guaranteed pay and were met with the defence that they had no remedy because they had not followed art. VI grievance procedure. The company submitted that if each employee had presented a grievance under art. VI within the specified time limits, they would have secured declarations that they were entitled to specific sums of money. Having secured these declarations, they could have filed them with the Supreme Court under s. 34(9) of *The Labour Relations Act*, R.S.O. 1960, c. 202, and then they would have had a judgment instead of what they presently had—useless declarations of right. The company further submitted that because the employees might have followed the grievance procedure under art. VI, secured these declarations and filed them as judgments, there was no jurisdiction in any court to consider the matter.

The Division Court judge and the Court of Appeal having rejected the company's contention, an appeal, with leave, was brought to this Court.

Held: The appeal should be dismissed.

The collective agreement was not concerned with the non-payment of wages. These could be sued for in the ordinary courts. If, however, the right to be paid depended upon the interpretation of the collective agreement, this was within the exclusive jurisdiction of a board of

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

1966

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arbitration appointed under the agreement, but whether this decision came under grievance procedure under art. VI, with the consequent registration of the equivalent of a judgment or a declaration at the instance of the union under art. VIII, made no difference. In the one case the individual employees got the equivalent of judgments; in the other case, they had declarations of right on which they could sue.

Where wages were concerned, if the employee let the specified time limit go by before he filed a grievance, the union could still pursue the matter under art. VIII as it did here.

Re Grottoli v. Lock & Son Ltd., [1963] 2 O.R. 254, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Warrender Co. Ct. J. Appeal dismissed.

Norman Mathews, Q.C., and *William S. Cook*, for the defendant, appellant.

Sydney Paikin, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—At the conclusion of the hearing the appeal was dismissed. Written reasons were to be given later.

The dispute is over the pay that a spare operator is guaranteed under the collective agreement between the union and the street railway during each regular fourteen-day period. The union says that if the spare operator works at all during this period, he is guaranteed a minimum of seventy hours' pay. The company disputes this and on this issue the parties went to arbitration under art. VIII of the agreement.

The union secured a decision favourable to the spare operators that they were entitled to their seventy hours' pay. The majority decision of the Board also held that the union was entitled to pursue its complaint under art. VIII of the agreement.

The company now says, and it has said throughout, that this procedure was wrong or if it is not wrong it is of no use to the employees because they cannot do anything with a mere declaration of entitlement. It says that each employee should have presented a grievance under art. VI dealing with grievance procedure. If they had followed this procedure within the time limits specified in the agreement, they would have secured declarations that they were entitled to

specific sums of money. Having secured these declarations, they could have filed them with the Supreme Court under s. 34(9) of *The Labour Relations Act*, R.S.O. 1960, c. 202, and then they would have had a judgment instead of what they have now—useless declarations of right. The company further says that because the employees might have followed the grievance procedure under art. VI, secured these declarations and filed them as judgments, there is no jurisdiction in any court to consider the matter. The result, therefore, is a procedural dilemma.

The union has been successful in getting the declaration favourable to the interpretation which would give the employees their money, but the arbitration board did not state in its reasons how much each was entitled to because they were not parties to the grievance procedure under art. VIII. The employees' next step was to sue in the Division Court for their unpaid guaranteed pay. They were met with the defence that they had no remedy because they had not followed art. VI grievance procedure.

Both the Division Court judge and the Court of Appeal have rejected this contention. These men have a point conclusively settled in their favour by the arbitration board. They can go before a court and say, "We are entitled to this money. All that remains is a mere matter of calculation. These are the hours for which we are entitled to be paid—seventy hours minus whatever hours we were paid for and which we actually worked."

This is all that has happened and, in my opinion, the courts have jurisdiction to determine this matter. This was the precise point decided by McRuer C.J., in *Re Grottoli v. Lock & Son Ltd.*[1].

If one follows the company's argument to its ultimate conclusion it means that no employee can ever sue for wages unpaid. He would have to follow the grievance procedure in the collective agreement and be bound by very stringent time limits. This would be so even though there is no dispute about the wages being due and owing. The collective agreement is not concerned with non-payment of wages. These may be sued for in the ordinary courts. If, however, the right to be paid depends upon the interpretation of the collective agreement, this is within the exclusive

[1] [1963] 2 O.R. 254, 39 D.L.R. (2d) 128.

1966

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Judson J.

jurisdiction of a board of arbitration appointed under the agreement, but whether this decision comes under grievance procedure under art. VI, with the consequent registration of the equivalent of a judgment or a declaration at the instance of the union under art. VIII, makes no difference. In the one case the individual employees get the equivalent of judgments; in the other case, they have declarations of right on which they can sue.

I would go further and say that where wages are concerned, if the employee lets the six days go by before he files a grievance, the union can still pursue the matter under art. VIII as it did here.

The Rights of Labour Act, R.S.O. 1960, c. 354, has nothing to do with this case. Section 3(3) provides:

> 3.(3) A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of *The Labour Relations Act*.

The citation of a conclusive arbitration award under a collective bargaining agreement as the foundation for a claim for wages is not the same thing as making the collective agreement the subject of any action in any court.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Mathews, Dinsdale & Clark, Toronto.

Solicitors for the plaintiff, respondent: White, Paikin, Foreman & Grannum, Hamilton.

VEATRICE KATHLEEN SWAIN, VIOLET IRENE CHADWICK and VIVIAN WILFRED WOODS (*Petitioners*) ..... APPELLANTS;

1966
*Nov. 2, 3
Nov. 21

AND

VIMY RIDGE DENNISON and VICTORIA MARGARET HISLOP (*Respondents*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Applications made under Testator's Family Maintenance Act, R.S.B.C. 1960, c. 378, to vary will—Discretion of Court—Whether Court of Appeal erred in substituting its own discretion for that of trial judge.

The testatrix, whose estate had a probable value of some $120,000, by her will bequeathed three legacies; namely, $300 to her daughter S, $200 to a friend B and $2,000 to a grandchild, the daughter of S. One third of the remainder was given to a daughter D, and one third to a daughter H. The remaining one third was to provide for the above legacies, and the balance to be held in trust as a life estate for the testatrix's son W, so long as such balance did not exceed one quarter of the whole estate. Any excess over such one quarter was to be divided equally among D, H and another daughter C. After the fulfilment of the life estate, the remainder of this one third was to be divided equally among the same three daughters.

The appellants, S and C, and the cross-appellant, W, made application under the *Testator's Family Maintenance Act*, R.S.B.C. 1960, c. 378, for a larger provision in their mother's estate than they had been allowed under her will. The trial judge exercised his discretion by directing that, after providing for the legacies to B and the daughter of S, the estate should be divided equally among the five children of the testatrix.

From this decision the present respondents appealed. The Court of Appeal, unanimously, directed that S and C should each receive the sum of $10,000 in addition to the benefits they received under the terms of the will. This total of $20,000 would be paid ratably out of the benefits received by each of the five children under the terms of the will.

From this judgment the appellants S and C appealed and the other three parties cross-appealed. S and C contended that the decision at trial should be restored; D and H sought restoration of the terms of the will. W supported the submission of the appellants, or, in the alternative the restoration of the will.

Held: The appeals and cross-appeals should be dismissed.

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

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The contention that the Court of Appeal had erred in substituting its own discretion for that of the trial judge failed. The entire jurisdiction of the trial judge under the Act in question was discretionary in character. Any person who considered himself prejudicially affected by the discretion exercised by the trial judge had a right to appeal. Consequently, the Act must have contemplated a review of that discretion by the Court of Appeal. It was held, therefore, that that Court had the power and the duty to review the circumstances and reach its own conclusion as to the discretion properly to be exercised.

In any event, in the present case the Court of Appeal was of the opinion that the trial judge had failed to give sufficient weight to relevant considerations and had disregarded principle. This Court agreed with the comments of the Court of Appeal in respect of the judgment at trial and, for that reason, would not restore that judgment.

With respect to the contention that the terms of the will should be restored, there were concurrent findings in the Courts below that the testatrix did not make adequate provision in her will for the maintenance and support of S and C. This Court would not, on the evidence, reverse that finding. No reason found to be persuasive was advanced to warrant this Court altering the order of the Court of Appeal in respect of the provision to be made for them in addition to what they each received under the terms of the will. Furthermore, the Court was not prepared to alter the findings of the Court of Appeal with respect to W.

Appeals—Judgment at trial and that on appeal involving exercise of judicial discretion—Appeal brought without leave—Jurisdiction of Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.

In view of s. 44 of the *Supreme Court Act*, where it is provided by subs. (1) that no appeal "lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceedings in equity . . .", this appeal was one which could only be brought with leave granted pursuant to s. 41. The submission that the proceedings were in the nature of a suit or proceedings in equity in view of the fact that s. 3(1) of the *Testator's Family Maintenance Act* empowered the Court to order such provision "as the Court thinks adequate, just, and equitable in the circumstances" was not accepted. The jurisdiction conferred upon the Court by s. 3(1) was a statutory jurisdiction giving the power to exercise a statutory discretion. When s. 44(1) referred to "a suit or proceedings in equity" it was referring to that kind of suit or proceedings which, in England, prior to the enactment of *The Judicature Act*, 1873, would have been commenced in a court of equity. (*Carnochan v. Carnochan*, [1955] S.C.R. 669, referred to.) Leave to bring the present appeal had not been obtained. However, counsel having relied on *Walker v. McDermott*, [1931] S.C.R. 94, and *In re Jones, McCarvill v. Jones et al.*, [1962] S.C.R. 273, two cases where the Court had considered appeals from judgments made pursuant to the provisions of the *Testator's Family Maintenance Act* without prior leave having been granted, although the requirement for leave to appeal did not appear to have been raised or considered in either case, it was decided to grant leave to bring this appeal.

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APPEALS and CROSS-APPEALS from a judgment of the Court of Appeal for British Columbia[1], which set aside and varied the judgment of Nemetz J. in respect of certain applications made under the *Testator's Family Maintenance Act*. Appeals and cross-appeals dismissed.

Frank G. P. Lewis, for the appellant, V. K. Swain.

Robert J. Brennan, for the appellant, V. I. Chadwick.

David Sigler, Q.C., for the cross-appellant, V. W. Woods.

B. W. F. McLoughlin, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the Court of Appeal for British Columbia[1], which set aside and varied the judgment of the learned trial judge in respect of applications made under the *Testator's Family Maintenance Act,* R.S.B.C. 1960, c. 378, in respect of the estate of Emma Woods.

The provisions of that statute, which are relevant, are as follows:

3. (1) Notwithstanding the provisions of any law or Statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the Judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children.

* * * *

17. From any order made under this Act a party deeming himself prejudicially affected may appeal to the Court of Appeal within the same time and the same manner as from a final judgment of the Court in a civil cause.

The appeal was brought before this Court without leave having been obtained under s. 41 of the *Supreme Court Act,* R.S.C. 1952, c. 259, and at the commencement of the argument counsel were requested to make their submissions as to whether, without such leave, an appeal could be brought in view of the provisions of s. 44, which provides:

44. (1) No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in

[1] (1965), 54 W.W.R. 606.

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the nature of a suit or proceedings in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

(2) This section does not apply to an appeal under section 41.

It was not contested, in argument, that both the judgment at trial and that on appeal involved the exercise of judicial discretion, but it was contended by counsel for the appellants that the proceedings were in the nature of a suit or proceedings in equity, in view of the fact that s. 3(1) of the *Testator's Family Maintenance Act* empowered the Court to order such provision "as the Court thinks adequate, just, and *equitable* in the circumstances". (The italics are mine.)

I do not agree with this submission. The jurisdiction conferred upon the Court by s. 3(1) is a statutory jurisdiction giving the power to exercise a statutory discretion. When s. 44(1) refers to "a suit or proceedings in equity" it is referring to that kind of suit or proceeding which, in England, prior to the enactment of *The Judicature Act*, 1873, would have been commenced in a court of equity.

This question was considered by Cartwright J., who delivered the judgment of the Court, in *Carnochan v. Carnochan*[1], at p. 674:

> I conclude that the judgment of Schroeder J. in the case at bar was "a judgment or order made in the exercise of judicial discretion".
>
> It is next necessary to inquire whether it was made "in proceedings in the nature of a suit or proceeding in equity". In my opinion it was not. The judgments of Kellock J.A., as he then was, and of Laidlaw J.A. in H. v. H., [1944] O.R. 438; 4 D.L.R. 173, set out the history of the jurisdiction of the Supreme Court of Ontario to grant alimony and shew that it was formerly exercised in the Court of Chancery; but in the case at bar the learned trial judge was not, I think, exercising the jurisdiction formerly exercised by that Court or one which he would have possessed, apart from statute, in a proceeding in equity, but rather a statutory jurisdiction conferred upon him by s. 12 calling upon him in the circumstances of this case, in the exercise of his discretion to make such order as he saw fit. That in making such order the learned judge was called upon to exercise his discretion judicially goes without saying and was fully recognized by him.
>
> For these reasons I am of opinion that the judgment of the learned trial judge in regard to issue (a) was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to this Court.

The present appeal is, therefore, one which could only be brought with leave granted pursuant to s. 41.

In the course of argument it was pointed out that this Court had considered two appeals from judgments made pursuant to the provisions of the *Testator's Family*

[1] [1955] S.C.R. 669.

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Maintenance Act without prior leave having been granted (*Walker v. McDermott*[1] and *In re Jones, McCarvill v. Jones et al.*[2]). Counsel for the appellants, in preparing this appeal, had, quite naturally, relied upon these authorities in reaching the conclusion that leave to appeal was not necessary. The requirement for leave to appeal does not appear to have been raised or considered in either of those cases. However, in view of counsel's reliance upon those cases, it was decided to grant leave to bring the present appeal.

This case involves the will of Emma Woods, who had been the sole beneficiary under the will of her husband, who predeceased her, and who was at the time of her death enabled to dispose of the whole of the family estate, which, we were advised, would probably have a value of some $120,000. The parties to the proceedings are five of her children, four daughters and one son. Another son had been given a life estate under the will, but died during the course of the proceedings.

Under the will three legacies had been bequeathed; namely, $300 to the appellant daughter, Mrs. Swain, $200 to a friend of the testatrix, Mrs. Bradley, and $2,000 to Mrs. Swain's daughter, Virginia Nash.

One third of the remainder was given to the respondent Mrs. Dennison, and one third to the respondent Mrs. Hislop. The remaining one third was to provide for the legacies above mentioned, and the balance to be held in trust as a life estate for the son Vivian Woods, so long as such balance did not exceed one quarter of the whole estate. Any excess over such one quarter was to be divided equally among Mrs. Dennison, Mrs. Hislop and the appellant Mrs. Chadwick. After the fulfilment of the life estate, the remainder of this one third portion was to be divided equally among the same three daughters.

The proceedings under the Act were commenced by Mrs. Swain, and, subsequently, Vivian Woods and Mrs. Chadwick filed affidavits to support claims for benefits from the estate in excess of those provided for them by the will.

The learned trial judge exercised his discretion by directing that, after providing for the legacies to Mrs. Bradley and Virginia Nash, the estate should be divided equally among the five children of Mrs. Emma Woods.

[1] [1931] S.C.R. 94.

[2] [1962] S.C.R. 273.

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From this decision the present respondents appealed. The Court of Appeal, unanimously, directed that Mrs. Swain and Mrs. Chadwick should each receive the sum of $10,000 in addition to the benefits they received under the terms of the will. This total of $20,000 would be paid ratably out of the benefits received by each of the five children under the terms of the will.

From this judgment the appellants Mrs. Swain and Mrs. Chadwick have appealed and the other three parties have cross-appealed.

The only issue of law raised by the appellants and by Vivian Woods was that the Court of Appeal had erred in substituting its own discretion for that of the trial judge. It was contended, on the authority of *Evans v. Bartlam*[1], *Charles Osenton & Co. v. Johnston*[2], and *Blunt v. Blunt*[3], that an appellate court should not interfere with the exercise of a discretion by a trial judge unless clearly of the opinion that he had acted on a wrong principle; wrongly exercised his discretion, in the sense that no sufficient weight had been given to relevant considerations; or that on other grounds the decision might result in injustice.

In my opinion, in view of the special nature of the provisions of the Act in question and the specific right of appeal which it confers, it is not proper to impose any fetters on the powers of the Court of Appeal in considering appeals under this Act. The entire jurisdiction of the trial judge under this statute is discretionary in character. The relief which may be granted under it is completely dependent on his opinion, first, as to whether adequate provision for proper maintenance and support has been provided for the spouse and children under the will, and second, if adequate provision is not thought to be made, as to what provision should be made. Notwithstanding this, the Act, by s. 14, gives to any party deeming himself to be prejudicially affected, a right to appeal. I construe s. 14 as meaning that any person who considers himself prejudicially affected by the discretion exercised by the trial judge has a right to appeal, and, in consequence, the Act must contemplate a review of that discretion by the Court of Appeal. This being so, that Court has the power and the duty

[1] [1937] A.C. 473 at 479.
[2] [1942] A.C. 130 at 138.
[3] [1943] 2 All E.R. 76 at 79.

to review the circumstances and reach its own conclusion as to the discretion properly to be exercised.

In any event, in the present case the Court of Appeal was of the opinion that the learned trial judge had failed to give sufficient weight to relevant considerations and had disregarded principle. Bull J.A., who delivered the judgment of the Court, said:

> With respect, I am of the view that he was wrong in concluding that everyone's entitlements were equal. In my opinion he failed to give due consideration to the circumstances of the appellants and their claims in the estate. By failing so to do he disregarded the principle that so long as a proper and just provision is made for each, a testator may prefer one child or more over others: *In re Testator's Family Maintenance Act; in re Dawson Estate* (1945) 61 B.C.R. 481; here the testatrix had some very definite preferences and by treating all children alike, rather than to interfere only to the extent necessary to right the wrong found, comes very close indeed to the making of a new will for the testatrix rather than remedying the fault of the old: *In re The Testator's Family Maintenance Act, In re Gill Estate* [1941] 3 W.W.R. 888.

Most of the argument before us, on behalf of each of the parties, was in respect of the merits of the case. The appellants Mrs. Swain and Mrs. Chadwick contended that the decision at trial should be restored. The respondents Mrs. Dennison and Mrs. Hislop sought the restoration of the terms of the will. Vivian Woods supported the submission of the appellants, or, in the alternative, the restoration of the will. The respective moral claims of each of the parties have been reviewed in the reasons for judgment of the Courts below. In view of the conclusions I have reached, it is unnecessary to review them here.

I have already cited the comments of the Court of Appeal in respect of the judgment at trial. I agree with them and, for that reason, would not be prepared to restore that judgment.

With respect to the contention that the terms of the will should be restored, there are concurrent findings in the Courts below that the testatrix did not make adequate provision in her will for the maintenance and support of Mrs. Swain and Mrs. Chadwick. I would not, on the evidence, reverse that finding. No reason which I found persuasive was advanced to warrant this Court altering the order of the Court of Appeal in respect of the provision to be made for them in addition to what they each receive

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under the terms of the will. Furthermore, I am not prepared to alter the findings of that Court with respect to Vivian Woods.

In the result, therefore, I would dismiss each of the appeals, and each of the cross-appeals. In the circumstances, I think that each of the parties should be responsible for his or her own costs.

Appeals and cross-appeals dismissed.

Solicitors for the appellant, V. K. Swain: Griffiths, McLelland & Co., Vancouver.

Solicitors for the appellant, V. I. Chadwick: Brennan & Becker, Vancouver.

Solicitors for the cross-appellant, V. W. Woods: Sigler, MacLennan & Clarke, Vancouver.

Solicitors for the respondents: Lawrence, Shaw & Co., Vancouver.

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*June 8, 9
June 9

FRANK DUDLEY WILBAND .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Dangerous sexual offender—Sentence of preventive detention—Evidence of psychiatrists—Whether admissible—Whether rule of hearsay evidence offended—Whether rule of confession evidence offended—Criminal Code, 1953-54 (Can.), c. 51, ss. 659, 660, 661.

The appellant was found by the trial judge to be a dangerous sexual offender and was sentenced to preventive detention. The evidence relied on by the Crown showed that the accused had been twice convicted of sexual offences against young girls, and included the opinion of two psychiatrists, whose opinion rested, in part, on material found in prison files and dealing with the accused's background and also on the accused's admissions to the psychiatrists. The appellant submitted that since the material in the prison files had not been proven in open Court and that the admissions made to the psychiatrists had not been proven to have been made voluntarily, both rules governing hearsay and confession evidence had been offended, with the result that the evidence of the two psychiatrists was inadmissible.

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* PRESENT: Taschereau C.J., and Fauteux, Abbott, Judson and Spence JJ.

The Court of Appeal affirmed the finding made by the trial judge as well as the sentence of preventive detention. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

As to the confession rule. The rule of evidence governing the admissibility of statements made by a person charged with an offence has no application in the case of statements made by a sexual offender to psychiatrists conducting examinations in accordance with recognized normal psychiatric procedures, in order to assist the Court in proceedings under s. 661 of the *Criminal Code*. These proceedings do not involve the conviction of an offence, but the determination of the sentence which may be pronounced after conviction. The rule has not been established for proceedings related to the determination of a sentence. Furthermore, the position of the psychiatrists during the examination of an accused pursuant to s. 661(2) of the Code is not that of persons in authority but is that of free and independent medical experts.

As to the hearsay rule. In order to form an opinion according to recognized normal psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate. In the present case, the evidence indicated that the information gathered from the prison files was not considered by the two psychiatrists as having any real significance in the formation of their opinion which was grounded ultimately on the examinations of the appellant and on evidence given at the hearing of the application. In any event, the trial judge found that the relevant evidence before him, exclusive of that of the psychiatrists, was conclusive, and this finding was upheld by the Court of Appeal.

Droit criminel—Délinquant sexuel dangereux—Sentence de détention préventive—Témoignage de psychiatres—Admissibilité—Règle concernant la preuve par ouï-dire a-t-elle été violée—Règle concernant la preuve d'aveux a-t-elle été violée—Code criminel, 1953-54 (Can.), c. 51, arts. 659, 660, 661.

La Cour de première instance a jugé que l'appelant était un délinquant sexuel dangereux et l'a condamné à une sentence de détention préventive. La preuve sur laquelle la Couronne s'est appuyée montre que l'accusé, à deux occasions, avait été trouvé coupable d'offenses sexuelles contre des fillettes, et comporte aussi l'opinion de deux psychiatres reposant, en partie, sur des documents provenant des dossiers de prison et portant sur les antécédents de l'appelant et aussi sur des aveux faits par l'appelant aux psychiatres. L'appelant soutient que puisque les documents provenant des dossiers de la prison n'avaient pas été prouvés en Cour et que les aveux faits aux psychiatres n'avaient pas été prouvés avoir été faits volontairement, les règles concernant la preuve par ouï-dire et la preuve par aveux avaient toutes deux été violées, avec le résultat que le témoignage des deux psychiatres n'était pas admissible. La Cour d'appel a confirmé le verdict du juge au procès ainsi que la sentence de détention préventive. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

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En ce qui regarde la règle concernant les aveux. La règle de preuve gouvernant l'admissibilité de déclarations faites par une personne accusée d'une offense ne s'applique pas dans le cas de déclarations faites par un délinquant sexuel aux psychiatres à l'occasion d'examens que ces derniers lui font subir selon les procédures psychiatriques normales et reconnues, en vue d'aider la Cour dans les procédures en vertu de l'art. 661 du *Code criminel*. Ces procédures n'entraînent pas la condamnation pour une offense, mais la détermination de la sentence qui doit être prononcée après la condamnation. La règle n'a pas été établie pour des procédures concernant la détermination d'une sentence. De plus, la position des psychiatres durant l'examen d'un accusé en vertu de l'art. 661(2) du Code n'est pas celle de personnes représentant l'autorité mais celle d'experts médicaux libres et indépendants.

En ce qui regarde la règle concernant la preuve par ouï-dire. Pour se former une opinion selon les procédures psychiatriques normales et reconnues, le psychiatre doit prendre en considération toute source possible d'information, y compris une source de seconde main. Ses activités professionnelles, son art et son entraînement lui permettent d'évaluer la véracité, l'exactitude et la signification de ces informations. Dans le cas présent, la preuve indique que les deux psychiatres n'ont pas considéré que les renseignements obtenus des dossiers de la prison avaient contribué d'une façon significative à la formation de leur opinion qui, en définitive, était basée sur l'examen de l'appelant et sur la preuve entendue lors de l'audition de la demande en vertu de l'art. 661 du Code. A tout événement, le juge au procès a été d'opinion que la preuve pertinente devant lui, à l'exclusion de celle des psychiatres, était concluante, et cette opinion a été partagée par la Cour d'appel.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], confirmant un verdict que l'appelant était un délinquant sexuel dangereux. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a finding that the appellant was a dangerous sexual offender. Appeal dismissed.

T. G. Ison, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal, brought by leave from a unanimous judgment of the Court of Appeal for British Columbia[1], affirming (i) a finding made by Munroe J., that the appellant is a dangerous sexual offender and (ii) the sentence imposed upon him as a sequence.

[1] (1965), 51 W.W.R. 251, 45 C.R. 385, 3 C.C.C. 98.

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At the conclusion of the hearing before us, the Court, indicating that reasons would be delivered later, dismissed the appeal.

The grounds of appeal which were raised, are related to the evidence which, so far as relevant to the principal and, indeed, only ground that needs to be dealt with, can be briefly stated. As indicated in the reasons for judgment of the trial Judge, the evidence relied on by the Crown at trial, shows that:—on November 26, 1960, the appellant was convicted by a jury of an indecent assault committed the preceding month, upon a 12 year old girl and was sentenced to 2 years' imprisonment; on November 16, 1963, he was convicted by a jury of having had sexual intercourse, in May of the same year, again with a 12 year old girl, and was sentenced to 8 years' imprisonment; the appellant, a stranger to the victim of the last mentioned attack, forced her into his car and on the floor thereof, on the threat of killing her, and drove her to a secluded area where, by force, he removed her clothing and had sexual relations without her consent. The evidence relied on by the Crown also includes the opinion of two experienced and well-qualified psychiatrists, namely Dr. J. C. Thomas and Dr. R. C. Whitman. Both called by the Crown, they testified, in chief, that, as a result of their personal and separately conducted examination of the appellant at the B.C. Penitentiary and of the evidence they heard at trial, they formed the opinion that the appellant was a person who, by his conduct, in any sexual matter, has shown his failure to control his sexual impulses, that he is likely to cause injury, pain or other evil to any person through failure in the future to control his sexual impulses, and that he is likely to commit further sexual offences. Counsel for the appellant, having then asked for and obtained permission to cross-examine the psychiatrists as to their conversations with the appellant, thereby elicited that the latter had thought of killing the victim of the last mentioned offence in order to destroy her evidence and that he had had similar, though undetected, experiences with other young girls, his nieces. Appellant's counsel also elicited from the doctors that, for the purpose of obtaining background information upon the appellant and his family, they had examined prison files containing, amongst other material, a psychiatric report made earlier by another psychiatrist, the results

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of a psychological test, a classification report, an Alberta hospital report and that such material was taken into account in reaching their conclusion which, in essence, however, was based on their examination of the appellant and the evidence given at the hearing.

The appellant did not testify, nor was any defence evidence called on his behalf.

Appellant's counsel submitted, at trial, that since the opinion of the psychiatrists rested, in part, on the above material found in prison files and not proved in open court and also on appellant's admissions or confessions to the psychiatrists, not proved to have been made voluntarily, both rules governing hearsay and confession evidence were offended with the consequence that the evidence of the two doctors was not only worthless but wholly inadmissible.

The trial Judge did not find it necessary to decide whether the hearsay rule had been offended. He noted that Dr. Thomas had stated that such reports were used to save time, were of no significance and merely confirmed his own finding reached independently thereof and that Dr. Whitman had testified that while such reports were helpful, his opinion, based only on his interview with the appellant and the evidence he had heard in court, would nevertheless be the same. Finally, the trial Judge found that the relevant evidence before him, exclusive of that of the psychiatrists, was conclusive.

The contention that there had been a breach of the rule governing confession, was rejected. The trial Judge referred to *Regina v. Leggo*[1] and quoted the following part of a statement made by Norris J.A., at page 407:

> ...the psychiatrists were entitled to rely on statements made by the appellant to them, in forming their opinions...

In the Court of Appeal[2], the appellant's submission with respect to the admissibility of the psychiatrists' evidence was also, and unanimously, rejected. The Court decided that there was no obligation for the Crown to prove the voluntariness of the admissions or confessions made by the appellant to the doctors, for the reason that the proceedings under s. 661 of the *Criminal Code* do not involve the conviction of a crime, but are held for the purpose of

[1] (1962), 39 W.W.R. 385, 38 C.R. 290, 133 C.C.C. 149.
[2] (1965), 51 W.W.R. 251, 45 C.R. 385, 3 C.C.C. 98.

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deciding whether a sentence of preventive detention should be substituted for the sentence pronounced on the substantive offence.

The Court of Appeal, like the trial Judge, did not find it necessary to decide whether the examination of the material found in the prison files offended the hearsay rule. The Court was satisfied from the evidence that this examination did not greatly influence either doctors who based their opinion mainly on the examination of the appellant and the evidence given at the hearing. Finally, the Court relied on the fact that the trial Judge had expressly stated, in his reasons for judgment, that, exclusive of such material, he would have reached the same view. Hence, the dismissal of the appeal.

Dealing at first with the applicability of the confession rule:— There are cogent reasons to hold, as did the Court of Appeal for British Columbia, in this case, and the Courts of Appeal for Manitoba and Alberta, respectively, in *Regina v. Johnston*[1] and *Regina v. McKenzie*[2], that the rule of evidence governing the admissibility of statements made by a person charged with an offence has no application in the case of statements made by a sexual offender to psychiatrists conducting examinations in accordance with recognized normal psychiatric procedures, in order to assist the Court in proceedings under s. 661 of the *Criminal Code*.

One of the reasons flows from the very nature of the issue involved in these proceedings. The issue, in these proceedings which can only be resorted to if the accused has been convicted of a sexual offence, is not whether he should be convicted of another offence, but solely whether he is afflicted by a state or condition that makes him a dangerous sexual offender within the meaning of s. 659(*b*) of the *Criminal Code*. To be so afflicted is not an offence. As to this aspect of the matter, the line of reasoning adopted by the Court of Criminal Appeal in the *King v. Hunter*[3] and this Court in *Brusch v. The Queen*[4], holding that a charge of being a habitual criminal is not a charge of an offence but merely the assertion of a status or condition, applies here on a charge of being a dangerous sexual offender.

[1] (1965), 51 W.W.R. 280, 3 C.C.C. 42.
[2] (1965), 51 W.W.R. 641, 46 C.R. 153, 3 C.C.C. 6.
[3] [1921] 1 K.B. 555.
[4] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

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Indeed, a reference to subs. 3 of s. 661 of the *Criminal Code* makes it clear that the object sought by Parliament, in enacting these special provisions, is not to create an offence but to enable the Court, in cases where a sexual offender is found to be a dangerous sexual offender, to pass upon him a further sentence in lieu of or in addition to the sentence passed or which could have been passed for the sexual offence of which he was convicted. These proceedings do not involve the conviction of an offence, but the determination of the sentence which may be pronounced after conviction. The confession rule, which excludes incriminatory statements not affirmatively proved to have been made voluntarily, is a rule which has been designed for proceedings where, broadly speaking, the guilt or innocence of a person charged with an offence is the matter in issue. The rule has not been established for proceedings related to the determination of a sentence. I know of no binding authority holding that its application extends, and can think of no valid reason why it should be held to extend to examinations conducted by psychiatrists, in compliance with subs. 2 of s. 661 of the *Criminal Code*, in order that they could form and subsequently convey to the Court an opinion as to the mental state or condition of a sexual offender.

Another reason why the confession rule does not obtain to exclude statements made by a sexual offender to psychiatrists examining him pursuant to subs. 2 of s. 661 of the Code, is that the latter are not, as it has been decided particularly by the Court of Appeal for Alberta in *Regina v. McKenzie, supra,* persons in authority. Indeed, the nature of their position, in relation to the proceedings under s. 661 of the Code, does not enable them to control or influence the course of such proceedings in the sense and the manner in which the course of proceedings may be controlled or influenced by persons who have a concern with the apprehension, prosecution or examination of prisoners conducted to collect evidence leading to the conviction of an offence. On the contrary, and as the purpose to be inferred from subs. 2 of s. 661 of the Code indicates, the position of the psychiatrists, in relation to the proceedings under s. 661, is that of free and independent medical experts, specialists in mental health, whose only part and concern in the proceedings is to give to the Court the assistance, which the latter

is required by subs. 2 to seek from them, for the assessment of the mental state or condition of a sexual offender and the determination of the application made under the section. Except in rare cases, where indications to the contrary might possibly appear,—and none have been shown in this case—psychiatrists called to assist the Court in these proceedings cannot be considered as being persons in authority. In this respect, their position, in relation to proceedings under s. 661 of the Code, does not differ from their position in relation to proceedings where insanity is raised as an issue, and never, as far as I know, was it suggested that, in the latter case, they have the status of persons in authority.

Dealing with hearsay:—The evidence, in this case, indicates that to form an opinion according to recognized normal psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate. Hence, while ultimately his conclusion may rest, in part, on second-hand source material, it is nonetheless an opinion formed according to recognized normal psychiatric procedures. It is not to be assumed that Parliament contemplated that the opinion, which the psychiatrists would form and give to assist the Court, would be formed by methods other than those recognized in normal psychiatric procedures. The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information. I find it unnecessary, in this case, to pursue these considerations which, I think, would generally obtain in proceedings under s. 661 of the Code, where the hearing and determination of the application are entrusted to a judge alone. In the present case, the information gathered from prison files was not considered by the two psychiatrists as having any real significance in the formation of their opinion which was grounded ultimately on the examinations of the appellant and the evidence given at the hearing of the application. And, in any event, the trial Judge found, as he was entitled

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to after considering all the evidence, that, exclusive of the evidence of the psychiatrists, the relevant evidence before him was conclusive.

In these circumstances, the present appeal could not be allowed and was, as above indicated, dismissed.

Appeal dismissed.

Solicitor for the appellant: T. G. Ison, Vancouver.

Solicitors for the respondent: Ewart, Kelley, Burke-Robertson, Urie & Butler, Ottawa.

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*May 27
Oct. 4

JOHN PERCY MacKROW .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Fraud—Real estate transaction—Lawyer for vendor acting also for purchaser—Existence of second mortgage not disclosed to purchaser—Whether case correctly put to jury—Criminal Code, 1953-54 (Can.), c. 51, s. 323(1).

The appellant, a lawyer, was convicted by a jury of having defrauded O by deceit, falsehood or other fraudulent means, contrary to s. 323(1) of the *Criminal Code*. The appellant, who was engaged on a monthly fee basis by the vendors, represented also the purchaser O in a transaction in respect of the sale of a motel. The evidence was that the appellant had failed to disclose to O the existence of an outstanding second mortgage on the property. The Crown contended that this failure constituted fraud within the meaning of s. 323(1) of the Code. The accused admitted that he knew of this second mortgage but that his failure to inform the purchaser was due to inadvertence on his part and without any intent to defraud. It was conceded that the accused did not personally profit from the alleged fraud. In his charge to the jury, the trial judge said that the evidence, if believed, was that a false statement had been made by the accused to the purchaser. An appeal to the Court of Appeal was dismissed. The accused was granted leave to appeal to this Court.

Held: The appeal should be allowed, the conviction quashed and the appellant acquitted.

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*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

The trial judge's charge amounted to misdirection. The Crown's case against the appellant was not that he had given false information but that he had fraudulently withheld material information from O, a situation essentially different in character from that put to the jury by the trial judge. It was not possible to say that no substantial wrong or miscarriage of justice had occurred by reason of this misdirection.

Droit criminel—Fraude—Opération immobilière—Avocat du vendeur agissant aussi pour l'acheteur—Existence d'une seconde hypothèque non dévoilée à l'acheteur—La cause a-t-elle été soumise correctement au jury—Code criminel, 1953-54 (Can.), c. 51, art. 323(1).

L'appelant, un avocat, a été trouvé coupable par un jury d'avoir frustré O par supercherie, mensonge ou autres moyens dolosifs, le tout contrairement à l'art. 323(1) du *Code criminel*. L'appelant, qui touchait des honoraires mensuels du vendeur, a représenté aussi l'acheteur O lors d'une opération immobilière concernant la vente d'un motel. La preuve était à l'effet que l'appelant n'avait pas dévoilé à O l'existence d'une seconde hypothèque en vigueur sur la propriété. La Couronne prétend que cette négligence constituait une fraude dans le sens de l'art. 323(1) du Code. L'appelant a admis qu'il était au courant de la seconde hypothèque mais que son défaut d'en informer l'acheteur était dû à une inadvertance de sa part et sans aucune intention de frustrer. Il est admis que l'appelant n'a retiré personnellement aucun profit de la fraude alléguée. Dans son adresse au jury, le juge au procès a dit que la preuve, si elle était crue, était à l'effet que l'accusé avait fait à l'acheteur une fausse déclaration. La Cour d'appel a rejeté l'appel. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu, la condamnation mise de côté et l'appelant acquitté.

Les instructions du juge au procès étaient erronées. L'accusation portée contre l'appelant n'était pas qu'il avait donné de faux renseignements mais qu'il avait frauduleusement caché à O des renseignements pertinents, une situation ayant un caractère essentiellement différent de celle qui avait été soumise au jury par le juge au procès. Il était impossible de dire qu'aucun tort important ou qu'aucune erreur judiciaire grave ne s'était produite en raison des instructions erronées.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique, confirmant un verdict de fraude. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a conviction for fraud. Appeal allowed.

No one appearing for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

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The judgment of the Court was delivered by

HALL J.:—The appellant was tried jointly with one Arthur Bennett by a judge and jury in the month of January 1963 at Vancouver in the Province of British Columbia upon three counts as follows:

1. That at the City of Vancouver, in the County and Province aforesaid, between the 1st day of January, A.D. 1959, and the 30th day of March, A.D. 1959, they, the said ARTHUR BENNETT and JOHN MacKROW, together with HYCREST HOLDINGS LIMITED and HYCREST MOTELS LIMITED by deceit, falsehood, or other fraudulent means, did defraud SAM~~UEL~~ NORWOLL of property, money or valuable security, contrary to the form of the statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.
2. That at the City of Vancouver, in the County and Province aforesaid and at the City of New Westminster, in the Province aforesaid, between the first day of May, A.D. 1959, and the 30th day of June, A.D. 1959, they, the said ARTHUR BENNETT and JOHN MacKROW, together with HYCREST INVESTMENTS LIMITED, IDEAL MOTELS LIMITED and HYCREST MOTELS LIMITED by deceit, falsehood or other fraudulent means, did defraud JAMES JACK ORAN of property, money or valuable security, contrary to the form of the statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.
3. That at the City of Vancouver, in the County and Province aforesaid, between the 1st day of May, A.D. 1959, and the 30th day of June, A.D. 1959, he the said JOHN MacKROW, being a trustee of money for the use and benefit of JAMES JACK ORAN did convert, with intent to defraud and in violation of his trust, the said money or a part of it to a use that was not authorized by the trust, contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

"Amended
15.1.63
A.B.C."

The jury acquitted MacKrow on Count 1, but convicted him on Counts 2 and 3. Bennett was convicted on Counts 1 and 2. MacKrow was sentenced by Mr. Justice Ruttan, the trial judge, to serve a term of five years in the penitentiary on each of Counts 2 and 3, the sentences to be served concurrently. He appealed to the Court of Appeal for

British Columbia which, on October 17, 1963, dismissed the appeal as to Count 2 but quashed the conviction on Count 3. Accordingly, Count 2 in respect of MacKrow only is the one issue now before the Court. The Court of Appeal did not disturb the five years' sentence when it dismissed the appeal in respect of Count 2. MacKrow was a prisoner in the penitentiary until paroled on July 8, 1965. Shortly after his release from the penitentiary, MacKrow applied to this Court for an order extending the time within which to make application for leave to appeal and for an order granting leave to appeal from the judgment of the Court of Appeal pronounced on the 17th day of October, 1963. This application was dealt with on December 8, 1965, when the following order was made:

THIS COURT DID ORDER AND ADJUDGE that the time for applying for leave to appeal to this Court be and the same was extended to the 8th day of December, 1965.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that leave to appeal from the Judgment of the Court of Appeal for the Province of British Columbia pronounced on the 17th day of October, 1963 be and the same was granted on the following questions of law, namely:

"(1) Did the Court of Appeal err in holding that there was evidence upon which the jury could reasonably convict the appellant on Count No. 2 of the indictment.

(2) Did the Court of Appeal for British Columbia err in holding that any defence which was available to the accused was properly and adequately put by the learned trial judge in view of the appellant's contention that:

(*a*) The learned trial judge instructed the jury that there was evidence on the part of the witness Oran that a false statement was made to him at the time specified in the said Count No. 2 whereas there was no such evidence;

(*b*) The learned trial judge instructed the jury that it was not challenged that the appellant had given false information to Oran whereas it was a part of the appellant's defence that he had not done so;

(*c*) The learned trial judge instructed the jury that the appellant's sole defence was that he had been negligent whereas it was part of his defence that he had given no false information."

The substantive question argued on the hearing of the appeal was whether the learned trial judge had erred in his direction to the jury in respect of the law and evidence relating to Count 2. MacKrow was not present on the hearing of the appeal nor was he represented by counsel. However, he did file a factum and a memorandum in reply to the respondent's factum pursuant to leave granted by the Chief Justice of this Court. Mr. Burke-Robertson, Q.C.,

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appeared for the Crown and developed the evidence and points in issue with scrupulous fairness to the Crown and to the appellant.

While the Crown was within its rights in including Counts 1 and 2 in the one indictment, the fact that the two counts were proceeded with in the one indictment did make for a very long and complicated trial (over three weeks) in which it was difficult to keep separate the evidence relating to Count 1 from that relating to Counts 2 and 3, particularly as the wheelings and dealings of Bennett and the corporate manipulations and financial difficulties of his companies, Hycrest Holdings Limited and Hycrest Motels Limited, named in Count 1, were involved in both Counts 1 and 2 and the same corporate manipulations and difficulties of these companies and of a third company, Ideal Motels Limited, named in Count 2, were also involved in respect of Count 2 as well as those of a fourth company, Pacific American Motels Limited, not named in the count. The offence charged in Count 2 was alleged to have taken place, according to the evidence, on or about the 15th day of May, 1959. The evidence shows that the appellant was arrested on the charge on January 5, 1962, and that in the interval civil litigation over the transactions in question had taken place resulting in James Jack Oran, the man named in Counts 2 and 3 recovering judgment against Bennett and MacKrow in an amount of approximately $5,000 and costs. I mention this because in the address of Mr. Mussallem, who was counsel for MacKrow at the trial, he made reference to this lapse of time. He was interrupted by Ruttan J. and directed to go no further with that submission as follows:

> THE COURT: But you are criticizing the Crown for not bringing the case earlier which, I think, is in fact criticism, and I ask you not to go ahead with it.

Considered alone, perhaps nothing substantial turns on this point although it is related to the question as to whether any defence which was available to the appellant was properly and adequately put to the jury by the learned trial judge. The fact that criminal proceedings were not instituted for some 32 months after the alleged offence is said to have been committed and then only after civil proceedings had been taken and a judgment for some $5,000 obtained which was unsatisfied when the charge was

laid, was in my view, a proper matter for comment when the issue was, as in this case, one relating to whether or not a person has been defrauded by deceit, falsehood or other fraudulent means. Criminal proceedings brought long after the event complained of and following civil proceedings that result in an unsatisfied judgment without any explanation for the delay may well be looked upon with some suspicion by a jury where the issue is financial loss arising out of a commercial transaction.

The basic facts upon which Counts 2 and 3 are based are that on or about the 15th day of May, 1959, the person named in Counts 2 and 3, the said James Jack Oran, had answered an advertisement in a Saskatchewan paper relating to a motel which was for sale at White Rock, British Columbia. He called at the Hycrest office in Vancouver on May 12, 1959, and saw a Mrs. Young and Bennett. Following a discussion with these parties, he decided to purchase the property. He signed a document (Exhibit 48) which is headed "Offer for Purchase, Acceptance and Interim Receipt", the vendor being Pacific American Motels Limited. The purchase price was stated to be $47,500 payable $18,000 cash and an Agreement for Sale for the balance, $29,500 payable over 15 years with interest at 6 per cent. He made a deposit of $1,000. He was told at this time that there was a mortgage in favour of Associated Investors Limited against the property for $12,000 payable at $225 per month. The offer was submitted to Pacific American Motels Limited. Two days later he was communicated with, and following a discussion, agreed to increasing the interest rate to 7 per cent. He was then brought to MacKrow's office which was in the office of Hycrest Investments Limited, a motel on Denman Street in Vancouver. MacKrow, who had been called to the Bar May 1, 1954, was engaged principally in doing work for Bennett and his companies on a $1,200 a month fee basis. This was the first time Oran had met MacKrow. In so far as going to MacKrow, Oran testified:

A. I did say to Mrs. Young if I decide to buy this property I will have to get a lawyer to draw up the transactions.

Q. Yes.

A. And she says, "Well, we have a lawyer working with us, Mr. MacKrow, and that would be the most convenient, to have him do the work." And I said, "Well, he works for your company. Probably I should still get a lawyer, some other lawyer." And she was

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very emphatic, she said that it will cost more to get some other lawyer, it will take more time, and besides MacKrow, he does this work every day, it will be quicker, and the effect of what she said was that it would be quicker and cheaper and it would be the best to have MacKrow do the work. As a result of her suggestion I did engage MacKrow.

Then, in connection with the actual Agreement for Sale which was prepared by MacKrow, Oran said that some two days later he got a call to come to MacKrow's office. This is when the Agreement for Sale (Exhibit 51) was prepared and signed. Respecting the agreement, Mr. Oran testified:

MR. COLTHURST:

Q. Who produced the agreement for sale, Mr. Oran?
A. MacKrow did.

Q. And what, if any, discussion took place about the document?
A. Well, I read over the first page terms.

Q. Yes?
A. And we agreed verbally with the terms, the full amount $47,500.00, the down payment $18,000.00, of which I had already paid $1,000.00.

Q. Yes?
A. And the monthly payments $263.51.

Q. Yes?
A. And there was a 15-year basis we agreed verbally.

Q. Let me see that. Do you recall any further discussion in connection with that agreement for sale?
A. Yes, I particularly noticed the Associated Investors mortgage.

Q. And that is the mortgage that is referred to on the first page of that document, is it?
A. That is right.

Q. Where it says subject to a mortgage in favour of Associated Investors Limited, registered in the Land Registry office under No. 238252C, which the vendors herein covenant to pay according to the terms thereof?
A. Yes.

Q. And save harmless the purchasers therefrom provided that should the vendors default in the payment of any monies due under the said mortgage the purchaser may make payment of such monies to the said mortgagee and the vendors shall allow the purchaser full credit hereunder to the amount of such payment.
A. That is what I am referring to, yes.

Q. And was there any discussion in that connection?
A. Well, we discussed the amount of the mortgage and the standing and he said that is the mortgage that was on the listing. It is approximately $12,000.00.

Q. And when you say "he", who was "he"?
A. MacKrow.

Q. Yes. He said that is it. I am sorry, you have already told us what he said. Yes, and what else?
A. That is the mortgage in good standing, it is being paid off at $225.00 a month.

Q. Yes.

A. I think there was another ten years to go. So I did say, "Well, couldn't I pay that directly to Associated Investors?" Well, he said it really didn't matter. The effect of what he said was that it didn't matter, the difference between $12,000.00 and the agreement for sale was $29,500.00, and this particular mortgage is only $12,000.00 so even if the vendor did default in the payments that I still had there was still $17,000.00 left. So it really didn't matter, he said.

Q. And did you look at any other portion of that agreement for sale?

A. Well, I went over all of it and they said, I probably didn't read all of the second page. MacKrow said, "Well, that is the usual form," and he emphasized paid in 15 years, I will get a clear title, and that is all I asked to have the agreement for sale be what it is.

Q. And as far as looking now at the second page of that agreement you say that you, as I recall the effect of what you said, was you probably didn't read it all. Did you read any of it or notice any of it?

A. Well, I probably didn't read it all, but I noticed there were, this blank space.

Q. Yes?

A. And I think we discussed that. MacKrow mentioned that if there were any changes or alterations it would be here. But this is the usual blank space, the usual form that is used and I felt that that was good enough.

Q. And you are referring to what blank space? Just hold it up and show?

A. This one here.

Q. That is the blank space where again?

A. Right here.

Q. Where there is certain typewritten words, is that right?

A. Yes.

Q. The typewritten words being what?

A. No exceptions.

After signing the agreement, Oran made out two cheques totalling $17,060.18 payable to MacKrow. Oran then left and did not see or speak to MacKrow again until some months later. Meanwhile, MacKrow proceeded to have the agreement registered and in due course, on June 2, 1959, wrote Oran at White Rock, British Columbia, as follows:

Dear Sir: Re sale to you of Ideal Motel, White Rock.

The registration of the above-mentioned sale has now been completed and I enclose herewith your copy of the agreement for sale, which was registered in the New Westminster Land Registry Office under No. 261951C. Also is enclosed a copy of the statement of adjustments for your records.

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He enclosed a statement of adjustments as follows:

Purchaser's Statement of Adjustments adjusted as of May 16, 1959.
Re: Purchase of Ideal Motel, White Rock, B.C.

To: Purchase Price	$ 47,500.00	
By: Agreement for Sale		$ 29,500.00
By: Deposit		1,000.00
To: Insurance at $404.00 for 3 yrs. unexpired portion 2 yrs.	268.40	
By: Taxes—Vendor's share 4½ mos. @ $677.71		254.11
By: Vendor's share sewer tax—$62.00 4½ mos.		23.31
By: Plexolite Sign	5.20	
To: Registration of Agree. for Sale	24.00	
To: Legal fees	40.00	
By: Balance due from you		17,060.18
	$ 47,837.60	$ 47,837.60

As stated previously, Oran was advised of the mortgage in favour of Associated Investors Limited before he saw MacKrow. The charge against MacKrow was that in addition to the Associated Investors' mortgage there was also registered against the title to the property which Oran was buying a second mortgage given by Ideal Motels Limited to Issie Feldstein dated September 19, 1958, for the sum of $12,000 payable on or before March 25, 1959. Oran was not advised of the existence of this mortgage when he signed the offer to purchase (Exhibit 48) and did not learn of it until, in the month of September 1959, he had a call from Feldstein advising him of the mortgage and demanding payment and threatening foreclosure as the mortgage was then overdue. He immediately got in touch with MacKrow who he says assured him the matter would be taken care of. MacKrow communicated with Bennett who, after some delay and because neither he nor Hycrest Motels Limited were able to pay off the Feldstein mortgage, arranged along with solicitors for Oran to have Credit Foncier Franco-Canadien take title and pay off the two mortgages. This left Oran to settle with Credit Foncier but the transaction resulted in an actual loss of $2,507.80 to Oran. The motel cost him that much more than he had agreed to pay for it in the first place. This loss was part of the unsatisfied judgment previously mentioned which he subsequently recovered against MacKrow and Bennett.

The Crown alleged that MacKrow had knowledge of the existence of the Feldstein mortgage on May 15, 1959, both from the fact that he had prepared the mortgage in the first place in September 1958 and from the fact that he participated in a meeting on April 8, 1959, at which a document (Exhibit 35) was prepared by him and which dealt specifically with the Feldstein mortgage. Exhibit 35 reads as follows:

Vancouver, B.C.
April 8, 1959.

Hycrest Motels Ltd.,
1120 Denman St.,
Vancouver, B.C.
Dear Sirs:

Re: Transfer to us of El Rancho
Columbia, Fairlane, Triway
Motels.

This is to confirm our agreement with you made this date with reference to the above transfer of motel properties, as follows:—

1. We are to have full possession and title to the above motels, together with all shares in companies owning any of the said properties.

2. All adjustments between us with reference to the said transfers are to be taken as settled by the transfer to us of all shares in the company known as Ideal Motels Ltd., and by the transfer to us of the property known as Buena Vista Motel, White Rock, B.C. You agree to discharge at your expense "by April 26, 1959" the mortgage now on the Ideal Motel property in the approximate amount of $13,800.00 held by one Issie Feldstein.

3. A full mutual release is to be executed by both you and us.

Yours very truly,
Pacific American Motel Corp. Ltd.
Per: "E. W. Ormheim"
Per: "J. W. Ambler"
"EWO"
"JPM"

The Crown says that MacKrow's failure to bring to Oran's attention the fact of the existence on May 15, 1959, of the Feldstein mortgage was fraud within the meaning of s. 323(1) of the *Criminal Code*. There is no evidence that MacKrow said in so many words that the property was subject only to the Associated Investors' mortgage or that there was only one mortgage. Rather he inserted a clause in the Agreement for Sale (Exhibit 51) to safeguard Oran in respect of the Associated Investors' mortgage only of which Oran had knowledge. The Crown's position is that MacKrow's silence and failure to make known the existence

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of the Feldstein mortgage to Oran at that time was fraud on his part. MacKrow, while admitting that he knew of the Feldstein mortgage in September 1958 and that it was still unpaid as of April 8, 1959, said that his failure to inform Oran of it was due to inadvertence on his part, and while admitting negligence as a solicitor in failing to have a search made of the title which would have shown the mortgage still on the title, he insisted that it had been done innocently and in a hurry and without any intent to defraud. The issue, therefore, which the jury had to decide was whether the Crown had made out its case of fraud against MacKrow beyond a reasonable doubt.

The burden of proof was on the Crown to establish the fraud. It relied strongly on Exhibit 35 quoted above, but it must be noted that this exhibit specifically contained the statement that the Feldstein mortgage was to be discharged by April 26, 1959. There was no direct evidence that the appellant knew that this had not been done when he dealt with Oran on May 15. The jury was asked to conclude that because this mortgage was registered against the property to MacKrow's knowledge in April that it was necessarily fraud on his part when he failed to communicate that fact to Oran on May 15 even though the document (Exhibit 35) relied on so strongly by the Crown itself provided for the mortgage being off the title by April 26. Much stress was placed by the Crown on a document (Exhibit 56) dated May 22, 1959, signed by one Ellen M. Rodgers, MacKrow's secretary, which accompanied the Agreement for Sale when it was tendered for registration in the Land Registry Office on May 27, 1959. This document in which Rodgers said she was the authorized agent of Oran stated that the Agreement for Sale was being registered subject to both mortgages and listed the registered numbers of the two mortgages. According to this witness, these numbers may have been typed in after the document was prepared between May 22 and May 27, 1959. Obviously by May 27, 1959, some one in MacKrow's office was or became aware that the Feldstein mortgage was still on the title because its registered number was inserted at or prior to the time the Agreement for Sale was being tendered for registration. MacKrow denied having prepared the document and there was no evidence of the source from which the witness Rodgers got the number of the Feldstein mortgage if, in

fact, she was the one who actually typed in the number. She did not identify MacKrow as the source from which she got the number.

This summarizes the evidence relied on by the Crown to bridge the gap between the time the Feldstein mortgage should have been discharged according to Exhibit 35 and May 15 and upon which the Crown argued that the jury must infer that MacKrow knew the mortgage had not been discharged as of May 15 and that he fraudulently withheld that fact from Oran in order to get the $17,000 cash for his principal client Bennett. It was conceded that MacKrow did not personally profit from the alleged fraud.

This was the case which MacKrow had to answer. The defences open to him on the evidence included (1) the contention that he had made no false or any statement to Oran respecting the Feldstein mortgage and (2) that his failure to tell Oran of the Feldstein mortgage was due to inadvertence and was not deliberate or intended to mislead or defraud Oran. Ruttan J. put the case to the jury as follows:

> Now on the other hand in the second count, in the Oran count, there is, I suggest to you, no evidence of a promise to do something in the future. *The evidence, if you accept it, on the part of Oran is that a false statement was made to him at that time. In fact, I do not think it is challenged that he was given false information. The defence is that it was by negligence, by inadvertence, but I do not think it is disputed that he was given false information, the false statement being once again, that there was only one encumbrance on the property when, in fact, there was a second encumbrance,* once again a mortgage in the name of Issie Feldstein which was never revealed to Oran until Feldstein himself called him up some months later to warn him that he was going to foreclose.

(The italics are my own.)

In my view this was misdirection. The case against the appellant was not that he had *given* false information but that he had fraudulently *withheld* material information from Oran in order to obtain the money which Oran paid to him on May 15, a situation essentially different in character from that put to the jury in the quotation set out above. See *Regina v. Charters*[1].

I am unable to say that no substantial wrong or miscarriage of justice has occurred by reason of this misdirection. It follows that the conviction against the appellant on Count 2 cannot stand.

[1] (1957), 119 C.C.C. 223.

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There remains the question as to whether a new trial should be ordered. Crown counsel did not ask for a new trial in the event that the conviction was set aside. The conviction will, accordingly, be quashed and MacKrow acquitted on Count 2. His previous acquittals on Counts 1 and 3 completely dispose of the charges against him.

Appeal allowed, conviction quashed and appellant acquitted.

Solicitors for the respondent: Boyd, King & Toy, Vancouver.

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*Nov. 17,
Nov. 25

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

GEORGE H. STEER ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Amount paid by taxpayer as guarantor of bank loan—Whether capital loss or deductible expense—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a), (b).

In 1951, the appellant and an associate entered into an agreement with two other persons to acquire an interest in an oil company. The other two persons had obtained a farmout agreement from Imperial Oil Ltd., which they had assigned to the company for 1,000 shares and a royalty. Four wells were to be drilled, and when the agreement with the appellant and his associate was made, three wells remained to be drilled and financed. Pursuant to the agreement, the shares were divided so that each of the four associates held a quarter interest, and the royalty was similarly divided. In return, the appellant and his associate agreed to guarantee the company's indebtedness to the bank up to a maximum of $62,500 each. The consideration received by the appellant (the shares and the royalty) was taxed in 1951 as income and valued by the Minister at $4,500.

In 1957, the appellant had to pay $62,500 to the bank in discharge of his guarantee. He subsequently recovered as a creditor of the company's bankruptcy $6,119 in 1959 and $3,200 in 1961. The appellant sought to deduct his $62,500 loss from his income. The Minister refused to allow the deduction. The Exchequer Court reversed the decision of the Income Tax Appeal Board and allowed the deduction. The Minister appealed to this Court.

Held: The appeal should be allowed.

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

The transaction entered into by the appellant was a deferred loan to the company, part of which was recovered in the bankruptcy. The loss suffered by the appellant was a loss of capital, the deduction of which was prohibited by s. 12(1)(*b*) of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Montant payé par contribuable en garantie d'un emprunt de banque—Perte de capital ou dépense déductible—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 12(1)(a), (b).

En 1951, l'appelant et un associé ont passé un contrat avec deux autres personnes pour acquérir un intérêt dans une compagnie pétrolifère. Les deux autres personnes avaient obtenu de l'Imperial Oil Ltd. le droit d'explorer un certain terrain. Elles avaient assigné ce droit à la compagnie en question sur réception de 1,000 actions du capital ainsi que des redevances. Quatre puits devaient être creusés, et lorsque l'entente avec l'appelant et son associé est survenue, il restait encore trois puits à creuser et à financer. En vertu de l'entente, les actions furent divisées de telle sorte que chacun des quatre associés en obtint le quart, et les redevances furent divisées pareillement. En retour, l'appelant et son associé ont convenu de se porter garants de la dette de la compagnie à la banque jusqu'à un maximum de $62,500 chacun. La considération reçue par l'appelant (les actions et les redevances) a été frappée d'un impôt en 1951 et évaluée par le Ministre à la somme de $4,500.

En 1957, l'appelant a dû payer $62,500 à la banque en acquittement de sa garantie. Il a subséquemment recouvré comme créancier de la compagnie alors en faillite une somme de $6,119 en 1959 et de $3,200 en 1961. L'appelant a cherché à déduire de son revenu la perte de $62,500. Le Ministre a refusé de permettre la déduction. La Cour de l'Échiquier a renversé la décision de la Commission de l'Impôt sur le Revenu et a permis la déduction. Le Ministre en a appelé devant cette Cour.

Arrêt: L'appel doit être maintenu.

L'appelant a fait un prêt différé à la compagnie, et une partie de ce prêt a été recouvrée de la faillite. La perte subie par l'appelant était une perte de capital dont la déduction du revenu était prohibée par l'art. 12(1)(*b*) de la Loi de l'*Impôt sur le Revenu*.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier[1], renversant une décision de la Commission de l'Impôt sur le Revenu. Appel maintenu.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal allowed.

[1] [1965] 2 Ex. C.R. 458, [1965] C.T.C. 181, 65 D.T.C. 5115.

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MINISTER OF NATIONAL REVENUE v. STEER

D. S. Maxwell, Q.C., and *D. G. H. Bowman*, for the appellant.

H. Heward Stikeman, Q.C., and *P. N. Thorsteinsson*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal by the Minister of National Revenue from the judgment of the Exchequer Court[1] which allowed an appeal from the decision of the Tax Appeal Board. This decision had rejected the taxpayer's contention that he was entitled in computing his income for the year 1957 to deduct a sum of $62,500 paid by him to the Dominion Bank under a guarantee of the indebtedness of Locksley Petroleums Limited signed in 1951. My opinion is that the appeal should be allowed and that the decision of the Board confirming the Minister's assessment should be restored.

In February 1951, the respondent and R. M. Montague made an agreement with William Buechner and Sam Yeske to acquire an interest in a company known as Locksley Petroleums Limited. Buechner and Yeske had obtained a farmout agreement from Imperial Oil on a quarter section of land in Alberta. This they assigned to the Locksley company in return for 1,000 shares and a two and a half per cent gross royalty. They or the company were obligated to drill four wells on the property. In February 1951, when they made their agreement with the respondent and R. M. Montague, his associate, three wells remained to be drilled and financed.

The agreement is simple. The shares were divided so that each associate held a quarter interest and the gross royalty was similarly divided. The respondent and Montague also each received three-quarters of one Net Royalty Trust Unit. In return they agreed to guarantee the company's indebtedness to the Dominion Bank up to the sum of $125,000, the liability of each guarantor being limited to the sum of $62,500. The respondent and Montague also stipulated that the company should assign to the bank the lease which it held on the property as security for the money to be borrowed by the bank and the liability of the guarantors. The total consideration which the respondent

[1] [1965] 2 Ex. C.R. 458, [1965] C.T.C. 181, 65 D.T.C. 5115.

received for becoming liable on a guarantee for $62,500 was 250 shares in the company, one-quarter of the gross royalty of two and one-half per cent and three-quarters of one Net Royalty Trust Unit. This consideration was treated as income on a valuation of $4,500 by the Minister of National Revenue and taxed accordingly.

I have no difficulty in defining the character of this transaction. The company needed money for the drilling of three wells. The convenient way of supplying this money was by a bank loan with the respondent's guarantee to the extent of $62,500. The guarantee meant that at some time the respondent might have to step into the bank's shoes to this extent. This happened in 1957. He was then subrogated to the bank's position. He subsequently proved as a creditor in the company's bankruptcy and received two dividends—one in 1959 for $6,119 and the other in 1961 for $3,200. The transaction was a deferred loan to the company, part of which was recovered in the bankruptcy. These bankruptcy dividends, contrary to the *obiter dictum* in the judgment of the Exchequer Court, were not income but a partial recovery of a capital loss. They are in no way analogous to the consideration received in 1951 as the respondent's remuneration for the guarantee, which I have characterized as a deferred loan.

It is enough therefore to decide this case to say that in my opinion the loss here is a loss of capital and that its deduction is prohibited by s. 12(1)(*b*) of the Act.

I would allow the appeal with costs here and in the Exchequer Court and restore the assessment appealed from.

Appeal allowed with costs.

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondent: Stikeman & Elliott, Montreal.

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*May 26, 27
Oct. 31

TED FRASER, EIRAN HARRIS and FRASER BOOK BIN LTD. ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

TED FRASER, DON POIRIER and FRASER BOOK BIN LTD. ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

TED FRASER and FRASER BOOK BIN LTD. ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Possession of obscene material for purpose of publication, distribution or circulation—Retail bookseller—Charge under s. 150(1)(a) of the Criminal Code—Whether three offences included in charge—Whether accused should properly be charged under s. 150(2)(a)—Criminal Code, 1953-54 (Can.), c. 51, s. 150.

The appellant company, the owner of two retail bookshops and a warehouse for the storage of books, was convicted, together with the individual appellants, of unlawfully having in their possession obscene material for the purpose of publication, distribution or circulation, contrary to s. 150(1)(a) of the *Criminal Code*. The convictions were affirmed by a majority judgment in the Court of Appeal. The accused were granted leave to appeal to this Court. There was no appeal from the finding that the material was obscene. The accused submitted that the information was void for duplicity and multiplicity and further that it had been laid under the wrong subsection of s. 150 of the Code.

Held: The appeal should be dismissed.

The gravamen of the offences charged in this case is possession of a quantity of obscene matter. Once possession is established it only remains for the Crown to lead evidence to prove one of the various

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*PRESENT: Taschereau C.J. and Fauteux, Martland, Ritchie and Hall JJ.

purposes for which the possession was had, namely, publication, distribution or circulation. It is one offence only which may be committed in different ways. In the circumstances of this case it was not necessary to make each book or pamphlet the subject of a separate count. The various titles recited in the different counts constituted nothing more than particulars of the offences charged.

On the facts of this case, the submission that the offence defined in s. 150(1)(*a*) of the Code could have no application to retail booksellers, such as the appellants, and that the charges should have been laid under s. 150(2)(*a*), could not be entertained. The evidence fully justified the inference that the distribution of obscene matter was a part of the business in which the appellants were engaged.

Droit criminel—Possession de matières obscènes aux fins de les publier, distribuer ou mettre en circulation—Libraire—Accusation portée sous l'art. 150(1)(a) du Code criminel—L'accusation contient-elle trois infractions—L'acte d'accusation aurait-il dû être porté sous l'art. 150(2)(a)—Code criminel, 1953-54 (Can.), c. 51, art. 150.

La compagnie appelante, propriétaire de deux librairies et d'un entrepôt servant à l'emmagasinage de livres, a été trouvée coupable, ainsi que les autres appelants, d'avoir eu illégalement en leur possession des matières obscènes aux fins de les publier, distribuer ou mettre en circulation, le tout contrairement à l'art. 150(1)(*a*) du *Code criminel*. Le verdict de culpabilité fut confirmé par un jugement majoritaire de la Cour d'appel. Les accusés ont obtenu permission d'en appeler devant cette Cour. Aucun appel ne fut porté à l'encontre du verdict que les matières étaient obscènes. Les accusés ont soutenu que l'acte d'accusation était nul parce qu'il était double et multiple et en plus qu'il avait été porté sous le mauvais alinéa de l'art. 150 du Code.

Arrêt: L'appel doit être rejeté.

La matière de l'infraction reprochée dans cette cause est la possession d'une quantité de matières obscènes. Une fois que la possession est établie, la Couronne n'a qu'à produire une preuve établissant une des diverses fins pour lesquelles on en avait la possession, à savoir, la publication, distribution ou mise en circulation. Il ne s'agit que d'une seule infraction qui peut être commise de diverses manières. Dans les circonstances, il n'était pas nécessaire de faire de chaque livre ou pamphlet le sujet d'un chef d'accusation séparé. Les titres énumérés aux divers chefs d'accusation ne constituaient autre chose qu'une communication de détails sur les infractions reprochées.

En se basant sur les faits de cette cause, la prétention que l'infraction telle que définie à l'art. 150(1)(*a*) du Code ne peut s'appliquer à des libraires, tels que les appelants, et que l'acte d'accusation aurait dû être porté sous l'art. 150(2)(*a*), ne peut pas être admise. La preuve justifie amplement l'inférence que la distribution de matières obscènes faisait partie des entreprises des appelants.

APPELS de trois jugements de la Cour d'appel de la Colombie-Britannique[1], confirmant un verdict de culpabilité. Appels rejetés.

[1] (1965), 52 W.W.R. 712, [1966] 1 C.C.C. 110.

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FRASER *et al.* v. THE QUEEN

APPEALS from three judgments of the Court of Appeal for British Columbia[1], affirming a conviction. Appeals dismissed.

Joseph Sedgwick, Q.C., and *W. H. Deverell*, for the appellants.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from three judgments of the Court of Appeal for British Columbia[1] rendered in accordance with a decision of the majority of that Court (Bull J.A. dissenting) which affirmed the convictions of the various appellants before Magistrate G. W. Scott on three separate informations each alleging that the various accused therein named "unlawfully had in their possession...for the purpose of publication, distribution or circulation a quantity of obscene written matter and pictures..." and each containing separate counts wherein the titles of a number of allegedly obscene publications were recited.

The appellant Company, Fraser Book Bin Ltd., is the owner of two retail book shops and a warehouse for the storage of books at Vancouver and Ted Fraser, who is a Director and General Manager of that Company, was at all material times in charge of the Company's book shop at 1247 Granville Street where he was assisted by the appellant Harris while the appellant Poirier was in charge of the Company's other book shop at 6184 Fraser Street.

The first information relates only to the shop at 1247 Granville Street, the second to the shop at 6184 Fraser Street and the third to the warehouse at 1390 Granville Street. Ted Fraser and Fraser Book Bin Limited are charged in each of the informations but Harris is charged only in the first and Poirier only in the second.

The learned Magistrate found that all the publications referred to, except those specified in Count 3 of the first and second informations and Count 1 of the third information, were obscene within the meaning of s. 150(8) of the *Criminal Code* and Fraser, Harris and Fraser Book Bin

[1] (1965), 52 W.W.R. 712, [1966] 1 C.C.C. 110.

Ltd. were found guilty on the first and fourth Counts of the first information on evidence which disclosed that the offending books referred to in those counts were found on the shelves of the shop at 1247 Granville Street at a time when customers were present. The Magistrate acquitted the accused on the second Count of this information on the ground that he had a doubt as to whether they had the motion pictures therein referred to in their possession "for the purpose of publication, distribution or circulation".

When the second and third informations came on to be heard no evidence was given as counsel in both cases formally admitted that the accused had the publications and motion pictures therein referred to in their possession "for the purpose of publication, distribution or circulation" and it was further admitted that the publications referred to in Counts 1 and 2 of the second information and Counts 2 and 3 of the third information were "identical in nature" with publications which the learned Magistrate had found to be "obscene" at the trial of the first information.

Fraser, Harris and the Company appealed their conviction on the first information on the ground that the shop at 1247 Granville Street was a retail book store exclusively operated for the purpose of selling books to individuals and that the charges contained in that information, alleging as they did that they had the publications "in their possession...for the purpose of publication, distribution or circulation" were charges framed in the language of s. 150(1)(*a*) of the *Criminal Code* which section was intended to be reserved for the prosecution of makers, publishers and wholesale distributors of obscene material and had no application to the selling of such material by retail which is the subject of s. 150(2)(*a*) of the Code.

The two subsections in question read as follows:

150 (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or...

150 (2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,...

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The essence of the submission in this regard is that the accused in the first information were charged under the wrong subsection and the distinction between the two subsections is said to be reinforced by the fact that s. 150(6) provides that ignorance of the nature or presence of the material by means of or in relation to which the offence was committed is not a defence to a charge under s. 150(1)(*a*) whereas when a charge is laid under s. 150(2)(*a*) the burden rests upon the Crown to prove that the accused had knowledge of the nature and presence of the material in respect of which it was laid.

It was upon this latter ground that Bull J.A., in the course of his dissenting opinion in the Court of Appeal found that the first information should have been quashed. This ground of appeal was, however, not open to those convicted on the second and third informations because of the formal admissions hereinbefore referred to.

The second ground of appeal, which applies to all the informations, was unanimously dismissed by the Court of Appeal for British Columbia and was the subject of an order granting leave to appeal to this Court by which it was expressly confined to the issue raised by the contention:

> That each of the counts in each of the said informations is bad and void for duplicity and multiplicity.

There is no appeal from the finding of the learned Magistrate with respect to obscenity which was unanimously affirmed by the Court of Appeal.

The appellants' submission that all the counts are void for "duplicity and multiplicity" is twofold. In the first place it is contended that the charge of having in their "possession...for the purpose of *publication, distribution* and *circulation,* a quantity of obscene written matter..." involves three separate charges each of which should be the subject of a separate count; and in the second place it is argued that possession of each publication constitutes a separate offence which should have been charged separately and that the counts each charging the accused with having a number of different publications in their possession are therefore void.

I agree with the members of the Court of Appeal that the gravamen of the offences charged in these informations

is "*possession*" of a "quantity of obscene matter..." and that the various titles recited in the different Counts constitute nothing more than particulars of the offences charged of the kind which the Court would have been justified in ordering to be delivered to the accused under the provisions of s. 497 of the Code. In this regard I can do no better than to adopt the language used by Maclean J.A., in the course of his reasons for judgment in the Court of Appeal where he said:

> In my view the gravamen of the charge is 'possession'. Once possession is established it only remains for the Crown to lead evidence to prove one of the various purposes for which the possession was had, namely, publication, distribution or circulation. In other words, it is one offence only which may be committed in different ways.
>
> I am fortified in this view by *Couture v. The Queen, supra,* where the charge of 'having in possession for sale, distribution or circulation' was regarded as one offence. Duplicity was found in that case only because the full charge alleged that the accused 'made, printed and had in possession for sale, distribution or circulation'.
>
> Dealing with the second branch of the appellants on duplicity, it is my view that the enumeration of a number of book titles is merely a particularization of the expression 'a quantity of obscene written matter'. In my view, in the circumstances of this case it was not necessary to make each book or pamphlet the subject of a separate count.

The submission that the offence defined in s. 150(1)(*a*) as charged in the first information could have no application to retail booksellers such as the appellants named therein, was advanced with great force by Mr. Sedgewick. In this regard it was argued that a retail bookseller might well have acquired his stock in bulk and never have read any of the offensive books or, indeed, that he might be a blind man, and it was strenuously contended that Parliament could never have intended that such a person could be exposed to a charge under s. 150(1)(*a*) and thus, by virtue of s. 150(6), be deprived of the defence that he was ignorant of the presence or contents of such books which defence would have been open to him if he had been charged as a "seller" under s. 150(2)(*a*).

However persuasive this argument may be thought to be, it does not appear to me to fit the circumstances of the present case. Here the appellant company, with the appellant Fraser as its General Manager, was proved to be operating a warehouse from which books were distributed to its two retail outlets one of which was referred to in the

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Ritchie J.

first information and was the place where the third appellant, Harris, was employed. This was, in my opinion, an organization for the distribution of books, a substantial number of which were found to be obscene.

In this regard the following excerpt from the evidence of the detective who supervised the seizure of the offending books appears to me to be revealing:

> I did go with Detective Matches to 1247 Granville Street, where I met Mr. Fraser and he told us at that time that he was the General Manager of Fraser Book Bin and that particular store. He took us to a warehouse at 1390 Granville and he told us he also had another store at 6184 Fraser, that they did a large volume of business in mail order as well as counter business, all over the world, both buying and selling.

I agree with the view expressed by Maclean J.A. on behalf of the majority of the Court of Appeal that the word "distribution" as used in s. 150(1)(*a*) "is obviously a word of wider connotation than 'sale' as sale is only one of a number of means of distribution". The appellant submitted that this construction would mean that everyone who "sells" within the meaning of s. 150(2)(*a*) would also be guilty of the offence defined in s. 150(1)(*a*) and that the provisions of the former section would thus be "reduced to a futility" to employ the language used in the factum filed on behalf of the appellants. Like Mr. Justice Maclean, however, I can envisage cases of individual sales which would constitute an offence under s. 150(2)(*a*) and yet would not be a "distribution" within the meaning of s. 150(1)(*a*), and I think also that there may well be cases of a bookseller who has in his shop a scattered few of these publications amongst a mass of inoffensive books, where a charge of possession for the purpose of sale contrary to s. 150(2)(*a*) would be more appropriate than one relating to "distribution" under s. 150(1)(*a*).

There may, indeed, be many cases in which it is difficult to determine which of these two subsections should be invoked in a prosecution but, in my opinion, the present circumstances do not present any such difficulty. I am satisfied that the evidence called in respect of the first information fully justifies the inference that the distribution of obscene written matter was a part of the business in which the appellants Fraser and Fraser Book Bin Ltd. were engaged and that the appellant Harris was employed as an active participant in that business.

For these reasons I would dismiss the appeals of all the appellants and affirm the convictions entered by the learned Magistrate.

Appeals dismissed.

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Solicitors for the appellants: Macey, Dowding & Co., Vancouver.

Solicitors for the respondent: Cumming, Bird & Richards, Vancouver.

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC AND CIBA, S.A. (*Plaintiffs*) ..... APPELLANTS;

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* Oct. 13
Oct. 13

AND

JULES R. GILBERT LIMITED *et al.* (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Chemical preparation—Patent containing three process claims—Importation of similar product—Action for infringement restricted to one process only—Whether presumption of s. 41(2) of the Patent Act, R.S.C. 1952, c. 203, applicable.

The patent held by the plaintiffs disclosed and claimed three processes for producing certain chemical substances. The defendants imported and sold in Canada products containing one of these substances. The plaintiffs brought an action for infringement of their patent and restricted their action to only one of the three processes, and relied upon the presumption contained in s. 41(2) of the *Patent Act*, R.S.C. 1952, c. 203. Neither the plaintiffs nor the defendants had any knowledge as to the process by which the substance complained of was prepared or produced. The trial judge ruled that the plaintiffs could not rely upon the presumption and dismissed the action. He did not express any opinion as to the other defences, including an attack upon the validity of the patent. The plaintiffs appealed to this Court.

Held: The appeal should be allowed and the case referred back to the Exchequer Court for consideration of the other defences.

The trial judge erred in holding that s. 41(2) of the *Patent Act* was inapplicable where there was more than one process claimed and thus patented. It would place an impossible burden on a plaintiff and defeat the object of the subsection to rule that where a patent makes

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*PRESENT: Taschereau C.J. and Fauteux, Judson, Hall and Spence JJ.

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SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC *et al.* *v.* JULES R. GILBERT LTD. *et al.*

a claim to different methods of producing a substance, the presumption of infringement provided by s. 41(2) is inapplicable unless it can be shown that the substance is produced according to all the various processes set out in the claims.

Brevets—Contrefaçon—Préparation chimique—Revendication de trois procédés—Importation d'un produit semblable—Action en contrefaçon restreinte à seulement un des procédés—Y a-t-il lieu d'appliquer la présomption de l'art. 41(2) de la Loi sur les Brevets, S.R.C. 1952, c. 203.

Le brevet possédé par les demandeurs décrit et revendique trois différents procédés pour produire certaines substances chimiques. Les défendeurs ont importé et vendu au Canada des produits contenant une de ces substances. Les demandeurs ont institué une action en contrefaçon de leur brevet et ont limité leur action à seulement un des trois procédés et s'en sont rapportés à la présomption de l'art. 41(2) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203. Ni les demandeurs ni les défendeurs ne connaissaient le procédé en vertu duquel la substance dont on se plaint avait été préparée ou produite. Le juge au procès a décidé que les demandeurs ne pouvaient pas s'appuyer sur la présomption et a rejeté l'action. Il n'a exprimé aucune opinion relativement aux autres défenses, y compris l'attaque contre la validité du brevet. Les demandeurs en ont appelé devant cette Cour.

Arrêt: L'appel doit être maintenu et le dossier retourné à la Cour de l'Échiquier pour disposer des autres défenses.

Le juge au procès a erré lorsqu'il a décidé que l'art. 41(2) de la *Loi sur les Brevets* ne s'appliquait pas lorsque plus d'un procédé est revendiqué et breveté. Lorsqu'un brevet revendique différentes méthodes de produire une substance, le demandeur dans une action en contrefaçon aurait un fardeau impossible et l'objet du paragraphe serait mis en échec s'il fallait décider que la présomption de contrefaçon prévue à l'art. 41(2) ne s'applique pas à moins que l'on puisse démontrer que la substance a été produite selon tous les divers procédés énumérés dans les revendications.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], rejetant une action en contrefaçon. Appel maintenu.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an action for infringement. Appeal allowed.

Russell S. Smart and *Robert H. Barrigar*, for the plaintiffs, appellants.

I. Goldsmith and *C. A. G. Palmer*, for the defendants, respondents.

[1] [1966] Ex. C.R. 59.

The judgment of the Court was delivered by

JUDSON J.:—This is an action brought by Société des Usines Chimiques Rhone-Poulenc and Ciba, S.A., for infringement of Patent No. 474,637 for improvements relating to substituted diamines. The patent was granted under s. 41(1) of the *Patent Act*, which reads:

> 41. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

The patent disclosed and claimed not one but three processes. The plaintiffs restricted their action to only one of these—claim 18. In these circumstances the learned trial judge[1] dismissed the action. The basis for his decision was that while s. 41(2) of the *Patent Act* might apply to raise the presumption that the alleged infringing substance was produced by some one or another of these three processes, the subsection cannot be read as raising the presumption that the substance was made by any particular one of them. Since there was no presumption to be applied, he consequently found that there was no basis for finding that the substance was made by the process of claim 18.

In so holding, in my respectful opinion, the learned trial judge was in error. Section 41(2) reads:

> 41. (2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.

The plaintiffs proved a case by putting in patent No. 474,637 and an agreed statement of facts as follows:

> For the purposes of this action the parties have agreed:
>
> 1. That the process claimed in claim 18 of Canadian patent No. 474,637 consists in the application of methods which were known on June 22nd, 1943, to substances which were also known on the said date, though the said methods had never at the said date been applied to the said substances except by the inventor named in the said patent.
> 2. That the substance referred to in paragraphs 6 and 7 of the reamended Statement of Defence was not manufactured in Canada and was imported from outside Canada.
> 3. That none of the defendants has any knowledge as to the process by which the said substance was prepared or produced.

[1] [1966] Ex. C.R. 59.

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Judson J.

They also proved the chemical composition of the substance and its sale by the defendants. They then relied upon the presumption set out in s. 41(2).

The defence raised a number of issues on infringement and attacked the validity of the claim in suit. The learned trial judge deliberately refrained from expressing any opinion on these matters. For the purpose of his reasons he assumed the validity of the patent and said that the plaintiff could not rely upon the presumption. He therefore decided the case on very narrow grounds. The judgment means that where a patent makes a claim to different methods of producing a substance, the presumption of infringement provided by s. 41(2) is inapplicable unless it can be shown that it is produced according to all the various processes set out in the claims. This obviously places an impossible burden on a plaintiff and defeats the object of the subsection.

This s. 41(1) patent is for a substance produced by three methods or processes. This is permitted by s. 41(1). Section 41(1) does not make it necessary to have three separate applications for the same substance, one by each process. The action is brought for infringement and one of these processes is pleaded. There is no reason why when the plaintiff frames its action in this way that the presumption in s. 41(2) should not apply. We are all of the opinion that the learned trial judge was in error in holding that s. 41(2) is inapplicable where there is more than one process claimed and thus patented.

The appeal is allowed with costs and the judgment of the Exchequer Court dismissing the action with costs is set aside. The case is remitted to the Exchequer Court to be dealt with on the matters remaining to be considered.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Smart & Biggar, Ottawa.

Solicitors for the defendants, respondents: Duncan, Goldsmith & Caswell, Toronto.

THE BOARD OF EDUCATION FOR THE CITY OF LONDON (*Defendant*) APPELLANT;

AND

THE EAST MIDDLESEX DISTRICT HIGH SCHOOL BOARD (*Plaintiff*) .. RESPONDENT.

1966

*Oct. 27, 28
Nov. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Parol contract between school boards for education of students—Breach of contract—Contract enforceable notwithstanding absence of corporate seal—Damages—The Corporations Act, R.S.O. 1960, c. 71, s. 293.

The plaintiff district high school board brought an action for breach of contract against the defendant board of education. The breach of contract committed by the defendant was the withdrawal by it from a high school, which was under the jurisdiction of the plaintiff, of a number of students prior to the commencement of the school year 1963-1964 who under the terms of the contract should have been left to complete their secondary school education at the said school. The students concerned would, if the contract had been carried out, have continued at this school during the school years 1963-1964, 1964-1965 and 1965-1966 and the cost of their education would have been payable by the defendant.

The trial judge found that the plaintiff had suffered proven damages of $45,234 but held that the action should be dismissed on the ground that, while there was a parol contract made between the parties the breach of which by the defendant had caused the aforesaid damages, the contract could not be enforced because it was not made under seal. The Court of Appeal agreed with the views of the trial judge as to the construction of the contract and as to its having been breached by the defendant but held that it was enforceable notwithstanding the absence of the corporate seal, by virtue of the provisions of s. 293 of *The Corporations Act,* R.S.O. 1960, c. 71.

The Court of Appeal was, however, of the view that in the circumstances of this case the damages should be assessed only down to the date of the judgment at trial and that, if they were to be assessed by the Court of Appeal, they should be assessed only down to the date of the judgment of that Court. Accordingly, the Court of Appeal allowed the appeal and directed a reference to determine the damages to the end of the calendar year 1964, without prejudice to the plaintiff's right to take further proceedings to recover damages arising thereafter and accruing until the termination of the defendant's obligation.

From this judgment the defendant appealed to this Court and the plaintiff cross-appealed on the question of the assessment of damages. At the conclusion of the argument for the appellant the Court, having retired to consider the matter, stated that, except in regard to the assessment of damages, it agreed with the reasons for judgment of the Court of Appeal and that consequently it would be necessary to hear

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Spence JJ.

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counsel for the respondent only on the question raised in the cross-appeal. A request that the damages should now be assessed once and for all was made by both parties.

Held: The appeal should be dismissed and the cross-appeal allowed.

The assessment of damages made by the trial judge should be accepted. The amount at which he assessed the damages was that set out in a statement prepared by a chartered accountant who had been for several years the auditor for the respondent. On the first of the two questions raised as to the accuracy of this statement, *i.e.*, as to the starting figure, being the number of students who were wrongly taken away in September 1963, the Court found that the trial judge was right in accepting the plaintiff's figure of 39 students. As to the second question, *i.e.*, as to the estimated "retention factor" used in calculating the loss for future years, the soundness of the estimates that were made was established by the evidence.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Lieff J., whereby an action for breach of contract was dismissed. Appeal dismissed and cross-appeal allowed.

C. F. MacKewn and *G. T. Mitches,* for the defendant, appellant.

W. B. Williston, Q.C., and *R. J. Rolls,* for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from the judgment of Lieff J. pronounced on August 11, 1964, finding that the respondent had suffered proven damages of $45,234 but holding that the action should be dismissed.

The reasons of Lieff J. proceeded on the ground that, while there was a parol contract made between the parties the breach of which by the appellant had caused the damages mentioned above, the contract could not be enforced because it was not made under seal. The Court of Appeal agreed with the views of Lieff J. as to the construction of the contract and as to its having been breached by the appellant but held that it was enforceable notwithstanding the absence of the corporate seal, by virtue of the provisions of s. 293 of *The Corporations Act,* R.S.O. 1960, c. 71, which had not been brought to the attention of the learned trial judge.

[1] [1965] 2 O.R. 51, 49 D.L.R. (2d) 586.

The Court of Appeal was, however, of the view that in the circumstances of this case the damages should have been assessed only down to the date of the judgment at trial and that, if they were to be assessed by the Court of Appeal, they should be assessed only down to the date of the judgment of that Court. In the result the Court of Appeal gave judgment declaring "that the contract referred to in the pleadings herein is valid and binding upon the defendant and that the defendant has committed a breach thereof" and directing a reference as to damages in the following terms:

3. And this Court doth order and adjudge that the matter be referred to the Master of this Court at London to inquire into and to determine the damages sustained by the Plaintiff to the end of the calendar year 1964.

4. And this Court doth further order and adjudge that the defendant do pay to the plaintiff such sum as the said Master may find the plaintiff entitled to as damages aforesaid forthwith after the confirmation of the said Master's Report according to the usual practice in that behalf.

5. And this Court doth further order and adjudge that this Order be without prejudice to the plaintiff's right to take such further appropriate proceedings as it may be advised to recover damages arising from the defendant's breach of contract after the end of the calendar year 1964 and accruing until the termination of the defendant's obligation.

At the conclusion of the argument of counsel for the appellant the Court, after having retired to consider the matter, stated that, except in regard to the assessment of damages, we agreed with the reasons for judgment of the Court of Appeal, delivered by Schroeder J.A., which we desired to adopt as our own and that consequently it would be necessary to hear counsel for the respondent only on the question raised in the notice of cross-appeal, that is, as to whether the direction of the Court of Appeal as to the method of assessing the damages should be set aside and judgment entered for the amount of damages assessed by the learned trial judge.

In answer to questions put by the Court before counsel for the respondent opened his argument on the cross-appeal, counsel for both parties stated that they would prefer that damages should now be assessed once and for all and requested that this be done. This relieved us from the necessity of inquiring whether or not in the absence of such a request a reference as provided in its judgment should have been directed by the Court of Appeal and I express no opinion upon that question.

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Cartwright J.

The amount at which the learned trial judge assessed the damages was that set out in a statement, ex. 16, prepared by the witness Kime, a chartered accountant who had been for several years the auditor for the respondent. It was he who had calculated the amounts due under the contract in question for the year 1961, $172,739.36, and for the year 1962, $136,521.22, both of which were accepted as correct by the appellant and duly paid.

It is not necessary to set out ex. 16 in detail. It should be explained that the breach of contract committed by the appellant was the withdrawal by it from Medway High School, which is under the jurisdiction of the respondent, of a number of students prior to the commencement of the school year 1963-1964 who under the terms of the contract should have been left to complete their secondary school education at Medway High School. The students concerned would, if the contract had been carried out, have continued at Medway during the school years 1963-1964, 1964-1965 and 1965-1966 and the cost of their education would have been payable by the appellant.

It became clear during the course of the argument before us that only two questions are raised as to the accuracy of ex. 16. The first was as to the starting figure, being the number of students who were wrongly taken away in September 1963. The figure used in the statement is 39. The appellant contends it should have been only 36. The second is as to the estimated "retention factor" used in calculating the loss for future years.

I will deal first with the second of these questions. In calculating the loss for the 1964-1965 school year it was estimated that only 85 per cent of the students who had completed the 1963-1964 year would have attended and in calculating the loss for the 1965-1966 school year it was estimated that only 60 per cent of those who had completed the 1964-1965 year would have attended. While these were of necessity estimates their soundness was established by the evidence of the witness Mr. Hoople, Principal of Medway, which was neither contradicted by other evidence nor weakened on cross-examination.

Dealing next with the question whether the starting figure should have been 39 or 36, it appears that prior to the commencement of the 1963-1964 school year the appellant obtained the transfer from Medway High School of the

records of 42 students who had been in regular attendance at Medway during the year 1962-1963. The names of these 42 students are set out in ex. 10. As to three of these Mr. Hoople, who appears to have acted throughout with exemplary fairness, said that he had reason to believe they would not have continued at Medway even if the appellant had continued to perform its part of the contract and thus the respondent's claim was reduced to 39.

At the trial counsel for the appellant claimed that in addition to the three students mentioned in the preceding paragraph three other students whose records had been transferred to it at its demand should not be included in calculating the respondent's claim, these being Jack Christianson, Jack Small and Charles Stock, but no evidence was given to show why they should not be included. No doubt on the pleadings the onus of proving its damages lay upon the plaintiff but when it had proved that the defendant had, in breach of its contract, withdrawn the records of 42 students and that those students had not returned to Medway it appears to me that the burden of adducing evidence shifted to the defendant if it sought to assert that these three named students would not in any event have returned to Medway. No such evidence was adduced and in my opinion the learned trial judge was right in accepting the plaintiff's starting figure of 39 students.

I conclude therefore that the assessment of damages made by the learned trial judge should be accepted.

I would dismiss the appeal with costs, allow the cross-appeal without costs, set aside paras. 3, 4 and 5 of the formal judgment of the Court of Appeal and that part of para. 6 thereof which deals with the costs of the Reference and direct that judgment be entered in favour of the respondent against the appellant for the sum of $45,234.

Appeal dismissed with costs; cross-appeal allowed without costs.

Solicitors for the defendant, appellant: Mitches & MacKeun, London.

Solicitors for the plaintiff, respondent: Gillies, Saint & Paddon, London.

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*Nov. 7, 8, 9
Nov. 25

THE SHIP *PACIFIC WIND* (*Defendant*) APPELLANT;

AND

ERIK JOHNSON, FOREST JAMES FERGUSON, GILBERT GEORGE, JEROME BOND and JAMES E. RIELLY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Collision between two ships—Narrow channel—Both ships negligent—Impossibility to establish degrees of fault—Application of s. 648(2) of the Canada Shipping Act, R.S.C. 1952, c. 29.

The trial judge apportioned the liability equally between the defendant and the plaintiffs in respect of damages alleged to have been sustained by the plaintiffs as a result of a collision in the coastal waters of British Columbia between the plaintiffs' fishing vessel *Unimak* and the defendant's tanker *Pacific Wind*. The collision occurred in mid-channel in a stretch of water known as Graham Reach, where, it is agreed, it constitutes a narrow channel within the meaning of the rules. The *Unimak*, which was proceeding in a southerly direction, was not steering by compass but was merely following the western shore line until it was thought to be too close whereupon an abrupt alteration was made to port. As to the *Pacific Wind*, it was proceeding in a northerly direction, on a course which was bringing the vessel to mid-channel. The collision ensued in spite of the fact that an order was given to alter the course of the *Pacific Wind* to starboard. No appeal was taken from the finding that the negligence of the *Unimak* had contributed to the collision. However, the *Pacific Wind* appealed to this Court from the trial judge's finding that it was equally negligent.

Held: The appeal should be dismissed.

There was no reason to disturb the finding of negligence against the *Pacific Wind*. It could not be said that in making the apportionment which he did the trial judge was in any way acting on a wrong ground of law or conclusion of fact. The *Pacific Wind's* negligence was such as to make it impossible to establish different degrees of fault between the vessels, within the meaning of s. 648(2) of the *Canada Shipping Act*.

Navigation—Collision entre deux bateaux—Chenal étroit—Négligence des deux bateaux—Impossibilité d'établir le degré de faute de chacun—Application de l'art. 648(2) de la Loi sur la Marine marchande du Canada, S.R.C. 1952, c. 29.

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*PRESENT: Cartwright, Abbott, Martland, Ritchie and Spence JJ.

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Le juge au procès a réparti la responsabilité également entre le défendeur et les demandeurs quant aux dommages qui auraient été subis par les demandeurs à la suite d'une collision dans les eaux côtières de la Colombie-Britannique entre le bateau de pêche *Unimak* appartenant aux demandeurs et le pétrolier *Pacific Wind* appartenant au défendeur. La collision a eu lieu au milieu du chenal dans une étendue d'eau connue sous le nom de Graham Reach. Les parties sont d'accord que cet endroit constitue un chenal étroit dans le sens des règles. L'*Unimak*, qui se dirigeait vers le sud, ne navigait pas au compas mais se contentait de longer la côte ouest. Un ordre soudain de changer de route vers la gauche fut donné lorsqu'il fut réalisé qu'on était peut-être trop près de la côte. Quant au *Pacific Wind*, il se dirigeait vers le nord et suivait une route qui devait éventuellement l'amener vers le milieu du chenal. La collision se produisit malgré le fait qu'un ordre de changer la route du *Pacific Wind* vers la droite ait été donné. Aucun appel ne fut interjeté à l'encontre du verdict que la négligence du *Unimak* avait contribué à la collision. Par contre, le *Pacific Wind* en appela devant cette Cour du verdict qu'il avait été négligent en proportion égale.

Arrêt: L'appel doit être rejeté.

Il n'existe aucune raison pour changer le verdict de négligence porté contre le *Pacific Wind*. On ne peut pas dire que le juge au procès a agi en vertu d'un motif de droit erroné ou d'une conclusion de fait erronée lorsqu'il a réparti la responsabilité également. La négligence du *Pacific Wind* était telle qu'il était impossible d'établir le différent degré de faute entre les deux bateaux, dans le sens de l'art. 648(2) de la *Loi sur la Marine marchande du Canada*.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada, siégeant dans le district d'Amirauté de la Colombie-Britannique. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada, sitting in the British Columbia Admiralty District. Appeal dismissed.

J. I. Bird, Q.C., and *W. O. Forbes*, for the defendant, appellant.

D. B. Smith and *T. P. Cameron*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment rendered by Mr. Justice Gibson of the Exchequer Court of Canada, sitting with two nautical assessors in the British Columbia

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Ritchie J.

Admiralty District, whereby he apportioned liability equally between the appellant and the respondents in respect of damage alleged to have been sustained by the respondents as the result of a collision which occurred in the coastal waters of British Columbia at 5:15 a.m. on a clear November morning between the fishing vessel *Unimak* and the tanker *Pacific Wind*. The learned trial judge found that the two ships collided in about mid-channel in a stretch of water known as Graham Reach at a point therein about 8 cables north of its juncture with another stretch of water called Tolmie Channel which runs into it from the south. The learned trial judge fixed the approximate point of collision as being about 3 cables south of Quarrie Point on the western shore of Graham Reach where the Department of Transport has installed a flashing green light as an aid to navigation. All these matters appear with greater clarity by reference to the Department of Mines and Technical Surveys Chart No. 3758 entitled "Sarah Island to Swanson Bay" and it is agreed between the parties that at the point where the collision took place Graham Reach constitutes a "narrow channel" within the meaning of Rule 25A of the Regulations for the Prevention of Collisions at Sea.

As the events developed which finally culminated in the collision, the *Unimak*, a fishing vessel about 58 feet in length, with a gross tonnage of 57.23 tons, was proceeding in a southerly direction in Graham Reach at about 8 knots loaded with a catch of fish on her way from her fishing grounds to Vancouver, whereas the *Pacific Wind*, an oil tanker about 230 feet in length with a gross tonnage of 1560.56 tons, was proceeding down Tolmie Channel in a northerly direction at between 10 and 11 knots on a voyage from Shellburn to Kitimat, B.C., loaded with a full cargo of fuel oil. Both vessels were equipped with radar but it is apparent that the *Unimak* was making no effective use of this aid although radar 'fixes' taken aboard the *Pacific Wind* enabled the mate to determine the position of the *Unimak* when she was six miles away and at that time was showing her green light. As *Pacific Wind* proceeded down Tolmie Channel she held her course to 342 degrees magnetic and maintained her speed while the *Unimak* proceeding up Graham Reach was not steering by any compass course at all but was merely following the western shore line until

it was thought to be too close whereupon an abrupt alteration was made to port and the vessel ran on its new course for about five minutes.

The learned trial judge has reviewed the contradictory evidence at some length and I do not propose to retrace the steps which he has taken with obvious care and with the expert assistance of the assessors who sat with him. I think it sufficient to say that he found that the crew in charge of the *Unimak* at all relevant times was incompetent, failed to keep an adequate lookout, took no adequate precautions to avoid collision when it became imminent and navigated just prior to the time of the collision in or about the center of the channel. This is a clear finding of negligence which contributed to the collision and subsequent damage and no appeal has been taken from it so that in my opinion the only question to be determined on this appeal is whether the *Pacific Wind* was also negligent and if so whether its negligence was such as to make it impossible to establish different degrees of fault between the vessels.

It is important to observe that if the course of 342 magnetic steered by the *Pacific Wind* had been maintained after entering Graham Reach from Tolmie Channel it would have brought the vessel well over to the west of mid-channel by the time it reached Quarrie Point. There is no doubt that an order to alter the course to starboard so as to bring the vessel to the eastward had been given very shortly before *Pacific Wind* entered Graham Reach but the learned trial judge found the evidence to be inconclusive "as to precisely when the first order was given to manoeuver the vessel *Pacific Wind* to starboard" and the fact of the matter is that she was in or about mid-channel at the time of collision so that, in my opinion, whenever the order was given it was not soon enough.

The actions of *Pacific Wind* are to be judged in light of the International Regulations for Preventing Collisions at Sea, Rule 25A of which reads as follows:

> In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

This rule, like the other "Steering and Sailing Rules" is required to be obeyed in accordance with the preliminary

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Ritchie J.

paragraphs of Part C of the Regulations, the first of which provides that:

> In obeying and construing these Rules, *any action taken should be positive, in ample time,* and with due regard to the observance of good seamanship.

(The italics are my own).

It is to be remembered that *Pacific Wind* had first been alerted to the presence of an approaching vessel, which was then showing a green light, at a distance of 6 miles and it seems to me that it should have been possible to take steps to ensure that the *Pacific Wind* was well in its own waters in time for the two vessels to pass safely notwithstanding the erratic and unpredictable manner in which the *Unimak* was being navigated.

The learned trial judge also found that the failure of *Pacific Wind* to reduce speed earlier than she did was a factor which contributed to the collision and I see no reason to disturb his finding.

Section 648 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, reads, in part, as follows:

> 648. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.
>
> (2) Where, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

In the present case, after having seen and heard the evidence of those who were aboard the respective vessels at the time of the collision and having had the advantage of the advice of two nautical assessors, the learned trial judge found it impossible to establish different degrees of fault, and although Mr. Bird, in his very able argument on behalf of the appellant, cast some doubt on the learned trial judge's findings as to credibility, I am nevertheless satisfied that this is not a case where a court of appeal should interfere with his conclusions.

The difficult problem of measuring the degrees of fault in the navigation of two ships is one which, as Lord Buckmaster said in the House of Lords in *SS. Kitano Maru v. SS. Otranto*[1]:

> ...is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

[1] [1931] A.C. 194 at 204.

The matter was put with perhaps greater force by Lord Justice Scrutton in *The Luso*[1], where he said at page 165 with respect to a finding at trial which had established different degrees of fault between two vessels:

> ...before the Court of Appeal ought to interfere with that finding they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he must have altered the proportion of damage.

Both these last quoted cases are referred to with approval in this Court by Davis J. in *S.S. Benmaple v. Ship Lafayette*[2], where he applied the same principle; saying of the trial judge in that case:

> ...we are not satisfied that in making the apportionment he did he was in any degree acting either on any wrong ground of law or conclusion of fact.

The decision of Lord Sumner in *S.S. Hontestroom v. S.S. Sagaporack*[3], which was cited with approval by Martland J. in *Prudential Trust Co. Ltd. v. Forseth*[4], is to the same effect.

Notwithstanding the doubts suggested by Mr. Bird as to the accuracy of the reconstruction by the learned trial judge of certain of the movements of the two vessels immediately before and at the time of the accident, I am not satisfied that in making the apportionment which he did he was in any way acting on a wrong ground of law or conclusion of fact and I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Campney, Owen & Murphy, Vancouver.

Solicitors for the plaintiffs, respondents: Bull, Housser & Tupper, Vancouver.

[1] (1934), 49 Ll. L.R. 163.
[2] [1941] S.C.R. 66 at 75, 1 D.L.R. 161.
[3] [1927] A.C. 37 at 47.
[4] [1960] S.C.R. 210 at 216, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

1966
*Feb. 11
Dec. 6

LE PROCUREUR GÉNÉRAL DU CANADA ..... APPELLANT;

AND

LA COMPAGNIE DE PUBLICATION LA PRESSE, LIMITÉE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Crown—Petition of right—Radio station—Licence—Fee—Validity of Order in Council increasing fee—Whether licence fee or tax imposed—Discrimination—Retroactivity—Whether made by proper authority—Radio Act, R.S.C. 1952, c. 233, ss. 3, 4, 10—General Radio Regulations, s. 5—Order in Council P.C. 1960-1488.

The petitioner company operated a private commercial radio broadcasting station in Montreal. In March 1960, and as required by the regulations, made under the provisions of the *Radio Act*, R.S.C. 1952, c. 233, then in force, the company paid a licence fee of $6,000 for the period from April 1, 1960 to March 31, 1961. On October 28, 1960, the regulations were amended by an Order in Council which provided for a scale of licence fees calculated on a different basis than the one provided for in the earlier regulations. The effect of s. 5(5) of the new regulations was to increase the licence fee payable by the company for the year ending March 31, 1961. As a result, the company paid under protest a sum of $5,452.30 which had been claimed as additional licence fees.

By its petition of right, the company claimed a refund of the $5,452.30, and alleged that the new s. 5 of the regulations, as enacted by the Order in Council, was *ultra vires* on the following grounds: (1) that it does not prescribe a licence fee but imposes a tax without parliamentary sanction; (2) that it was unjust and discriminatory; (3) that it affects the rights of the company and others in a retroactive manner not authorized by the enabling legislation; (4) that it was beyond the authority of the governor in council and infringed on the exclusive authority of the Minister of Transport. The Exchequer Court held that the new s. 5 was invalid and *ultra vires*. The Crown appealed to this Court and the company cross-appealed.

Held (Taschereau C.J. *dissenting*): The appeal should be allowed and the cross-appeal dismissed.

Per Fauteux, Abbott and Ritchie JJ.: It could not be said that the new s. 5 of the regulations imposes a tax and not a licence fee. A licence issued by the Minister of Transport was required by the company to operate, and licence fees prescribed by the governor in council must

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Ritchie and Hall JJ.

be paid to hold such a licence. The changing of the tariff of such licence by the Order in Council in question in no way changed the character of the levy.

Neither could it be said that the new s. 5 was discriminatory. In any event, since s. 3 of the *Radio Act* puts no limitation upon the powers of the governor in council to prescribe licence fees, the fact that they may be discriminatory affords no legal ground of attack upon the validity of the regulation.

Neither could it be said that the new s. 5(5) was invalid because it purported to legislate on a matter over which the governor in council did not have authority, but only the Minister of Transport. Under the *Radio Act,* the Minister of Transport, as the minister responsible for the administration of the Act, is no doubt required to collect the licence fees prescribed by the governor in council but, except in his capacity as one member of the executive branch, he has no authority to determine what the tariff of such fees should be.

The contention that the new s. 5 was invalid because it had a retroactive effect, could not be sustained. If the order did have retroactive effect, —as to which it was not necessary to express an opinion—s. 3 of the *Radio Act* contains no limitation upon the power of the governor in council to make such an order. In view of the nature of the right held by a person licenced to operate a private commercial broadcasting station,—being a privilege granted by the state—the governor in council can validly increase or decrease the fees payable by such a licensee at any time during the currency of the licence. In this case the Order in Council clearly expresses an intention to affect the licence fees payable for the then current licence year.

Per Hall J.: The Order in Council was retroactive legislation, however, it was validly enacted under the power given the governor in council by the *Radio Act* and it clearly expressed the retroactive effect it was intended to achieve.

Per Taschereau C.J., *dissenting*: The Order in Council was illegal because it violated the principle of non-retroactivity. In our juridical system there can be no retroactivity in a statute unless the text enacted by the legislator clearly expresses an intention to legislate not only for the future, but also for the past. This also applies in the case where the legislator delegates his powers to a subordinate body. Section 3 of the *Radio Act,* which gives to the governor in council the power to prescribe the tariff of licence fees, speaks only for the future and not for the past. The Order in Council went therefore beyond the powers of the governor in council when it purported to affect the licence fees payable for the current licence year.

The contention that only the Minister of Transport, and not the governor in council, could legislate in this matter, cannot be accepted. Under s. 3 of the *Radio Act* exclusive authority to prescribe the tariff of fees to be paid for the licence is given to the governor in council.

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PROCUREUR GÉNÉRAL DU CANADA v. LA COMPAGNIE DE PUBLICATION LA PRESSE, LTÉE

Droit constitutionnel—Couronne—Pétition de droit—Station de radiodiffusion—Licence d'exploitation—Droit de licence—Validité d'un arrêté en conseil augmentant le droit de licence—S'agit-il d'un droit de licence ou de l'imposition d'une taxe—Discrimination—Rétroactivité —Autorité de légiférer en la matière—Loi sur la Radio, S.R.C. 1952, c. 233, arts. 3, 4, 10—Règlements généraux sur la Radiodiffusion, art. 5 —Arrêté en conseil C.P. 1960-1488.

La compagnie pétitionnaire exploitait une station commerciale privée de radiodiffusion à Montréal. Durant le mois de mars 1960, et en conformité avec la réglementation, passée sous l'empire des dispositions de la *Loi sur la Radio*, S.R.C. 1952, c. 233, alors en vigueur, la compagnie payait un droit de licence de $6,000 pour la période du 1er avril 1960 au 31 mars 1961. Le 28 octobre, les règlements étaient amendés par un arrêté en conseil prévoyant une échelle de droits de licence calculée sur une base différente de celle prévue dans la réglementation antérieure. L'art. 5(5) de la nouvelle réglementation a eu pour effet d'augmenter les droits de licence payables par la compagnie pour l'année se terminant le 31 mars 1961. Comme résultat de ce changement, une demande de paiement additionnel, au montant de $5,452.30, a été faite à la compagnie, et cette dernière paya le montant sous protêt.

La compagnie a réclamé ce montant de $5,452.30 par pétition de droit, et a attaqué la validité du nouvel art. 5 des règlements, tel qu'édicté par l'arrêté en conseil, pour les motifs qu'il: (1) ne prescrit pas des droits de licence mais impose une taxe sans l'autorité du parlement; (2) est injuste et discriminatoire; (3) affecte les droits de la compagnie et autres d'une façon rétroactive et non autorisée par la *Loi sur la Radio*; (4) va au-delà de l'autorité du gouverneur en conseil et empiète sur l'autorité exclusive du Ministre des Transports. La Cour de l'Échiquier a jugé que le nouvel art. 5 était invalide et *ultra vires*. La Couronne en appela devant cette Cour et la compagnie a porté un contre-appel.

Arrêt: L'appel doit être maintenu et le contre-appel rejeté, le Juge en chef Taschereau étant dissident.

Les Juges Fauteux, Abbott et Ritchie: On ne peut pas dire que le nouvel art. 5 des règlements impose une taxe et non un droit de licence. Pour exploiter son commerce la compagnie doit avoir une licence émise par le Ministre des Transports, et le détenteur d'une telle licence doit payer les droits de licence prescrits par le gouverneur en conseil. Le fait de changer le tarif des droits à payer pour les licences par l'arrêté en conseil en question ne change d'aucune manière le caractère du paiement.

On ne peut pas dire non plus que le nouvel art. 5 est discriminatoire. A tout événement, puisque l'art. 3 de la *Loi sur la Radio* n'apporte aucune limite aux pouvoirs du gouverneur en conseil de prescrire les

droits de licence, le fait que ces droits peuvent être discriminatoires n'offre aucun motif légal pour attaquer la validité du règlement.

On ne peut pas dire non plus que le nouvel art. 5(5) est invalide parce qu'il prétend légiférer sur une matière sur laquelle le gouverneur en conseil n'a pas d'autorité, mais seulement le Ministre des Transports. Il n'y a pas de doute que sous l'empire de la *Loi sur la Radio,* le Ministre des Transports, comme étant le ministre responsable de l'administration du statut, doit percevoir les droits de licence prescrits par le gouverneur en conseil mais, excepté en sa qualité de membre de l'exécutif, il n'a aucune autorité pour déterminer quel doit être le tarif de ces droits.

La prétention que le nouvel art. 5 est invalide parce qu'il a un effet rétroactif, ne peut pas être soutenue. Si l'arrêté en conseil a un effet rétroactif,—et il n'est pas nécessaire d'exprimer une opinion sur cette question—l'art. 3 de la *Loi sur la Radio* ne contient aucune limite aux pouvoirs du gouverneur en conseil d'édicter un tel arrêté en conseil. Considérant la nature du droit détenu par la personne ayant une licence pour exploiter une station commerciale privée de radiodiffusion—qui est un privilège accordé par l'état—le gouverneur en conseil peut validement augmenter ou diminuer les droits payables par une telle personne n'importe quand durant le terme de la licence. Dans le cas présent, l'arrêté en conseil exprime clairement une intention d'affecter les droits de licence payables pour l'année de licence courante.

Le Juge Hall: L'arrêté en conseil est une pièce de législation ayant un effet rétroactif; cependant, il a été validement édicté sous l'empire des pouvoirs donnés au gouverneur en conseil par la *Loi sur la Radio* et exprime clairement l'effet rétroactif qu'on avait l'intention de réaliser.

Le Juge en chef Taschereau, *dissident:* L'arrêté en conseil est illégal parce qu'il viole le principe de la non-rétroactivité. La rétroactivité de la loi dans notre système juridique ne peut être admise à moins que le texte édicté par le législateur déclare clairement une intention de légiférer non seulement pour l'avenir, mais également pour le passé. Ceci est vrai aussi dans le cas où le législateur délègue ses pouvoirs à une organisme subordonné. L'article 3(1) de la *Loi sur la Radio,* qui donne au gouverneur en conseil le pouvoir de prescrire le tarif des droits à payer pour les licences, ne parle que pour l'avenir et non pas pour le passé. L'arrêté en conseil va donc au-delà des pouvoirs qui sont conférés au gouverneur en conseil lorsqu'il prétend affecter les droits de licence payables pour l'année de licence courante.

La prétention que ce n'est pas le gouverneur en conseil, mais bien le Ministre des Transports qui seul peut réglementer en la matière, ne peut pas être acceptée. L'article 3(1) de la Loi dit que c'est le gouverneur en conseil qui prescrit le tarif des droits à payer pour les licences.

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APPEL et CONTRE-APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], accordant une pétition de droit. Appel maintenu et contre-appel rejeté, le Juge en Chef Taschereau étant dissident.

APPEAL and CROSS-APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], allowing a petition of right. Appeal allowed and cross-appeal dismissed, Taschereau C.J. dissenting.

Rodrigue Bédard, Q.C., for the appellant.

Gordon F. Henderson, Q.C., and *John D. Richard*, for the respondent.

LE JUGE EN CHEF (*dissident*): La requérante-intimée, La Compagnie de Publication La Presse Limitée, exploite à Montréal une station commerciale privée de radiodiffusion, dont les lettres d'appel sont CKAC. Au mois de mars 1960, elle faisait parvenir un chèque au montant de $6,000, à l'ordre du Receveur Général du Canada, en paiement des droits de licence émise en sa faveur par le Ministre des Transports, pour la période du 1er avril 1960 au 30 mars 1961.

Cette licence est requise par le Ministre en vertu du règlement général édicté sous l'empire de la *Loi sur la Radio*, le 25 janvier 1958. L'arrêté en conseil mettant ce règlement en vigueur décrète que lorsque le revenu brut d'un poste de radio excède le montant de $400,000 par an, le prix du permis annuel est de $6,000. Pour les fins de ce règlement les mots «revenu brut» signifient le revenu brut du détenteur du permis provenant des opérations du poste de radio pour l'année fiscale se terminant le 31 décembre précédent.

C'est donc le revenu brut de l'année 1959 qui doit servir de base pour le prix de la licence du 1er avril 1960 au 30 mars 1961. L'article 5 de l'arrêté en conseil qui nous intéresse et qui déterminait le prix des licences au cours du

[1] [1964] Ex. C.R. 627.

mois de mars 1960, quand le chèque de $6,000 a été payé, se lit ainsi:

C.P. 1958-146

HÔTEL DU GOUVERNEMENT À OTTAWA

Le SAMEDI 25 janvier 1958.

TAXES DE LICENCE DE STATION COMMERCIALE PRIVÉE DE RADIODIFFUSION

5. (1) Au présent article, l'expression «recettes brutes», par rapport au titulaire d'une licence, désigne les recettes brutes provenant de l'exploitation d'une station pendant toute année financière ou autre période spécifiée dans le cas de cette station, déduction faite des commissions des agences.

(2) Sous réserve des dispositions du présent article, la taxe annuelle de licence afférente à une station commerciale privée de radiodiffusion est le montant indiqué dans la colonne 3 du tableau suivant et a pour base les recettes brutes du titulaire, données à la colonne 2, pour l'année financière terminée le ou avant le 31 décembre qui précède immédiatement la date à laquelle ou avant laquelle la taxe de licence doit être acquittée:

Colonne 1 Catégorie de stations	Colonne 2 Recettes brutes	Colonne 3 Taxe de licence
A	$ Moins de $25,000	$ 100.00
B	25,000 mais moins de 50,000	250.00
C	50,000 mais moins de 75,000	500.00
D	75,000 mais moins de 100,000	1,000.00
E	100,000 mais moins de 200,000	1,500.00
F	200,000 mais moins de 400,000	3,000.00
G	400,000 ou plus	6,000.00

Le 28 octobre 1960, par arrêté en conseil (C.P. 1960-1488) l'article 5 du règlement général ci-dessus a été abrogé et on lui a substitué les dispositions suivantes:

C.P. 1960-1488

HÔTEL DU GOUVERNEMENT À OTTAWA

Le VENDREDI 28 octobre 1960.

PRÉSENT:

SON EXCELLENCE LE GOUVERNEUR GÉNÉRAL EN CONSEIL

Sur avis conforme du ministre des Transports et en vertu de l'article 3 de la Loi sur la radio, il plaît à Son Excellence le Gouverneur général en conseil d'apporter par les présentes, selon la Liste ci-jointe, les nouvelles modifications suivantes au Règlement général sur la radio, Partie I, établi par le décret C.P. 1958-146 du 25 janvier 1958, dans sa forme modifiée.

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LISTE DE MODIFICATIONS

1. Révoquer l'article 5 du Règlement général sur la radio, Partie I, et le remplacer par ce qui suit:

5. (1) Au présent article, l'expression

a) «recettes brutes», relativement au titulaire d'une licence, désigne les recettes brutes provenant de l'exploitation de la station, déduction faite des commissions des agences; et

b) «année de licence», appliquée à une station commerciale privée de radiodiffusion, désigne une période de douze mois commençant le 1er avril et se terminant le 31 mars suivant, pendant laquelle la licence délivrée pour cette station est en vigueur.

(2) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence est exigible au début de l'année de licence ou antérieurement.

(3) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence aura pour base les recettes brutes du titulaire pour l'année financière terminée le ou avant le 31 décembre qui précède immédiatement le début de l'année de licence, ainsi qu'il suit:

a) Si les recettes brutes sont de $200,000 ou moins, la taxe est de 1 p. 100 des recettes brutes;

b) Si les recettes brutes excèdent $200,000, la taxe est de $2,000 plus 1½ p. 100 des recettes brutes en excédant de $200,000.

(4) Par dérogation au paragraphe (3) et sous réserve des paragraphes (9) et (10), la taxe minimum de licence afférente à une station commerciale privée de radiodiffusion est de $100 pour chaque année de licence.

(5) Si la taxe de licence afférente à une station commerciale privée existante de radiodiffusion pour l'année de licence 1960-1961, calculée suivant les indications du paragraphe (3), excède la taxe qui était exigible conformément au tableau des taxes de licence en vigueur le 31 mars 1960, alors la taxe de licence pour l'année de licence 1960-1961 est égale à la moitié de la somme

a) de la taxe de licence qui était exigible conformément audit tableau des taxes de licence en vigueur le 31 mars 1960, et

b) du montant calculé suivant les indications du paragraphe (3).

Comme résultat de ce changement apporté par ce dernier arrêté en conseil, une demande de paiement additionnel a été faite à l'intimée. Il s'ensuit qu'au lieu de payer $6,000 pour la période du 1er avril 1960 au 30 mars 1961, l'intimée serait tenue de payer pour la même période la somme de $11,452.30. S'autorisant de ce nouvel arrêté en conseil, le

ministère des Transports a réclamé cette somme de $5,452.30, le 6 janvier 1961, et après un échange de correspondance, où l'intimée niait la validité de cette réclamation, elle a définitivement payé sous protêt le 10 mars 1961, quelques jours avant l'expiration de la licence. Le 24 avril 1961, l'intimée a réclamé ce montant par pétition de droit.

Ce litige s'instruisit devant l'honorable Juge Dumoulin de la Cour de l'Échiquier[1], qui accueillit la réclamation de la requérante jusqu'à concurrence de $5,452.30 avec intérêts et dépens. C'est de ce jugement que se pourvoit l'appelant devant notre Cour.

L'intimée invoque trois raisons sérieuses à l'appui de ses prétentions. Elle soutient, en premier lieu, que l'arrêté en conseil du 28 octobre 1960, modifiant l'arrêté en conseil antérieur du 25 janvier 1958, est illégal parce qu'il viole le principe de la non-rétroactivité, qui veut qu'une ordonnance nouvelle ne peut porter atteinte aux droits régulièrement acquis sous l'empire d'une ancienne ordonnance. Il est certain qu'une loi ne peut avoir d'effet rétroactif à moins que le statut le dise clairement. En droit français, comme aussi en droit anglais, on reconnaît ce principe fondamental de justice et d'équité. L'article (2) du *Code Napoléon* consacre dans un texte cette proposition élémentaire: «La loi ne dispose que pour l'avenir, elle n'a point d'effet rétroactif.» Dans Craies «On Statute Law» (6e éd., p. 386), et dans «Maxwell on Interpretation of Statutes» (11e éd., p. 204), on cite Lord Lindley, *Lauri v. Renad*[2], qui disait: «It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction.»

Dans *Pardo v. Bingham*[3], Lord Hatherley disait avec raison:

> The question is...secondly, whether on general principles the statute is in this particular section to be held to operate retrospectively, the

[1] [1964] Ex. C.R. 627.
[2] [1892] 3 Ch. 402 at 421, 67 L.T. 275.
[3] (1869), 4 Ch. App. 735 at 739-40, 20 L.T. 464.

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general rule of law undoubtedly being, that, except there be a *clear indication* either from the subject matter or from the wording of the statute, the statute is not to receive a retrospective construction.

Maxwell, *vide supra*, s'exprime ainsi:

Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. *Nova constitutio futuris formam imponere debet, non præteritis.* They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a *retrospective effect be clearly intended.*

Le *Code Civil* de la province de Québec ne contient pas de semblable disposition, mais Mignault (vol. 1, p. 66) enseigne que ce principe a été accepté par la jurisprudence. L'auteur s'exprime ainsi: «Si la loi réglait le passé, si un droit légitimement acquis pouvait être ravi, si un acte accompli alors qu'il était licite pouvait ensuite être puni, il n'y aurait plus ni liberté civile ni sécurité.» Et les commissaires du *Code Civil,* commentant l'article (2) du *Code Napoléon,* disaient ce qui suit:

Cet article qui avait été copié du Code Napoléon (art. 2) a été omis, non parce que la règle qu'il consacre est incorrecte ou douteuse, mais parce que l'énonciation en a paru inutile et même dangereuse: inutile à l'égard du législateur, qui aurait toujours droit de ne s'y pas conformer; dangereuse quant au juge, qui pourrait la regarder comme réagissant sur le passé et influant sur les nombreuses lois de cette nature, auxquelles, sous cette impression, il refuserait, quoiqu'à tort, de donner effet.

D'après les discussions qui ont eu lieu en France sur cet article, l'on voit qu'il n'a été admis que parce que l'on n'avait pas à craindre là le même inconvénient quant aux lois antérieures.

Il ne peut donc y avoir de doutes qu'en vertu des différents systèmes de droit, qui régissent les citoyens du pays, la rétroactivité des lois dans notre système juridique ne peut être admise à moins que le texte édicté par le législateur déclare clairement une intention de légiférer non seulement pour l'avenir, mais également pour le passé. On peut ajouter aussi que le législateur qui délègue ses pouvoirs à un organisme subordonné peut aussi autoriser, mais également sans ambiguïté ni équivoque, de se départir du principe général de la non-rétroactivité et d'affecter ainsi les droits antérieurs acquis.

Ces principes ont été reconnus par Sir Lyman Duff dans l'affaire de *Spooner Oils Limited v. Turner Valley Gas Conservation Board*[1]. Voici comment il s'exprimait:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or an existing status, unless the language in which it is expressed requires such a construction. The rule is described by Coke as a law of Parliament, meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

Dans le cas présent, l'intimée a obtenu sa licence pour une période de douze mois, soit du 1er avril 1960 au 30 mars 1961. Comme je l'ai dit déjà, elle avait antérieurement payé pour ce permis d'exploitation la somme de $6,000 réclamée par le ministère. C'était le seul montant qu'elle pouvait avec raison s'attendre à payer pour l'année courante et il est juste, je crois, de penser que son budget a été préparé en conséquence, et ce n'est qu'au début de janvier qu'on a réclamé la somme additionnelle de $5,452.30, payée le 10 mars 1961, soit un an après le paiement de la première somme de $6,000.

En vertu de la *Loi sur la radio* au Canada,

> 3.(1) Le gouverneur en conseil peut
>
> *a*) prescrire le tarif des droits à payer pour les licences et pour l'examen relatif aux certificats de capacité détenus et émis en vertu de la présente loi;

Mais le gouverneur en conseil tient ses pouvoirs de la législation sur la radio, adoptée par le Parlement. Cette loi aurait pu, sans doute, décréter que le gouverneur en conseil serait investi de l'autorité nécessaire pour déclarer la rétroactivité de certains des règlements qu'il est autorisé à établir. Cependant, nulle part voit-on dans la loi que le gouverneur en conseil peut réglementer le passé.

Dans son factum et à l'audition, le procureur de l'appelant nous dit que les termes de l'article 3(1), *supra*, de la *Loi sur la radio* ont une portée très vaste; il n'y a, dit-il, aucune restriction imposée à la compétence attribuée au gouverneur en conseil, et le Parlement lui a délégué tous les

[1] (1933) R.C.S. 629, 638.

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pouvoirs qui étaient siens en ce domaine spécifique de l'établissement d'un tarif. L'appelant fait observer que si le gouverneur en conseil a agi dans les limites des pouvoirs que lui a conférés le Parlement, il n'appartient pas aux tribunaux de considérer la sagesse ni même l'équité de la mesure qui a été prise.

Je ne peux m'accorder avec cette proposition qui veut dire que la rétroactivité des règlements existe, à moins que le Parlement ait édicté que seul l'avenir serait affecté. C'est le contraire qui est vrai, et la rétroactivité n'existe pas à moins que l'autorité compétente l'autorise. Aucun texte de cette nature ne se trouve dans le cas qui nous occupe. Il me faut donc conclure que l'article 3(1) ne parle que pour l'avenir et non pour le passé. L'arrêté en conseil va donc au-delà des pouvoirs qui sont conférés au gouverneur général en conseil quand, le 28 octobre 1960, il prétend augmenter les tarifs pour la période du 1er avril 1960 au 30 mars 1961. Il s'agit ici d'un cas clair de délégation de pouvoirs, et le subordonné doit donc demeurer dans les limites strictes de l'autorité que le Parlement lui a conférée.

Devant la Cour de l'Échiquier et devant cette Cour, l'intimée a prétendu que ce n'est pas le gouverneur en conseil, mais bien le ministre des Transports, qui seul pouvait réglementer ce qui fait l'objet du présent litige. Il est certain que le ministre des Transports a une grande autorité en ce qui a trait aux licences de radio en vertu de l'article 4(1) de la Loi, mais l'article 3(1) de la même loi dit que c'est le gouverneur en conseil qui prescrit le tarif des droits à payer pour les licences. Si j'acceptais la prétention de l'intimée sur ce point, il me faudrait mettre de côté l'article 3(1), ce que je ne peux certainement pas faire.

Si la théorie de l'intimée est fondée, elle doit nécessairement s'appuyer sur l'article 10 de la *Loi sur la radio,* qui voudrait dire que lorsqu'il y a violation de la Loi, l'équipement peut être confisqué, et *implicitement* le retrait de la licence, à défaut de paiement du prix, peut être exigé. On

prétend que l'illégalité naîtrait du fait que l'intervention du gouverneur en conseil mettrait un terme à la durée de la licence, terme qui doit être déterminé par le ministre des Transports seul.

Je ne vois pas d'empiètement par le gouverneur en conseil sur les prérogatives du ministre des Transports. Le gouverneur en conseil tient son autorité de l'article 3, et l'article 10 est le texte de la loi qui impose la pénalité à défaut de paiement. C'est la loi elle-même qui limite les pouvoirs du ministre des Transports et non pas un acte arbitraire de la part du gouverneur en conseil.

Nous n'avons qu'à déterminer la question de savoir si le prix de la licence peut être majoré pour l'année 1960-61 comme il l'a été. La conséquence de cette rétroactivité donnée par le gouverneur en conseil à l'arrêté ministériel du 28 octobre 1960 rend ce dernier inopérant, et me dispense de discuter les autres questions qui ont été soulevées. L'appelant nous y invite d'ailleurs lorsqu'il dit dans son factum qu'à strictement parler l'appel ne repose que sur cette partie du jugement qui, déclarant que l'arrêté en conseil dont il s'agit a un effet rétroactif que la loi n'autorise pas, conduit à la conclusion qu'il y a empiètement sur les pouvoirs du ministre des Transports.

Je suis donc d'opinion que cet appel doit être rejeté avec dépens.

The judgment of Fauteux, Abbott and Ritchie JJ. was delivered by

ABBOTT J.:—The sole question at issue in this appeal is the validity of Order in Council P.C. 1960-1488, passed under the provisions of s. 3 of the *Radio Act*, R.S.C. 1952, c. 233, as amended. That Order in Council rescinded s. 5 of the "General Radio Regulations" then in force, and replaced it with a new section. The said section prescribed the fees payable by private commercial broadcasting stations licensed under the *Radio Act*.

The relevant facts are not in dispute.

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Abbott J.

Respondent is a corporation which for many years has operated a private commercial radio broadcasting station in the city of Montreal whose call letters are CKAC with a power of 50,000 watts on a frequency of 730 kilocycles. It has been licensed to do so by a series of annual licences issued by the Minister of Transport under the provisions of the *Radio Act*. Unless otherwise provided, such licences are granted on an annual basis for a period running from April 1 to March 31. Licence fees payable by private commercial broadcasting stations have varied from time to time over the years, but for some time prior to October 1960 the fees payable by respondent were the maximum then provided for of $6,000 per year.

On October 28, 1960, Order in Council P.C. 1960-1488 was adopted, which amended the Regulations then in force, by repealing s. 5 of the said regulations which prescribed the licence fees payable by private commercial radio stations, and replacing it by a new s. 5 providing for a scale of licence fees calculated on a different basis than the one provided for in the earlier regulation.

The effect of the new regulation was to increase the licence fee payable by respondent for the then current licence year from $6,000 to $11,452.30.

On January 6, 1961, the Department of Transport claimed from respondent, as additional licence fees for the then current year, the sum of $5,452.30. Payment was refused by respondent, but after discussions which took place with officials of the Department, the amount claimed was paid under protest. By its petition of right filed April 24, 1961, alleging the invalidity of the said Order in Council of October 28, 1960, respondent claimed reimbursement of the said sum of $5,452.30 with interest and costs. In its petition of right and before this court, respondent submitted that s. 5 of the General Radio Regulations as enacted by Order in Council P.C. 1960-1488 was invalid and *ultra vires* in the following respects:

1. That it does not prescribe a licence fee but in fact and in law creates and imposes a tax without Parliamentary sanction or approval.

2. That it is unjust and discriminatory between the respondent and other private commercial broadcasting stations and also between a group of private commercial radio broadcasting stations, the Canadian Broadcasting Corporation and other categories of broadcasting stations.

3. That it affects the rights of respondent and others affected thereby in a retroactive manner not authorized by the enabling legislation.

4. That it was beyond the authority of the Governor-in-Council and in the form in which it was passed infringed on the exclusive authority of the Minister of Transport.

Mr. Justice Dumoulin of the Exchequer Court[1] held that the said s. 5 was invalid and *ultra vires* in that it was beyond the power of the Governor in Council to increase licence fees during the currency of a licensing period since the exercise of this power infringed on authority reserved exclusively to the Minister of Transport under the *Radio Act*. He appears also to have been of opinion that the by-law illegally had a retroactive effect, but he rejected the other grounds of alleged illegality raised by respondent. He recommended repayment to respondent of the sum of $5,452.30 with interest.

Appellant appealed from that judgment to this Court and respondent cross-appealed on the ground that the learned trial judge should have declared the Order in Council invalid on grounds 1, 2 and 3 which I have enumerated. As a result all the grounds of alleged invalidity raised in the Court of first instance were argued before this Court.

The relevant portions of Order in Council P.C. 1960-1488 read as follows:

1. Section 5 of the General Radio Regulations, Part I is revoked and the following substituted therefore:

5. (1) In this section,

(*a*) "gross revenue", in relation to any licensee, means the gross revenue of the licensee derived from the operation of the station, less agency commissions, and

(*b*) "licence year", as applied to any Private Commercial Broadcasting Station, means a twelve-month period commencing April 1st and ending March 31st following, during which the licence issued for that station is in force.

[1] [1964] Ex. C.R. 627.

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(2) Subject to this section, the licence fee for a Private Commercial Broadcasting Station for each licence year is payable on or before the commencement of the licence year.

(3) Subject to this section, the licence fee for a Private Commercial Broadcasting Station for each licence year shall be based upon the gross revenue of the licensee for the fiscal year of the station ending on or before the 31st day of December immediately preceding the commencement of the licence year as follows:

(*a*) if the gross revenue is $200,000 or less, the fee is one per cent of the gross revenue, and

(*b*) if the gross revenue exceeds $200,000, the fee is $2000 plus one and one-half per cent of the gross revenue in excess of $200,000.

(4) Notwithstanding subsection (3) and subject to subsections (9) and (10), the minimum licence fee for each licence year for a Private Commercial Broadcasting Station is $100.

(5) If the licence fee for the licence year 1960-61 for an existing Private Commercial Broadcasting Station, computed in accordance with subsection (3) exceeds that which would have been payable under the schedule of licence fees in force on March 31st, 1960, then the licence fee for the licence year 1960-61, is one-half the sum of

(*a*) the amount of the licence fee which would have been payable under the said schedule of licence fees in force on March 31st, 1960, and

(*b*) the amount computed in accordance with subsection (3).

The statutory authority for the adoption of such Order in Council is contained in s. 3 of the *Radio Act*, the relevant portions of which read

3. (1) The Governor in Council may

(*a*) prescribe the tariff of fees to be paid for licences and for examination for certificates of proficiency held and issued under this Act;...

(2) Any person who violates any regulation made under this section for which no penalty is provided is liable upon summary conviction to a penalty not exceeding fifty dollars and costs or to imprisonment for a term not exceeding three months.

I shall deal first with the questions raised on cross-appeal. The learned trial judge held to be unfounded respondent's contentions that s. 5 of the Radio Regulations as enacted by the Order in Council was invalid because (1) it imposed a tax and not a licence fee and (2) was unjust and discriminatory. I am in agreement with that view and have little to add to what the learned trial judge has said on these two points.

The operator of a private commercial broadcasting station is required under the *Radio Act* to be in possession of a licence issued by the Minister of Transport. The holding of such a licence involves the obligation to pay licence fees as prescribed by the Governor in Council. As I have stated, the tariff of such licence fees has been varied from time to time over the years. The tariff established under P.C. 1960-1488 abolished a previously existing maximum fee and provided for licence fees calculated upon the basis of gross revenues of the licencee. In my view this is no way changed the character of the levy. As to the alleged discriminatory character of the regulation, I am not satisfied that it is in fact discriminatory. In any event s. 3 of the Act puts no limitation upon the powers of the Governor in Council to prescribe licence fees. That such fees may in fact be discriminatory, in my opinion, affords no legal ground of attack upon the validity of the Order.

Dealing now with the appeal itself. The learned trial judge, although he referred to respondent's contention that the Order in Council was invalid because of its alleged retroactive effect, did not explicitly found his judgment upon that point. He held that subs. 5 of s. 5 of the Radio Regulations as enacted by Order in Council P.C. 1960-1488 was invalid for the following reasons:

> En bref, le paragraphe (5) de l'article 5 susdit me paraît entaché de nullité moins à cause de sa rétroactivité, que, parce qu'il entend statuer en une matière sur laquelle son auteur, le gouverneur en conseil, n'aurait pas autorité, mais le ministre des Transports seulement.

With respect, I am unable to agree with that finding. Under s. 4 of the *Radio Act,* exclusive authority concerning the issue of licences is given to the Minister of Transport. Under s. 3 of the said Act exclusive authority to prescribe the tariff of fees to be paid for such licences is given to the Governor in Council. In the one case an administrative discretion has been granted and in the other case an authority to legislate. The Minister of Transport, as the minister responsible for the administration of the *Radio*

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PROCUREUR GÉNÉRAL DU CANADA v. LA COMPAGNIE DE PUBLICATION LA PRESSE, LTÉE

Abbott J.

Act, is no doubt required to collect the licence fees prescribed by the Governor in Council but, except in his capacity as one member of the executive branch of government, he has no authority to determine what the tariff of such fees should be.

I shall now deal with respondent's contention that the Order in Council was invalid because of its alleged retroactive effect. The so-called rule of non-retroactivity is of course a well established rule of interpretation that generally speaking, a law is not to be interpreted as having a retroactive effect unless it contains express words or there is the plainest implication to the contrary effect—see *Maxwell v. Callbeck*[1].

In the present case, as I have stated, respondent held a valid licence to operate for the licence year April 1, 1960 to March 31, 1961, a private commercial broadcasting station and to use a certain specified radio frequency for that purpose. As Lord Atkin stated in *Shannon v. Lower Mainland Dairy Products Board*[2], such a licence merely involves a permission to trade, subject to compliance with certain conditions. In the present case, there was no contractual relationship between the Crown and respondent, and the latter had no vested or property right in the licence which it held. What it did have was a privilege granted by the state, conferring authority to do something which without such permission would be illegal.

The Order in Council clearly was intended to affect the licence fees payable for the then current licence year. From the terms of subs. 5 of the new s. 5, however, it is also clear, that fees were calculated for that year on the old basis with respect to the first six months and on the new basis with respect to the last six months.

If the Order did have retroactive effect, (as to which I do not find it necessary to express any opinion) s. 3 of the

[1] [1939] S.C.R. 440 at 444, 3 D.L.R. 580.
[2] [1938] A.C. 708 at 721, 2 W.W.R. 604, 4 D.L.R. 81.

Radio Act contains no limitation upon the power of the Governor in Council to make such an order. In view of the nature of the right held by a person licensed to operate a private commercial broadcasting station, I am of opinion that the Governor in Council can validly increase or decrease the fees payable by such a licensee at any time during the currency of the licence. As I have said, Order in Council P.C. 1960-1488 clearly expressed an intention to do so.

For the foregoing reasons, I would allow the appeal and dismiss the petition of right with costs here and in the Exchequer Court. The cross appeal should also be dismissed with costs.

HALL J.:—I agree with His Lordship the Chief Justice that the Order in Council in this appeal was retroactive legislation. The Order in Council, however, was validly enacted under the power given the Governor in Council by the *Radio Act* and it clearly expresses the retroactive effect it was intended to achieve. I concur, therefore, in the appeal being disposed of as proposed by my brother Abbott.

Appeal allowed and cross-appeal dismissed, with costs.

Solicitor for the appellant: R. Bédard, Ottawa.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

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*Nov. 3
Nov. 25

JACK GOLLNER (*Defendant*) ..... APPELLANT;

AND

LAURENTIDE FINANCIAL CORPORATION LTD. (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Guarantee—Promissory notes—Whether notes covered by guarantee—Knowledge of guarantor as to intent of guarantee.

In an action involving six promissory notes, the respondent company, which claimed against the appellant as guarantor, was awarded judgment for $19,844.99. An appeal to the Court of Appeal for British Columbia having been dismissed, a further appeal was brought to this Court. At the conclusion of the argument for the appellant, the Court stated that reply was required in reference only to the appellant's sixth submission which appeared in his factum in these words: "That alternatively if the guarantee is held to be valid that the promissory notes as transactions inter partes which are the subject of this action were not promissory notes contemplated by the guarantee." The trial judge had found that when the appellant executed the guarantee he knew that it covered the repayment of moneys advanced or credited by the respondent for new and used wholesale financing. The Court of Appeal supported that finding.

Held: The appeal should be dismissed.

Whether the word "purchased" or the word "discounted" applied to the promissory notes in question, the phrase in the guarantee "of any and all notes, bills of exchange, agreements, contracts or acceptances now held or which may hereafter be purchased or discounted by the corporation" was broad enough to cover the said promissory notes and in the light of the concurrent findings of fact of the Courts below it was intended to cover the said notes.

APPEAL from the judgment of the Court of Appeal for British Columbia, dismissing an appeal from a judgment of Hutcheson J. Appeal dismissed.

F. G. P. Lewis, for the defendant, appellant.

G. T. Guest, for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia which dismissed with costs an appeal from the judgment of Hutcheson J. whereby he awarded the plaintiff the sum of $19,844.99 plus

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Spence JJ.

costs. That amount was the total due on six promissory notes made by Steveston Motors Limited in favour of Imperial Investment Corporation Limited. The latter has now become the respondent Laurentide Financial Corporation Limited which claimed against the appellant as guarantor.

After presentation of the argument by counsel for the appellant, the Court informed counsel for the respondent that reply was required in reference only to the sixth submission of the appellant. That submission appeared in the appellant's factum in these words:

> That alternatively if the guarantee is held to be valid that the promissory notes as transactions inter partes which are the subject of this action were not promissory notes contemplated by the guarantee.

The guarantee upon which the plaintiff (here respondent) based its claim was one under date of November 19, 1956. The material part of the guarantee reads as follows:

> In consideration of the purchase or discount of any note, bill of exchange, agreement, contract or acceptance bearing the signature in any capacity of Steveston Motors Ltd. of Steveston, B.C., hereinafter called the Dealer by the Imperial Investment Corporation Ltd., hereinafter called the Corporation, the undersigned do hereby jointly and severally unconditionally guarantee to the Corporation the payment at maturity or whenever by the terms of said note, bill of exchange, agreement, contract or acceptance, the same shall become or be declared to be due, *of any and all notes, bills of exchange, agreements, contracts or acceptances, now held or which may hereafter be purchased or discounted by the Corporation,* on which the Dealer is or may become liable as maker, drawer, acceptor, indorser, signatory or guarantor...

(The italics are my own.)

The learned trial judge made a specific finding of fact: "I find that when the defendant executed the guarantee sued upon he knew that it covered the repayment of moneys advanced or credited by the plaintiff for new and used wholesale financing."

Davey J.A., in giving the judgment for the Court of Appeal for British Columbia, said:

> The learned trial judge found appellant knew when he signed the document that it was a guarantee of the dealer's obligations for wholesale financing.... I am unable to say the learned Judge was wrong and this ground of appeal fails.

Therefore, we have concurrent findings of fact that the guarantee was intended to cover new and used wholesale financing. As Davey J.A. points out in his reasons for

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judgment for the Court of Appeal for British Columbia, "used wholesale financing, which the guarantee was intended to cover, consisted principally of money loaned directly to the dealer and the word 'discount' was undoubtedly intended to apply to that type of transaction."

On full consideration of the matter, we have come to the conclusion that whether the word "purchased" or the word "discounted" applied to these promissory notes of Steveston Motors Limited, the phrase "of any and all notes, bills of exchange, agreements, contracts or acceptances now held or which may hereafter be purchased or discounted by the corporation" is broad enough to cover the said promissory notes and in the light of the concurrent findings of fact made by the Courts below upon the circumstances outlined in the evidence it was intended to cover the said promissory notes.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Griffiths, McLelland & Co., Vancouver.

Solicitors for the plaintiff, respondent: Robson, Macdonald & Guest, Vancouver.

CHRISTOPHER A. TONKS and ANNA TONKS (*Defendants*) .... } APPELLANTS;

1966

* Oct. 26, 27
Nov. 29

AND

HAZEL DOREEN REID and JOHN CAIRD REID (*Plaintiffs*) ..... } RESPONDENTS;

AND

THE CORPORATION OF THE TOWNSHIP OF YORK (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal law—Sale by municipality to municipal official of part of closed highway—Failure to fix price and make offer to abutting owner—By-law and sale of land thereby authorized void—Claim for lien rejected—The Municipal Act, R.S.O. 1960, c. 249, s. 477—The Conveyancing and Law of Property Act, R.S.O. 1960, c. 66, s. 38(1).

The Township of York closed a highway and sold part of it to the defendant T, the reeve of the township, without compliance with s. 477 of *The Municipal Act*, which compels the municipality, if it decides to sell, to fix a price and offer it to the abutting owner or owners. T had arranged to buy the land in the name of a nominee. The owner of an abutting property and her husband brought an action for a declaration that the by-law and the sale of the closed road thereby authorized were null and void and for an order setting aside the sale. The trial judge dismissed the action. The Court of Appeal in reversing this judgment held that non-compliance with s. 477 of *The Municipal Act* results in a void transaction. They also held that in this particular case the conduct of T was fraudulent. They set aside that part of the by-law which authorized the sale and declared the deed of conveyance to be null and void. T appealed to this Court.

Held: The appeal should be dismissed.

The Court agreed with the judgment of the Court of Appeal that if the provisions of s. 477 of *The Municipal Act* are not observed, the council is without authority and a by-law authorizing sale is void and is open to attack notwithstanding that more than a year has elapsed from the date of its passing. The council was under no compulsion to sell, but if it determined to sell, it had to sell in accordance with the provisions of s. 477. It fixed no price and it made no offer to the abutting owners. Council had no authority whatever to make this sale to T. It was not within its competence to pass any by-law authorizing such a sale or the execution of a deed to T.

Nothing was found in the conduct of the plaintiffs which would indicate any waiver of their rights and they could not be deprived of these rights except by compliance with s. 477. There was nothing in this case but a by-law which was passed in bad faith at the instigation of the reeve and simply to subserve his interest as a private individual. Such a by-law was a nullity.

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

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TONKS *et al.* *v.* REID *et al.*

T's claim that under s. 38(1) of *The Conveyancing and Law of Property Act* he was entitled to a lien of $30,600 upon the lands in question, this being the amount that the land and the improvements had cost him, was rejected. Section 38(1) did not apply to a case such as this. T acquired this land knowing that s. 477 had not been complied with and knowing that he had no right to purchase. He could have no honest belief that he was making improvements on land that was his own. He knew the weaknesses of his title and took his chance.

Jones v. Tuckersmith (1915), 33 O.L.R. 634, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of King J. Appeal dismissed.

H. E. Manning, Q.C., for the defendants, appellants.

F. M. Catzman, Q.C., and *M. A. Catzman*, for the plaintiffs, respondents.

J. H. Boland, Q.C., for the Corporation of the Township of York.

The judgment of the Court was delivered by

JUDSON J.:—The municipality closed a highway and sold part of it to a municipal official without compliance with s. 477 of *The Municipal Act*, now R.S.O. 1960, c. 249, which compels the municipality, if it decides to sell, to fix a price and offer it to the abutting owner or owners. The trial judge dismissed the action. The Court of Appeal[1] reversed this judgment and the defendant Tonks now appeals. The municipality submits its rights to the Court.

The Court of Appeal held that non-compliance with s. 477 of *The Municipal Act* results in a void transaction. They also held that in this particular case the conduct of the municipal official was fraudulent. They set aside that part of the by-law which authorized the sale and declared the deed of conveyance to be null and void.

In 1955 the two plaintiffs, Hazel Doreen Reid and John Caird Reid, who are husband and wife, purchased No. 2 Paulson Road in the Township of York as joint tenants. In 1959, the husband conveyed his interest to his wife, who remains the sole owner.

[1] [1965] 2 O.R. 381, 50 D.L.R. (2d) 674.

The defendants, Christopher A. Tonks and Anna Tonks, are husband and wife. Christopher Tonks was elected a member of the municipal council of the Township of York in 1951. He was elected as deputy reeve in 1952 and was appointed acting reeve on September 4, 1956. He was elected reeve in December 1956 and held this office until December 1960.

No. 2 Paulson Road was a corner lot before Myra Road was closed. It fronts on Paulson Road and its easterly boundary was Myra Road. Paulson Road runs east and west, Myra Road north and south. The property was on the northwest corner. There is no access for vehicles to the rear of No. 2 Paulson Road from Paulson Road. Before the closing there was access to the rear of the property from Myra Road. Myra Road had been dedicated as a highway in 1951 by by-law of the township and it was closed on August 13, 1956, by by-law 15396. There is no attack on the propriety of the closing.

On September 10, 1956, Reid wrote to the township clerk and solicitor to say that he wished to acquire part of the west side of Myra Road as closed by the by-law to enable him to gain access to the rear of his property. He received an acknowledgment of his letter from the clerk and solicitor telling him that it would be put before council at its next meeting and that he would be advised later. Reid's letter was put before the Committee of General Purposes of the township on September 17, 1956. Tonks was then acting reeve of the township and was present at the meeting of the committee, which referred the request to the Committee on Sale of Land. The report of the Committee of General Purposes referring Reid's request was approved by the township council at a meeting on October 9, 1956, at which Tonks was present as acting reeve. There is no record that Reid was advised that his request was being considered, or that the Committee on Sale of Land ever dealt with his application. His letter is missing from the file and has never been found. Reid heard nothing further about his application and assumed that nothing could be done.

Early in 1957, Tonks became interested in buying the southern half of Myra Road, which abutted on the plaintiff's property. He well knew as a member of council that

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he was disqualified from purchasing. He had consulted the township solicitor and had received this advice. Tonks discussed the matter with another deputy reeve and decided to buy the property in the name of a nominee. In June 1957, he had one Joseph Fraser, a friend and relative by marriage, submit an offer for $6,600. Fraser enclosed his own cheque for $1,320 with the offer as a deposit. This money was supplied by Tonks. The offer was made subject to a condition that the municipality as vendor would secure the approval of the Ontario Municipal Board to amend a restrictive by-law against building on a lot having a frontage of less than 70 feet. Myra Road was only 66 feet wide. Fraser's offer of June 10, 1957, was submitted to the Committee of General Purposes, which recommended directly to council that the offer be accepted. Tonks was then reeve and was present at the meeting. If it makes any difference, there is no evidence that Tonks declared his interest at the meeting, although he does say that he may have disclosed it to some of the members before the meeting. There is no reference to any disclosure in the minutes of the meeting.

On June 17, the report of the Committee of General Purposes was approved by council, which formally accepted Fraser's offer by enacting by-law 15649. On June 24, 1957, council enacted by-law 15656 permitting the erection of a house on these lands notwithstanding that they had a frontage of less than 70 feet. Tonks was present at that meeting and signed the by-law in his capacity as reeve. Again he made no disclosure of his interest in the by-law. He says that he assumed that everybody knew. The by-law was submitted to and approved by the Ontario Municipal Board without any disclosure of Tonks' interest.

Fraser, who was the first nominee of Tonks, did not take a conveyance of the property. He assigned his right to purchase to Marie Eunice Froman, another nominee of Tonks. She received a deed from the township on January 14, 1958, executed by Tonks, as reeve, and by the township clerk. On December 19, 1957, Fraser, the first nominee, had paid the balance of the purchase price with money supplied by Tonks.

On July 17, 1958, Marie Eunice Froman executed a deed to Tonks and his wife. This deed was registered on the

following day, which was more than one year after the enactment of by-law 15649 which had approved the sale to Fraser.

Tonks applied for a building permit to erect a house on this property on December 20, 1957. His plans were approved on January 14, 1958 and he began building the house in April of 1958.

The learned trial judge found that the township had not complied with the provisions of s. 477 of *The Municipal Act* in selling this property. He was, however, of the opinion that the township by-law 15649, passed on June 17, 1957, approving the acceptance of Fraser's offer, was voidable only and could not be impeached except by an application to quash brought within one year of its passage. No such application having been made, the action failed and was dismissed with costs.

The Court of Appeal in reversing the judgment held that the by-law was a nullity for non-compliance with s. 477 and should be set aside on that ground. They also found fraud on the part of Tonks. They further rejected a defence that the plaintiffs had waived their rights under s. 477 and had acquiesced in Tonks' purchase.

I agree with the judgment of the Court of Appeal that if the provisions of s. 477 of *The Municipal Act* are not observed, the council is without authority and a by-law authorizing sale is void and is open to attack notwithstanding that more than a year has elapsed from the date of its passing. The provisions of s. 477 are set out here:

> 477. (1) Where a highway for the site of which compensation was paid is established and laid out in place of the whole or any part of an original allowance for road, or where the whole or any part of a highway is legally stopped up, if the council determines to sell such original allowance or such stopped-up highway, the price at which it is to be sold shall be fixed by the council, and the owner of the land that abuts on it has the right to purchase the soil and freehold of it at that price.
>
> (2) Where there are more owners than one, each has the right to purchase that part of it upon which his land abuts to the middle line of the stopped-up highway.
>
> (3) If the owner does not exercise his right to purchase within such period as may be fixed by the by-law or by a subsequent by-law, the council may sell the part that he has the right to purchase to any other person at the same or a greater price.

Words could not be plainer. The council was under no compulsion to sell, but if it determined to sell, it had to sell in accordance with these provisions. It fixed no price and it

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made no offer to the abutting owners. Council had no authority whatever to make this sale to Tonks. It was not within its competence to pass any by-law authorizing such a sale or the execution of a deed to Tonks. This is the effect of *Jones v. Tuckersmith*[1], and I agree with the analysis of that case in the reasons of the Court of Appeal[2].

The Court of Appeal stated a second ground for its reasons for judgment. They held that the reeve of this municipality fraudulently acquired this land in violation of the rights of abutting owners. A mere recital of the facts as I have outlined them leads irresistibly to this inference. No innocent construction is possible. Although Reid had enquired in good time about his right to purchase, he was ignored, and I think deliberately ignored, and the person who appeared on the scene as the ultimate purchaser was the reeve. There can be no doubt that he had determined to purchase this property when he well knew that his position forbade him to do so, and Reid had no notice of this until it was an accomplished fact. When he learned about it, instead of at once attacking the transaction, he tried to make a deal with Tonks which would give him access to the rear of his lot. From what Reid did it is argued that he renounced or waived his rights under s. 477. Reid's explanation is that he was confronted by the fact of acquisition and that he did the best he could. It is urged against him that he did not follow up his letter of 1956; that when he knew that Tonks had become the purchaser he signed consents on his own behalf and persuaded others to sign consents to have the restriction of 70 feet varied; that in March of 1958 he was not interested in buying more land. He had in fact separated from his wife and was not living in the house. I have already mentioned that he conveyed his interest to his wife in 1959. But he also said that he was promised access to the rear of his lot by Tonks—Reid says 12 feet wide, Tonks says 8 feet—but as a result of Tonks' building plans, which were perhaps dictated by the configuration of the ground, the space between the two houses was too narrow for vehicles to pass between them.

I can find nothing in the conduct of the Reids which would indicate any waiver of their rights and I do not

[1] (1915), 33 O.L.R. 634, 23 D.L.R. 569.
[2] [1965] 2 O.R. 381, 50 D.L.R. (2d) 674.

think that they can be deprived of these rights except by compliance with s. 477. There is nothing in this case but a by-law which was passed in bad faith at the instigation of the reeve and simply to subserve his interest as a private individual. Such a by-law is a nullity.

The final point raised by the appellant is that under s. 38(1) of *The Conveyancing and Law of Property Act*, R.S.O. 1960, c. 66, he is entitled to a lien of $30,600 upon the lands in question. This is what the land and the improvements cost him. Section 38(1) reads:

> 38. (1) Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

This section does not apply to a case such as this. Tonks acquired this land knowing that s. 477 had not been complied with and knowing that he had no right to purchase. He could have no honest belief that he was making improvements on land that was his own. He knew the weaknesses of his title and he took his chance. His claim for a lien should be rejected.

I would affirm the judgment of the Court of Appeal and dismiss this appeal with costs. The municipality submitted its rights to the Court. There should be no order for costs for or against it.

Appeal dismissed with costs. No costs for or against the Township of York.

Solicitors for the defendants, appellants: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the plaintiffs, respondents: Catzman & Wahl, Toronto.

Solicitor for the Township of York: J. H. Boland, Toronto.

1966
*Nov. 21, 22
Dec. 19

LEONARD SLEEN, H. THORNTON R. GREGG and THOMAS JOHN HOPWOOD (*Defendants*) ..... APPELLANTS;

AND

HARRY L. AULD (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Promissory note—Note given by way of payment of balance owing for purchase price of shares—Action to recover balance owing on note—Counterclaim for damages for fraudulent misrepresentations—Defendants' failure to establish that they were induced to enter contract to purchase shares by reason of fraudulent misrepresentation by plaintiff.

The respondent brought an action against the appellants for the balance owing on a promissory note dated January 11, 1960. The note was given by way of payment of the balance owing by the appellants to the respondent for the purchase price of all the shares of a restaurant company, which had been owned by the respondent and his wife. The appellants denied liability on the note, and counterclaimed for damages for fraudulent misrepresentations, which they claimed had been made to them by the respondent and had induced them to enter into the contract for the purchase of the shares.

The trial judge dismissed the respondent's claim and awarded to the appellants one half of the damages that they had claimed. On appeal, the respondent's claim on the note was allowed and the majority of the Court directed that the damages claimed by the appellants be referred back for assessment. The appellants appealed and the respondent cross-appealed from the judgment of the Appellate Division.

Held: The appeal should be dismissed and the cross-appeal allowed.

The appellants failed to establish that they were induced to enter the contract to purchase the shares by reason of fraudulent misrepresentation by the respondent. The Court agreed with the reasons of Porter J.A., in his dissenting judgment, for deciding that, accepting the findings of the trial judge as to certain statements made by the respondent to the appellant H, the evidence did not support the conclusion that it was their reliance upon those statements which led the appellants to enter into the contract to purchase the shares.

The following items of evidence were significant in this regard:

1. It was not the respondent who first sought to effect the sale to the appellants. On the contrary, H, on learning that the respondent wished to dispose of the business, made the first approach.
2. A statement by the respondent about not having to put his hand into his pocket was made, according to H, on an occasion when

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

the respondent explained the daily cash register to him. This book clearly disclosed a $4,000 payment made to the company by another company controlled by the respondent in March 1959, which the trial judge said was not discovered by the appellants until 1962.

3. In considering the impact of the respondent's representation that the restaurant was paying its way, it was significant that the agreement precluded the respondent from receiving payments for the shares (other than a $2,000 cash payment plus the value of the liquor on the premises) unless the business was earning a net profit.

4. It was after the appellants had operated the business for seven months at a loss, and after they had received a balance sheet and a statement of liabilities of the company, prepared as of the date of the sale of the shares, that they agreed to execute the promissory note in favour of the respondent.

5. Notwithstanding the lack of success in the operation of the restaurant business, the appellants made payments on the note until December 1960.

6. No suggestion of misrepresentation on the part of the respondent was made until after the respondent had sued on the note in August 1962, more than three years after the agreement was made.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, allowing in part an appeal from a judgment of Manning J. dismissing the respondent's action under a promissory note and awarding damages to the appellants under a counterclaim for false misrepresentation in respect of the sale of certain shares. Appeal dismissed and cross-appeal allowed.

William B. Gill, Q.C., for the defendants, appellants.

Reginald J. Gibbs, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action was brought by the respondent against the appellants for the balance owing on a promissory note dated January 11, 1960, whereby the appellants promised to pay the respondent $10,727.09 with interest at 6 per cent per annum on the unpaid balance, computed from June 1, 1959. The note was payable at the rate of $350 per month from March 15, 1960, until February 15, 1963, when the balance was payable. It contained provision for acceleration of payment in the event of non-payment of any instalment.

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This note was given by way of payment of the balance owing by the appellants to the respondent for the purchase price of all the shares of Safari Restaurants Limited (hereinafter called "the Company"), which had been owned by the respondent and his wife. The Company operated a restaurant in the City of Calgary. The appellants Gregg and Hopwood were members of a Calgary law firm which, prior to and for some time after the sale, acted for the respondent.

The appellants denied liability on the note, and counterclaimed for damages for fraudulent misrepresentations, which they claimed had been made to them by the respondent and had induced them to enter into the contract for the purchase of the shares.

The contract of sale, made on May 26, 1959, provided for the sale by the respondent and his wife to the appellants of their shares in the Company, for the sum of $40,000 plus the value of all stock-in-trade on the restaurant premises, less the amount of all the liabilities of the Company. If such liabilities exceeded $40,000 the excess was to be paid by the vendors of the shares. The agreement provided for the determination of the liabilities by the Company's auditor.

The respondent, and a company which he controlled, Western Store Fixtures Limited, agreed to cancel the Company's indebtedness to each of them. (In fact, at the time of the agreement, the Company was indebted to Western Store Fixtures Limited in the amount of $32,700, but the respondent owed the Company $7,525. By agreement, both of these debts were cancelled.)

The agreement provided for vendors' liens on the shares sold and for payment of the balance due under the agreement if the appellants resold the shares.

The appellants agreed to give a promissory note for the balance payable for the shares, on the terms and conditions in the agreement.

The purchase price was payable, in cash, as to $2,000 and the value of the liquor on the premises at invoice price. The balance was payable, with interest at 6 per cent per annum, in monthly payments of $1,542.98 less the monthly pay-

ments payable by the Company under all its finance contracts, plus one half of the Company's net monthly profits (if any), after deduction therefrom of the said sum of $1,542.98.

The evidence is that the figure of $1,542.98 represented the monthly amount due, at the time of sale, by the Company under its finance contracts. For such time as those payments were required to be paid by the Company, in essence, the vendors were to be paid only out of the Company's net profits (if any).

The Company's auditor prepared a statement of liabilities and a balance sheet, as of May 31, 1959, which were received by the appellants early in January 1960. The former fixed the total of Company liabilities to be deducted from the purchase price of $40,000 at $26,445.81. The latter disclosed an indebtedness of $32,700 of the Company to Western Store Fixtures Limited, and a debt of the respondent to the Company of $7,525. It disclosed assets of $62,964 and liabilities (including capital stock equity of 15,050 shares of no par value at $15,050) of $79,329.41. The difference between these two figures, $16,365.41, was shown on the balance sheet as being:

Balance at debit on September 30, 1958	$ 12,293.94
Add loss per statement	4,071.47
	$ 16,365.41

A footnote to the balance sheet stated:

Note – Item of $7,525.00 due from H. Auld & $32,700.00 due to Western Store Fixtures Ltd. will not apply after May 31, 1959.

In the interval between the date of the sale of the shares, May 31, 1959, and the receipt of the statement of liabilities and balance sheet, in January 1960, there had been no net profits earned from the operation of the restaurant by the appellants.

It was subsequent to the receipt of this material from the Company's auditor that the appellants, on January 11, 1960, signed the promissory note in favour of the respondent on which the latter has sued. The effect of that note was to commit the appellants to make specific monthly payments to the respondent, not tied to the earning of net

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profits by the Company. At the same time, the respondent and his wife signed an agreement to accept the note in full satisfaction of all claims under the agreement, thereby relinquishing any lien on the shares, and freeing the appellants from the obligation to make full payment of the balance owing under the agreement in the event of a resale of the shares.

During the year 1960 payments were made on the note by the appellants, the last being made in December of that year.

In February 1960, the restaurant was leased on a basis whereby the tenant paid as rent 10 per cent of the gross proceeds each month. This lease was terminated in July 1961. Early in 1962 an agreement was made by the appellants to sell the shares to one Haderer for $47,500, with a down payment of $15,000 in the form of restaurant equipment, which was subsequently distrained by Haderer's landlord.

When Haderer was unable to complete the transaction, the shares were returned to the appellants who sold them to one Vogel at a price of $28,000 with a cash payment of some $7,500. No further payments were made and the Company went into liquidation, out of which the appellants recovered $4,000.

In July of 1962 the respondent demanded payment of his note, and the next month commenced action upon it. The appellants, for the first time, by their defence alleged fraudulent misrepresentation by the respondent, and counterclaimed for damages. The allegation was that, prior to the sale of the shares by the respondent and his wife, the respondent had represented that the restaurant was earning sufficient money to pay all current expenses in full, including rent and monthly instalments payable to finance companies.

The learned trial judge found that the respondent had told the appellant Hopwood, who conducted the negotiations for the appellants, that the business was "paying its way", and that the respondent had not had to put his hand "in his own pocket" for some time. He found that the appellants had relied on the respondent's statements, and that it was not until 1962 that Hopwood discovered from

the records of the Company that it had always lost money and that the respondent had advanced $4,000 to the business in March 1959.

In the result, he dismissed the respondent's claim and awarded to the appellants one half of the damages they had claimed. Those damages represented all the moneys the appellants testified they had paid into the business of the Company. The 50 per cent reduction was on the basis that the respondent could not have reasonably anticipated that the appellants would continue to put money into the business for the length of time which they did. He gave the appellants judgment for $19,350.

On appeal, the Appellate Division allowed the respondent's claim on the note. The majority of the Court directed that the damages claimed by the appellants be referred back for assessment, to be confined to a period of one and one half years from May 31, 1959, with credit to be given for the amounts received by the appellants on the sales of their shares to Haderer and to Vogel. Porter J.A. dissented as to this direction and would have dismissed the counterclaim.

From this judgment the appellants now appeal and the respondent has cross-appealed.

During the course of the argument before us, counsel for the appellants was advised that the Court was unanimously of the view that, if the appellants were entitled to recover any damages based on the claim that they had been induced to purchase the shares by fraudulent misrepresentation, the measure of damages, in the circumstances of this case, was not the amount of money advanced by the appellants to the Company, but the difference between what the appellants had agreed to pay for the shares and their actual value at the time of purchase.

I do not find it necessary to determine whether damages computed in that way have actually been established. I am in agreement with the reasons of Porter J.A., in his dissenting judgment, for deciding that, accepting the findings of the learned trial judge as to the statements made by the respondent to Hopwood, the evidence does not support the conclusion that it was their reliance upon those statements which led the appellants to enter into the contract to purchase the shares.

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The following items of evidence are significant in this regard:

1. It was not the respondent who first sought to effect the sale to the appellants. On the contrary, Hopwood, on learning that the respondent wished to dispose of the business, made the first approach.

2. The respondent's statement about not having to put his hand into his pocket was made, according to Hopwood, on the occasion when the respondent brought in the daily cash register. Hopwood also says that the respondent took him through the book, showed him the amount of the restaurant's sales and explained the book to him. This book clearly disclosed the $4,000 payment made to the Company by the respondent's company, Western Store Fixtures Limited, in March 1959, which the learned trial judge says was not discovered by the appellants until 1962.

3. In considering the impact of the respondent's representation that the restaurant was paying its way, it is significant that the agreement precluded the respondent from receiving payments for the shares (other than the $2,000 cash payment plus the value of the liquor on the premises) unless the business was earning a net profit.

4. It was after the appellants had operated the business for seven months at a loss, and after receiving the balance sheet and statement of liabilities, that they agreed to execute the promissory note in favour of the respondent.

5. Notwithstanding the lack of success in the operation of the restaurant business, the appellants made payments on the note until December 1960.

6. No suggestion of misrepresentation on the part of the respondent was made until after the respondent had sued on the note in August 1962, more than three years after the agreement was made.

In the light of these facts, and for the reasons given by Porter J.A., I am of the opinion that the appellants have failed to establish that they were induced to enter the contract to purchase the shares by reason of fraudulent misrepresentation by the respondent. I would, therefore,

dismiss the appeal and allow the cross-appeal, both with costs. The respondent should be entitled to the costs of the trial and of the appeal to the Appellate Division.

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Appeal dismissed and cross-appeal allowed, both with costs.

Solicitors for the defendants, appellants: Gill, Condrad & Cronin, Calgary.

Solicitors for the plaintiff, respondent: Prothroe, Gibbs, McCruden & Hilland, Calgary.

ÉDOUARD LATREILLE (*Demandeur*) .....APPELANT;

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*Juin 14
Déc. 6

ET

HUBERT LAMONTAGNE et JEAN-PAUL CARRIÈRE (*Défendeurs*) INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Automobile—Accident mortel—Collision entre motocyclette et camion—Responsabilité—Fils mineur adoptif tué—Parents adoptifs ont-ils le bénéfice du droit d'action de l'art. 1056 du Code civil—Code de la Route, 8-9 Eliz. II (Qué.), c. 67, art. 36(13), (18)—Loi de l'adoption, S.R.Q. 1925, c. 196.

Le fils adoptif du demandeur fut tué lorsque la motocyclette qu'il conduisait de l'ouest à l'est est venue en collision avec un camion appartenant au défendeur Lamontagne et conduit dans une direction opposée par son préposé, le défendeur Carrière. L'accident est survenu à l'occasion d'un virage à gauche que le chauffeur du camion entendait faire. Le compagnon du fils du demandeur, qui était assis à l'arrière de la motocyclette, n'a rien vu de ce qui s'est passé; il évalue de 30 à 35 milles à l'heure la vitesse de la motocyclette et déclare n'avoir rien constaté d'anormal jusqu'au moment de la collision. Quant au chauffeur du camion, qui était seul, il raconte qu'il s'est approché de l'intersection à une vitesse de 8 à 10 milles à l'heure, qu'il a quitté sa droite pour se placer à gauche de la ligne blanche, qu'il a vu venir la motocyclette à une vitesse de 50 milles à l'heure et que pour en assurer le passage il a immobilisé son camion qui était alors complètement à gauche de la ligne blanche, pour attendre pendant plusieurs secondes que la motocyclette ait passé. Il raconte que la motocyclette, à environ 50 pieds du camion, commença à louvoyer à gauche et à droite de la ligne blanche et à environ 10 pieds du camion, glissa sur le côté pour venir en frapper l'avant gauche. Le juge au procès

CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Spence.

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jugea que l'accident était imputable au chauffeur du camion et rejeta la prétention de la défense à l'effet que les parents adoptifs n'entrent pas dans la catégorie des personnes auxquelles l'art. 1056 du *Code civil* accorde une action en indemnité. En Cour d'appel, on jugea que le fils du demandeur, avait été le seul responsable de cet accident, et la Cour ne se prononça pas sur le quantum des dommages et sur la portée de l'art. 1056. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge en Chef Taschereau étant dissident.

Les Juges Fauteux, Abbott, Ritchie et Spence: C'est à bon droit que le juge de première instance a conclu à la responsabilité du chauffeur du camion. Ce dernier a violé le *Code de la Route*; il a créé une situation propre à jeter la confusion dans l'esprit des personnes venant en sens opposé, et en regard de toutes les circonstances révélées par la preuve, il a créé le danger que les dispositions du *Code de la Route* avaient pour objet de conjurer.

Il n'y a aucune raison justifiant cette Cour d'intervenir pour modifier sur le quantum des dommages le jugement de la Cour de première instance.

Il ressort des dispositions de la *Loi de l'adoption*, S.R.Q. 1925, c. 196, que par une fiction de droit on a créé une filiation légitime entre les personnes de l'adopté et des adoptants. Le législateur a élevé et situé la famille adoptive au plan juridique de la famille légitime et a même voulu couvrir les traits de la famille adoptive en lui donnant la physionomie de la famille légitime. Vu la règle de l'art. 21 de la *Loi de l'adoption* prescrivant, sauf exception, que dans toute autre loi le mot «enfant» ou tout autre mot du même sens—par exemple le mot «descendant» dans l'art. 1056 du Code—comprend aussi un enfant adopté, et vu aussi les dispositions de l'art. 1056 où les dommages dont il est question résultent en général presque exclusivement de la perte de cette créance réciproque qu'est la créance alimentaire, il n'est plus permis de justifier l'exclusion de la famille adoptive du cadre de l'art. 1056 du Code. On ne peut donc plus affirmer que les mots «ascendant» et «descendant» n'ont jamais, dans l'art. 1056, d'autre sens que le sens généalogique impliquant consanguinité et que ces mots ne réfèrent toujours qu'à la famille légitime. Il s'ensuit que les parents adoptifs, tout comme l'enfant adopté, bénéficient du droit d'action conféré par l'art. 1056 du *Code civil*.

Le Juge en Chef Taschereau, *dissident*: La Cour d'appel a bien jugé lorsqu'elle est arrivée à la conclusion que le conducteur du camion n'avait commis aucune faute engageant sa responsabilité ou celle de son patron. L'art. 1056 du *Code civil* accorde un recours au père adoptif contre l'auteur du décès de son fils adoptif.

Motor vehicle—Fatal accident—Collision between motorcycle and truck—Liability—Adopted child killed—Whether adopting parents can bring action under art. 1056 of the Civil Code—Highway Code, 8-9 Eliz. II (Que.), c. 67, s. 36(13), (18)—Adoption Act, R.S.Q. 1925, c. 196.

The plaintiff's adopted son was killed when the motorcycle which he was driving in an easterly direction collided with a truck belonging to the defendant Lamontagne and driven in an opposite direction by his

servant, the defendant Carrière. The accident occurred as the driver of the truck was preparing to make a left-hand turn. A friend of the victim, who was riding on the back of the motorcycle, saw nothing of what happened; he estimates the speed of the motorcycle at 30 to 35 miles an hour and says that everything had been normal up to the time of the collision. The driver of the truck, who was alone, says that he approached the intersection at a speed of 8 to 10 miles an hour, that he drove his truck to the left side of the centre white line of the road, that he saw the on-coming motorcycle driven at a speed of 50 miles an hour and that he brought his vehicle to a stop on the left of the white line to allow the motorcycle to pass and waited a few seconds for the motorcycle to do so. He says further that the motorcycle, at about 50 feet from his truck, started to zigzag left and right of the white line and that, at about 10 feet from the truck, it skidded on its side until it finally struck the left front end of the truck. The trial judge held that the driver of the truck was solely to blame for the accident and dismissed the contention of the defendants to the effect that the adopting parents do not fall into the category of persons to whom art. 1056 of the *Civil Code* gives an action in indemnity. The Court of Appeal decided that the sole responsibility for the accident rested on the appellant's son and did not express an opinion as to the quantum of damages and as to the scope of art. 1056. The plaintiff appealed to this Court.

Held (Taschereau C.J., *dissenting*): The appeal should be allowed.

Per Fauteux, Abbott, Ritchie and Spence JJ.: The trial judge was right in his finding that the driver of the truck was solely to blame for the accident. The driver had violated the *Highway Code*; he created a situation liable to confuse the drivers coming from the opposite direction, and having regard to all the circumstances revealed by the evidence, he had created the very danger which the dispositions of the *Highway Code* were enacted to prevent.

There was no reason which could justify the intervention of this Court to modify the quantum of damages.

It appears from the provisions of the Adopting Act, R.S.Q. 1925, c. 196, that by a fiction of the law a legitimate filiation has been created between the person of the adopted and the person adopting. The legislator has elevated and placed the adopting family on a juridical level with the legitimate family and has even purported to cover the features of the adopting family by giving it the physiognomy of the legitimate family. Having regard to the rule contained in s. 21 of the *Adopting Act* providing, with certain exceptions, that in any other Act the word "child" or any other words of the same meaning—as for example the word "descendant" in art. 1056 of the Code—shall include also an adopted child, and having regard also to the provisions of art. 1056 where the damages in question are generally almost exclusively the result of the loss of that reciprocal debt which is the alimentary maintenance, it is impossible to justify the exclusion of the adopting family from art. 1056 of the Code. One cannot affirm any more that the words "ascendant" and "descendant" do not have, in art. 1056, any other meaning than the genealogical one implying consanguinity and that these words refer only to the legitimate family. It follows that the adopting parents, as well as the adopted child, have the benefit of the action given by art. 1056 of the *Civil Code*.

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Per Taschereau C.J., *dissenting*: The Court of Appeal has rightly found that the driver of the truck did not commit any fault involving his liability or that of his master. Art. 1056 of the *Civil Code* gives to the adopting parents a right of action against the person causing the death of their adopted child.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Coté J. Appeal allowed, Taschereau C.J. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant une décision du Juge Coté. Appel maintenu, le Juge en Chef Taschereau étant dissident.

Rodolphe Paré, C.R., et *Guy Pépin*, pour le demandeur, appelant.

John Bumbray, C.R., pour les défendeurs, intimés.

LE JUGE EN CHEF (*dissident*):—Aux termes d'un jugement de la Cour supérieure rendu par l'honorable Juge Louis Cousineau le 1er juin 1942, le demandeur et son épouse, qui sont mariés sous le régime de la communauté de biens, ont adopté un enfant mineur né à Montréal, en octobre 1940, et baptisé le 29 octobre de la même année sous les noms de Joseph Jean Pierre Viau.

En vertu de ce jugement, cet enfant adopté devait porter à l'avenir les noms de Joseph Lucien Claude Latreille, soit le nom du père adoptif. Cet enfant a demeuré avec le demandeur et son épouse qui lui ont donné toute l'affection, les soins et l'éducation voulus comme s'il eut été issu naturellement de leur mariage.

Cet enfant, Joseph Lucien Claude Latreille, est décédé des suites d'un accident d'automobile survenu le 27 août 1960, alors qu'il était âgé de dix-neuf ans. A cette date, vers les six heures p.m., cet enfant mineur du demandeur conduisait une motocyclette, la propriété de son père, sur la route N° 29 dans la municipalité d'Oka, en direction de Montréal. Le demandeur allègue que son fils conduisait sa motocyclette à sa droite de la route, mais que, lorsque arrivé à l'intersection de ladite route avec la rue St-Édouard, il

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entra en collision avec un camion, la propriété du défendeur Hubert Lamontagne, conduit par le co-défendeur, Jean-Paul Carrière, employé et préposé du défendeur, qui était alors dans l'exercice et l'exécution de ses fonctions.

La Cour supérieure a maintenu l'action du demandeur pour les dommages résultant de la mort de Claude Latreille et lui a accordé la somme de $9,607. La Cour d'Appel[1] a renversé ce jugement et en est arrivée à la conclusion que le conducteur du camion n'avait commis aucune faute engageant sa responsabilité ou celle de son employeur, et a maintenu l'appel et rejeté l'action.

Je partage entièrement l'opinion et les vues exprimées par M. le Juge en chef Tremblay et par MM. les Juges Rivard et Brossard. Comme eux, je crois qu'aucune faute ne peut leur être attribuée.

Le camion du défendeur circulait sur la route 29, entre Montréal et Oka, sur la rive nord, dans une direction est-ouest, et le conducteur avait l'intention de tourner à gauche pour s'engager dans la rue St-Édouard, vers le sud. Au moment où il s'apprêtait à faire ce virage, il aperçut la motocyclette du jeune Latreille qui venait en sens inverse à une vitesse d'environ trente-cinq milles à l'heure. Le chauffeur du camion immobilisa alors son véhicule à peu près au centre du chemin, laissant de chaque côté du camion l'espace voulu pour permettre un passage libre où la motocyclette pouvait s'engager en toute sécurité.

Il est clair, d'après la preuve, que le chauffeur du camion ne s'est pas engagé dans la rue St-Édouard, et les témoignages et l'ensemble des circonstances révèlent qu'il a tenté d'obliquer vers la droite afin de donner encore un espace plus large à la motocyclette qui venait en sens inverse. C'est ce qui explique que les dommages au camion ont été causés sur le côté gauche.

Le seul témoin qui a vu l'accident est le conducteur du camion, Carrière. C'est lui qui nous raconte les faits que je viens de réciter. Le jeune compagnon, qui accompagnait la victime sur le siège arrière de la motocyclette, n'a rien vu.

Le juge au procès aurait exonéré Carrière, mais il dit qu'il ne le croit pas et la raison donnée me paraît dépourvue de tout fondement juridique. Le juge refuse d'accepter le témoignage de Carrière non pas à cause de l'attitude

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du témoin, de sa façon de témoigner, ni parce qu'il y a contradiction dans son récit des faits. Il n'y a rien dans son comportement qui démontre de l'hostilité, mais la seule et unique raison invoquée par le juge au procès est qu'il est invraisemblable qu'un conducteur de camion attende cinq secondes à l'intersection d'une route pour laisser libre passage à un véhicule venant en sens inverse. Le savant juge croit, en résumé, que les habitudes des chauffeurs modernes sont d'être imprudentes et que l'on ne peut pas croire un témoin qui affirme avoir fait preuve de prudence. Je ne puis accepter cette prétention nouvelle et étonnante qui me paraît totalement déraisonnable.

J'accepte de préférence les conclusions de la Cour d'Appel qui a fait une analyse minutieuse de la preuve et qui est arrivée à la conclusion que le défendeur Carrière n'avait commis aucune faute engageant sa responsabilité ou celle de son patron.

Bien que l'opinion que j'exprime sur la question de responsabilité me dispenserait de me prononcer sur la question de savoir si l'art. 1056 du *Code Civil* accorde un recours au père adoptif contre l'auteur du décès de son fils, il me paraît approprié, cependant, de dire que sur cette question, je partage l'opinion de M. le Juge Fauteux.

L'appel doit être rejeté avec dépens.

Le jugement des Juges Fauteux, Abbott, Ritchie et Spence fut rendu par

LE JUGE FAUTEUX:—L'appelant, tant personnellement qu'en sa qualité de chef de la communauté de biens existant entre lui et son épouse, a réclamé des intimés les dommages résultant du décès de Claude Latreille, leur fils adoptif. Ce dernier trouva la mort, à l'âge de 19 ans, le 27 août 1960, au cours et par suite d'une collision entre la motocyclette qu'il conduisait de l'ouest à l'est sur la route 29, dans la région d'Oka, et le camion d'Hubert Lamontagne conduit dans une direction opposée par son préposé, Jean-Paul Carrière, agissant alors dans l'exécution des fonctions auxquelles il était employé. Survenue à l'occasion d'un virage à gauche, que Carrière entendait faire pour quitter la route 29 et s'engager dans la rue St-Édouard, cette collision résulte directement, suivant le demandeur, des fautes commises par Carrière en la circonstance.

En défense, les intimés ont plaidé que cet accident était exclusivement imputable au jeune Latreille, que le montant des dommages réclamés était exagéré, qu'en droit les parents adoptifs n'entrent pas dans la catégorie des personnes auxquelles l'art. 1056 du *Code Civil* accorde une action en indemnité et que partant il n'y a aucun lien de droit entre eux-mêmes et l'appelant.

La Cour supérieure rejeta la prétention voulant que les parents adoptifs n'aient pas le bénéfice du droit d'action conféré par l'art. 1056 C.C., jugea que l'accident était imputable à Carrière et, réduisant le montant des dommages réclamés, condamna les intimés à payer à l'appelant la somme de $9,607 avec intérêts depuis la date de l'assignation (juin 1961) et les dépens.

En Cour d'Appel[1], on jugea que le jeune Latreille, et non Carrière, était responsable de cet accident et pour cette raison, on n'eut pas à se prononcer sur le *quantum* des dommages et sur la portée de l'art. 1056 C.C. L'appel de Lamontagne et Carrière fut accueilli et l'action de Latreille rejetée avec dépens. D'où le présent pourvoi.

Sur la responsabilité:—Des trois voyageurs, impliqués dans cet accident, deux ont survécu: le jeune René Provin, compagnon de Latreille, et Carrière qui était seul dans le camion. Assis à l'arrière de Latreille sur la motocyclette, Provin, plus petit que Latreille, n'a rien vu de ce qui s'est passé à l'avant; il évalue cependant de trente à trente-cinq milles à l'heure la vitesse de la motocyclette et déclare n'avoir rien constaté d'anormal jusqu'au moment de la collision. Quant à la version de Carrière, il convient, avant d'en faire le récit, de décrire les lieux de l'accident et noter certains faits matériels que la preuve établit. Au moment de l'accident, le temps était clair, le pavé était sec et nul véhicule, autres que la motocyclette et le camion, était engagé sur les lieux. La rue St-Édouard est une rue secondaire d'une largeur d'environ dix-sept pieds, allant du nord au sud, aboutissant et finissant au côté sud de la route 29. La route 29 est une route provinciale, ayant une largeur de trente pieds pavée d'asphalte et dont le centre est indiqué par une ligne blanche. Au point de jonction avec la rue St-Édouard, cette route accuse une élévation progressant en ligne droite de l'est à l'ouest, sur une distance de six cents

[1] [1965] B.R. 624.

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pieds. Au temps de l'accident, il y avait, dans le pavé d'asphalte de la route, du côté sud-ouest de la jonction et près de l'accotement, une dépression d'une profondeur de six pouces et d'un diamètre de cinq pieds et demi, réduisant ainsi à quelque dix pieds la largeur de l'espace libre permettant à la motocyclette de passer sans danger à droite de la ligne blanche. Avant et à l'instant même de la collision, le camion se trouvait complètement à gauche de la ligne blanche; et à l'instant même de la collision, l'avant en était presque en ligne avec le côté est de la rue St-Édouard. Ainsi conduit, ce camion, d'une largeur de six pieds et demi, diminuait encore et d'autant la largeur de l'espace libre permettant le passage de la motocyclette, à droite de la ligne blanche, largeur qui est ainsi finalement devenue réduite à quelque quatre ou cinq pieds. Après l'accident, on a constaté une trace de freins, laissée par la motocyclette. Longue de dix-sept pieds, cette marque de freins commence à peu près en ligne avec le côté ouest de la rue St-Édouard, pour se continuer en ligne droite, parallèlement et à six pieds à la droite, soit au sud, de la ligne blanche, jusqu'au point de contact avec l'avant gauche du camion. Outre les dommages qu'on a constatés à l'avant gauche du camion et qui ont permis de situer à cet endroit le point de contact des deux véhicules, on a observé, après l'accident, que les deux roues d'avant du camion étaient tournées vers la droite, tout comme si, avant l'instant de la collision, Carrière avait tenté une manœuvre pour reprendre sa droite afin de libérer la lisière dans laquelle venait la motocyclette. Carrière, lui-même âgé de 24 ans, donne la version suivante sur la façon dont l'accident s'est produit. Ce jour-là, il était engagé à faire de l'annonce commerciale au moyen des huit haut-parleurs placés sur le toit du camion et permettant une diffusion dans une distance de un demi-mille. Il raconte que s'étant approché de l'intersection à une vitesse de huit à dix milles à l'heure, il a quitté sa droite pour se placer à gauche de la ligne blanche en vue du virage à gauche qu'il entendait faire pour s'engager sur la rue St-Édouard, qu'il a vu venir la motocyclette au haut de la côte, à une vitesse de cinquante milles à l'heure, et que pour en assurer le passage, il a—*alors qu'il était complètement à gauche de la ligne blanche*—immobilisé son camion, pour attendre pendant plusieurs secondes que la motocyclette ait passé, les roues d'avant étant alors, d'après lui, tournées ou, suivant

son expression, «barrées pour virer vers la gauche». Pendant qu'il était ainsi à l'arrêt, dit-il, il surveillait la motocyclette qui, à environ cinquante pieds du camion, commença à louvoyer à gauche et à droite de la ligne blanche et à environ dix pieds du camion, glissa sur le côté pour venir en frapper l'avant gauche. Il apparaît clairement des raisons données au soutien de son jugement, que le Juge de première instance n'a pas ajouté foi à Carrière. Référant particulièrement à l'affirmation qu'il aurait immobilisé son camion pour attendre pendant plusieurs secondes le passage de la motocyclette, le Juge déclare trouver invraisemblable que Carrière ait poussé l'esprit civique à un point ne correspondant pas «aux habitudes de la circulation moderne où l'on tente à tout brûler, feux de circulation, droits de passage, etc.». Ce commentaire du Juge, dit le procureur des intimés à l'instar de la Cour d'appel, ne peut, en soi, justifier juridiquement l'opinion que le Juge s'est formée sur la crédibilité de Carrière. A mon avis, là n'est pas, cependant, l'unique raison de cette opinion. En fait, le Juge au procès qui a observé, vu et entendu témoigner Carrière, n'a certes pas été sans être impressionné de l'insistance qu'on a dû mettre en contre-interrogatoire, au cours duquel le Juge lui-même dut intervenir, pour faire admettre à Carrière qu'au moment du choc, son camion n'était pas au centre de la route, comme il l'avait déclaré dans l'interrogatoire principal, mais complètement à gauche de la ligne blanche. Je crois qu'il y a lieu d'appliquer ici la règle bien connue que Lord Halsbury dans *Montgomerie & Co. v. Wallace-James*[1] formule comme suit à la page 75:

> Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have.

En toute déférence pour ceux qui ont l'opinion contraire, je dirais, comme en a conclu le Juge de première instance, «après avoir minutieusement considéré tous les éléments de preuve qui lui ont été soumis» que, contrairement à ce qu'a dit Carrière, «le camion était encore en mouvement ou tout au moins venait-il de s'arrêter au moment du choc».

[1] [1904] A.C. 73.

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En droit, l'intimé qui voulait tourner à gauche, devait, suivant le *Code de la route,* 8-9 Eliz. II, c. 67, art. 36, para. 18, s'approcher de la ligne médiane de la route 29, continuer en ligne droite jusqu'à la ligne médiane de la rue St-Édouard et effectuer le virage à gauche dès que la voie était libre. Il devait aussi, suivant le para. 13 du même article, céder le passage à tout véhicule venant en direction inverse et entrant dans l'intersection ou qui en était si près qu'il pouvait y avoir danger de tourner devant ce véhicule. Ce qui est certain, c'est qu'en quittant sa droite pour conduire à gauche de la ligne blanche, avant d'arriver au côté est de l'intersection, puis, étant arrivé à ce point, en tentant de reprendre sa droite, comme semble fortement l'indiquer la position des roues d'avant du camion, ou en immobilisant, comme lui-même l'a prétendu, son véhicule complètement à gauche de la ligne blanche, Carrière a violé le *Code de la route,* il a créé une situation propre à jeter la confusion dans l'esprit des personnes venant en sens opposé, et au regard de toutes les circonstances révélées par la preuve, il a créé le danger que ces dispositions du *Code de la route* avaient pour objet de conjurer et dont l'inobservance, en l'espèce, eut l'accident pour conséquence. Aussi bien, soit dit avec respect pour ceux qui entretiennent l'opinion contraire, est-ce à bon droit que le Juge de première instance a conclu à sa responsabilité et partant à celle de son patron, Lamontagne.

Sur le quantum des dommages:—Le factum des intimés n'indique aucune raison justifiant cette Cour d'intervenir pour modifier sur ce point le jugement de la Cour supérieure. D'ailleurs, à l'audition, le procureur des intimés n'a pas insisté sur la question.

L'article 1056 C.C. et la Loi de l'adoption:—L'on sait que l'art. 1056 tire son origine des Statuts Refondus du Canada de 1859, c. 78, qui reproduisent la Loi 10-11 Vict. (1847), c. 6, applicable au Bas-Canada comme au Haut-Canada et qui, sauf en ce qui a trait aux dispositions relatives au duel, est modelée, en substance sinon en expression, sur le statut impérial *The Fatal Accidents Act,* 9-10 Vict., c. 93, communément connu sous le nom de *Lord Campbell's Act.* L'on sait aussi que cet article a été introduit au Code, sans avoir passé par les rapports des codificateurs et sans avoir figuré parmi les amendements que la Législature du Bas-

Canada a apportés au projet de code, par la Loi 29 Vict. (1866), c. 41, mais qu'il apparaît à cette édition du *Code Civil* du Bas-Canada qui, sous l'Union, fut imprimée par l'Imprimeur de la Reine de la *province du Canada* et qui a subséquemment reçu de la Législature de la *province de Québec* une reconnaissance officielle par la Loi 31 Vict. (1868), c. 7, où il est formellement décrété que cette édition a force de loi.

Le premier alinéa de l'art. 1056 est le seul qui nous intéresse en l'espèce. Tel qu'il se lit, depuis qu'il a été modifié en 1930, par la Loi 20 Geo. V, c. 98, art. 1, afin de remplacer, dans la version française, les mots «père, mère et enfants» par les mots «ascendants et ses descendants»,—assurant ainsi la concordance avec la version anglaise—, ce premier alinéa prescrit que:

> Art. 1056. Dans tous les cas où la partie contre qui le délit ou quasi délit a été commis décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, ses ascendants et ses descendants ont, pendant l'année seulement à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès.

L'appelant ne prétend pas, et, me semble-t-il, il serait maintenant difficile de prétendre, que ce texte permet, *per se* et sans plus, d'inclure comme bénéficiaire de la disposition, la famille adoptive, *i.e.*, l'enfant adopté et les parents adoptifs. En effet, dans la cause de *Town of Montreal West v. Hough*[1], cette Cour ayant à se prononcer sur la validité de l'action, prise en cette affaire avant l'amendement de 1930, par le père et la mère d'un enfant naturel, déclara que le droit d'action conféré par cet article était restreint à la famille légitime. Dans ses raisons de jugement, le juge Rinfret, tel qu'il était alors, déclare que les mots «père», «mère» et «enfants», dans l'art. 1056, ne pouvaient avoir pris, dans la pensée du Législateur du Québec, un sens différent de celui qu'ils ont dans les autres articles du Code et que, lorsque ces mots y sont employés sans qualificatif,—excepté si le texte impose une interprétation différente,—ils réfèrent exclusivement à la paternité, à la maternité et à la filiation légitimes. Ce raisonnement vaut aussi pour l'interprétation des mots «ascendants» et «descendants», qui ont remplacé mais comprennent les mots «père» et «mère» et le mot «enfants» respectivement.

[1] [1931] S.C.R. 113.

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Et c'est ainsi que dans *Windsor Hotel Limited v. Dame Stadnicka et al*[1], où il s'agissait de la réclamation faite de la part d'enfants naturels, le juge Adjutor Rivard, adoptant une même interprétation, concluait que

> ...l'amendement de 1930 n'a rien changé à l'article 1056 quant au caractère légitime de la parenté des personnes ayant droit de réclamer et que, par conséquent, les enfants naturels ne sont pas compris dans l'énumération de ceux à qui l'article 1056 donne une action.

En fait, l'appelant a concédé, qu'antérieurement à 1924, alors que l'adoption n'était pas reconnue par la loi du Québec, la famille adoptive n'était pas considérée, par la jurisprudence, comme bénéficiaire de l'art. 1056, ainsi qu'en avait jugé la Cour supérieure dans *Dionne v. La Compagnie des Chars Urbains*[2], où il s'agissait d'une réclamation faite par le père adoptif *de facto* et non *de jure*. Cette décision, antérieure à 1924, pas plus d'ailleurs que celle de *Town of Montreal West v. Hough, supra,* où, tel que déjà indiqué, il s'agissait d'une action intentée postérieurement à 1924, mais non par des parents adoptifs, ne peuvent nous assister, en l'espèce, pour déterminer cette question, qui, tel que déclaré par les procureurs des parties, n'a jamais été décidée en cour d'appel ou en cette Cour, savoir: l'un des effets légaux du jugement d'adoption n'est-il pas d'inclure la famille adoptive dans la catégorie des bénéficiaires de l'article 1056? Il faut donc se référer à la *Loi de l'adoption,* S.R.Q. 1925, c. 196.

L'objet de la *Loi de l'adoption,* tel que le révèlent l'esprit, le sens et la fin véritables de ses prescriptions, est ainsi généralement décrit par Trudel, Traité de Droit civil du Québec, vol. 2., p. 153:

> Toutes les dispositions de notre loi d'adoption visent à réaliser, dans la famille adoptive, jusqu'à l'atmosphère de la famille réelle, dans l'espoir que la première remplira exactement le même rôle que la seconde. Cette haute visée sociale fournira la raison et l'explication de principes qui seraient autrement excessifs. Dans les conditions et dans les effets de l'adoption nous apercevrons toujours ce désir impérieux de la loi.

Parmi les dispositions relatives aux effets du jugement d'adoption, il importe de signaler et citer celles des arts. 16 et 21. Ces articles établissent ce que désormais, dans l'économie du droit civil qu'ils modifient fondamentalement en ce qui concerne les droits et obligations de la personne, doit être la position juridique de la famille adoptive.

[1] (1938), 64 B.R. 298 à 303. [2] (1895), 7 C.S. 449.

Art. 16. A compter du jugement accordant la demande d'adoption:

1. Les parents, le tuteur ou les personnes chargées de la garde et des soins de l'enfant perdent tous les droits qu'ils possèdent en vertu du *droit civil* et sont dispensés de toutes les obligations légales auxquelles ils sont tenus relativement à cet enfant;

2. L'adopté est considéré à tous égards, relativement à cette garde, à l'obéissance envers ses parents et aux obligations des enfants envers leurs père et mère, comme l'enfant propre de ses parents d'adoption;

3. Les parents d'adoption sont tenus de nourrir, entretenir et élever l'enfant comme s'il était le leur propre.

Art. 21. Le mot «enfant», ou tout autre mot de même sens dans une autre loi ou dans un acte, comprend aussi un enfant adopté, à moins que le contraire n'apparaisse clairement, mais il ne comprend pas l'adopté lorsqu'il s'agit de substitution dans laquelle les enfants propres de l'adoptant sont les grevés ou les appelés.

Commentant plus particulièrement sur les effets du jugement d'adoption, Trudel, *supra*, aux pages 162 et suivantes, note comment le législateur donne ainsi à l'enfant une famille légale, assimilable à la famille légitime; comment les parents naturels perdent tout droit civil et sont dispensés de toute obligation légale par rapport à l'enfant adopté et que le déplacement de la puissance paternelle entraîne les conséquences suivantes:

Entre les personnes de l'adopté et des adoptants il existe une filiation légitime: une fiction de droit en fait une réalité juridique. Entre eux serait (sic) dus et exigibles tous devoirs et droits de famille; aliments et successibilité réciproques, garde, entretien, éducation, correction. Outre ces précisions de l'article 16, l'article 21 déclare que le mot enfant, dans les lois et les actes, comprend toujours l'enfant adopté. Sauf deux exceptions: une indication contraire; dans les substitutions, si le grevé ou l'appelé est l'enfant propre de l'adoptant. La jurisprudence a traité comme légitime l'enfant adopté. Une mère adoptive, sans être tutrice, peut réclamer en son nom des aliments pour les besoins de son enfant d'adoption (Flamand v. Corriveau, 73 C.S., 185). On lui étend une prérogative accordée en pratique aux mères légitimes et refusée aux filles-mères. Autre exemple: l'adopté a, comme les autres enfants légitimes, contribué de son salaire à la caisse familiale, au budget général des dépenses communes; il n'a pas d'action en recouvrement contre l'adoptant. Il agissait à titre d'enfant, de débiteur alimentaire (Bouchard v. Perron, 74 C.S., 141).

Dans une étude intitulée *The Quebec Adoption Act and Domicile* et publiée dans la Revue du Barreau, tome 16, 1956, page 5, l'auteur, Walter S. Johnson, Q.C., référant particulièrement à l'art. 16, indique, à la page 6, une même ligne de pensée:

Section 16, taking the child upon its adoption out of the custody and care of its parents, depriving them of all rights they possessed, and freeing them of all obligations, *places the child instantly in the family of the adopter "as the adopting parents' own child." Here the Code begins to*

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apply. As their own child, he owes them honor and respect (art. 242), is subject to their authority during minority (art. 243), cannot leave the home without parental consent (art. 244), and takes the domicile of his adoptive father (art. 83); and so on. That is one group of "effects of adoption".

Signalons aussi que dans d'autres articles de la loi, on donne au fait de l'adoption un caractère strictement confidentiel. C'est ainsi que, pour conjurer tout danger d'indiscrétion, on a prescrit la forme du certificat de naissance que doit, sur demande, livrer le dépositaire des registres de l'état civil (S.R.Q. 1941, c. 324, art. 26). Aux mêmes fins, on a formellement décrété confidentiels les dossiers de la cour relatifs aux jugements d'adoption, dont on a prohibé la consultation à moins d'une permission spéciale de la cour, que celle-ci ne peut accorder que dans des circonstances spécifiées ou toute autre estimée suffisamment grave ou importante par le juge pour justifier «dans l'intérêt de l'adopté» la consultation du dossier et qu'à la condition que, dans tous les cas, celui qui demande cette permission, établisse, à la satisfaction du juge, «un intérêt compatible avec le plus grand bien de l'adopté» (8-9 Elizabeth II, c. 10, art. 6).

De ce qui précède, il ressort, ainsi qu'on s'en exprime dans Trudel, *supra*, que par une fiction de droit qui en fait une réalité juridique, on a créé une filiation légitime entre les personnes de l'adopté et des adoptants. Entre adopté et adoptants, on a créé—particulièrement quant aux aliments—des droits et obligations qui, dans la famille légitime, sont respectivement ceux de l'enfant vis-à-vis son père et sa mère et ceux de ces derniers vis-à-vis leur enfant. Ainsi, peut-on affirmer que le Législateur a élevé et situé la famille adoptive au plan juridique de la famille légitime et même voulu, en prescrivant la forme du certificat de naissance et décrétant le caractère confidentiel du dossier de l'adoption, couvrir les traits de la famille adoptive en lui donnant, et lui assurant par des mesures fortifiées de sanctions pénales, la physionomie de la famille légitime.

Cette conclusion, conjuguée (i) avec la règle de l'art. 21, *supra*, prescrivant, «*à moins que le contraire n'apparaisse clairement*» et sauf l'exception relative aux substitutions, que dans toute autre loi le mot «enfant» ou tout autre mot du même sens,—tel le mot «descendants», dans l'art. 1056, qui, comme ci-dessus indiqué, remplace mais implique le

mot «enfant»,—comprend aussi un enfant adopté et (ii) avec les dispositions de l'art. 1056, où les dommages, pour le recouvrement desquels le droit d'action est conféré aux bénéficiaires de la disposition, résultent, en général, presque exclusivement de la perte de cette créance réciproque qu'est la créance alimentaire, ne permet plus de justifier l'exclusion de la famille adoptive du cadre de l'art. 1056. L'intimé ne conteste guère que l'enfant adopté ait le bénéfice des dispositions de l'art. 1056; l'art. 21 suffit pour faire obstacle à la prétention contraire. Il soumet, cependant, que toute autre est la situation en ce qui concerne les parents adoptifs. Le mot «ascendants», argumente-t-il, employé au sens généalogique, implique un lien du sang et ne saurait conséquemment comprendre les parents adoptifs. A mon avis, ce raisonnement fait abstraction de la règle posée par l'art. 21 et de cette fiction de droit qui crée une filiation légitime entre adopté et adoptants, ce qui, dès lors, ne permet plus d'affirmer que les mots «ascendants» et «descendants» n'ont jamais, dans l'art. 1056, d'autre sens que le sens généalogique impliquant consanguinité et que ces mots ne réfèrent toujours qu'à la famille légitime.

A l'instar du juge de première instance, je dirais donc que les parents adoptifs, tout comme l'enfant adopté, bénéficient du droit d'action conféré par l'art. 1056 et que partant, la prétention des intimés qu'il y a absence de lien de droit entre les parties ne peut être accueillie.

Pour toutes ces raisons, je maintiendrais l'appel et infirmerais le jugement de la Cour du banc de la reine, avec dépens, et rétablirais le jugement de première instance.

Appel maintenu avec dépens, LE JUGE EN CHEF TASCHEREAU *étant dissident.*

Procureurs du demandeur, appelant: Pinard, Pigeon, Paré, Cantin & Thomas, Montréal.

Procureurs des défendeurs, intimés: Bumbray, Carroll, Cardinal & Dansereau, Montréal.

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*Nov. 23, 24
Dec. 19

CANADA SECURITY ASSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

DENISE LUCILLE MARIE JOYNT, Administratrix of the estate of Stanley Willard Joynt, Deceased, suing on behalf of herself and all persons having judgments or claims against the insured, Charles Keyworth Topp (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Automobile—Judgments obtained by plaintiff against insured —Class action commenced against insurance company—Action by insured against his insurer dismissed—Whether plaintiff bound by judgment in insured's action against insurer—The Saskatchewan Insurance Act, 1960, 1960 (Sask.), c. 77, s. 219(1).

Appeals—Motion to quash—Whether judgment appealed from a final judgment.

In actions arising out of an automobile accident the plaintiff J obtained two judgments against T, one as administratrix of the estate of her husband under *The Fatal Accidents Act,* and one for injuries to her two children. Because there was an appeal and a reassessment of damages, it was not until January 1964 that the damages in the *Fatal Accidents* action were finally ascertained at a sum in excess of $90,000. In March 1963, J had begun a class action against the defendant insurance company under s. 219(1) of *The Saskatchewan Insurance Act, 1960,* suing on behalf of herself and all persons having judgments or claims against the insured T.

An action started by T in June 1962 against his insurer to recover his costs of defence and for a declaration that at the time of the collision he was entitled to be indemnified under his policy was dismissed on December 31, 1963, on the ground that T was in breach of the condition of the policy relating to the consumption of liquor.

In J's action against the insurance company a motion was brought in June 1965 which was designed to end the action. The insurance company sought to have it determined that J was bound by the judgment in T's action against his insurer, asserting that this was a complete defence to J's action in so far as excess coverage was concerned. The judge of first instance dismissed the motion and this dismissal was affirmed by the Court of Appeal. The insurance company then appealed to this Court.

On the opening of the appeal, a motion was made for an order quashing the appeal on the ground that the judgment appealed from was not a final judgment.

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

Held: Both the motion to quash and the appeal should be dismissed.

J was not bound by the judgment in T's action to which she was not a party. T did not stand in any relationship of privy to her. She was entitled to have her right to recover against the insurance company determined in her statutory action under s. 219(1) of *The Saskatchewan Insurance Act, 1960*. T and the insurance company could not determine this right by litigation between themselves and then tell her that it was all over. The insurance company would have to prove its defence under this policy against her in her action and it was reasonable that they should do so. *Global General Insurance Co. v. Finlay and Layng*, [1961] S.C.R. 539, discussed.

With respect to the motion to quash, had the insurance company's motion been granted in the Saskatchewan Courts, this would have finally disposed of the matter as to excess coverage. The liability to pay the statutory limit of $5,000 was never in question. Leave to appeal was, therefore, unnecessary.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, dismissing an appeal from a judgment of MacDonald J. Appeal dismissed.

R. Rees Brock and *Richard J. Scott*, for the defendant, appellant.

James A. Griffin and Harold A. Dietrich, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Denise Lucille Marie Joynt sued two motorists, Topp and Ritco, for the death of her husband and injuries to her two children. The husband and children were innocent bystanders at the scene of the accident. Ritco was exonerated but Mrs. Joynt obtained two judgments against Topp, one as administratrix of the estate of her husband under *The Fatal Accidents Act*, R.S.S. 1953, c. 102, and one for injuries to the two children. Because there was an appeal and a reassessment of damages, it was not until January 1964 that the damages in the *Fatal Accidents* action were finally ascertained at a sum in excess of $90,000. In March 1963, Mrs. Joynt had begun the present class action against the insurance company under s. 219(1) of *The Saskatchewan Insurance Act, 1960*, 1960 (Sask.), c. 77, suing on behalf of herself and all persons having judgments or claims against the insured Topp.

In June of 1962, Topp had started an action against his insurer, the present appellant, Canada Security Assurance

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Company, to recover his costs of defence and for a declaration that at the time of the collision he was entitled to be indemnified under his policy. This action was dismissed by Tucker J. on December 31, 1963, on the ground that Topp was in breach of the condition of the policy relating to the consumption of liquor. No appeal was taken from this judgment.

The next step that we are concerned with in the Joynt action against the insurance company is a motion brought in June 1965 which was designed to end the action. The insurance company sought to have it determined that Mrs. Joynt was bound by the judgment of Tucker J. in *Topp v. Canada Security Assurance Company,* asserting that this was a complete defence to Mrs. Joynt's action in so far as excess coverage was concerned. MacDonald J. dismissed this motion. This dismissal was affirmed by the Court of Appeal. The insurance company now appeals to this Court.

I do not think that Mrs. Joynt is bound by the judgment in the *Topp* action to which she was not a party. Topp did not stand in any relationship of privy to her. She is entitled to have her right to recover against the insurance company determined in her statutory action under s. 219(1) of *The Saskatchewan Insurance Act, 1960.* Topp and the insurance company cannot determine this right by litigation between themselves and then tell her that it is all over. The insurance company will have to prove its defence under this policy against her in her action and it is reasonable that they should do so. If they had been prudent they would have seen to it that both actions were on the list together at the trial. Then there would not have been the present difficulties.

Counsel for the appellant submitted that *Global General Insurance Company v. Finlay and Layng*[1] was authority for his proposition that Mrs. Joynt is bound by the judgment in *Topp v. Canada Security Assurance Company.* I do not think that this submission is sound.

At the trial on the question of liability for the accident in the *Global* case the insurance company refused to defend. The car was originally owned by Rheta Campbell. She died and ownership of the car became vested in Margaret Jean Campbell, her executrix. Layng was the driver of

[1] [1961] S.C.R. 539.

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the car at the time of the accident. He had the car with the consent of the executrix. The judge found that Layng was negligent and responsible for the accident, and that Margaret Jean Campbell was responsible as owner. The trial judge was not concerned with the terms of any insurance policy. He simply decided that Margaret Jean Campbell was the owner as executrix and, as owner, was responsible for the damages under *The Highway Traffic Act*.

Both Margaret Jean Campbell and Layng then sued the insurance company for indemnity. For the first time the question arose whether Margaret Jean Campbell was covered as executrix. The insurance company pleaded that she was not and that the policy covered Rheta Campbell and only during her lifetime. The trial judge in this action decided that the third party liability coverage terminated upon the death of Rheta Campbell.

In the Court of Appeal and in this Court it was held that where a policy provides for indemnity against third party liability to "the insured, his executors and administrators and. . .every other person who with the insured's consent personally drives the automobile", the insurer's obligation of indemnity continues during the policy period, even though the insured owner has died, where title to the car passes to the executrix and third party liability was incurred by a person driving the car with the executrix's consent.

So far there is nothing in the *Global* case to assist the appellant. The second point in the *Global* case deals with what must be proved in the statutory action. The insurance company had urged that the whole cause of action against the insured had to be proved. This was rejected at trial, on appeal and in this Court. The question in the statutory action is not whether the judgment in the liability action is correct but whether the plaintiff has a judgment against the insured for which indemnity is provided in the motor liability policy. A plaintiff in such an action proves his case by putting in the judgment against the insured, the insurance policy and proof of non-payment. All else is a matter of defence with the onus of proof on the insurance company.

Counsel for Mrs. Joynt moved at the opening of the appeal for an order quashing the appeal on the ground that

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the judgment appealed from was not a final judgment. The motion to quash and the appeal were argued together and no additional costs were incurred. Had the insurance company's motion been granted in the Saskatchewan Courts, this would have finally disposed of the matter as to excess coverage. I think that counsel for the insurance company is right in saying that the liability to pay the statutory limit of $5,000 was never in question. Leave to appeal was, therefore, unnecessary.

I would dismiss the motion to quash but without costs and would dismiss the appeal with costs.

Motion to quash dismissed without costs; appeal dismissed with costs.

Solicitors for the defendant, appellant: Thompson, Dilts & Co., Winnipeg.

Solicitors for the plaintiff, respondent: Pearce, Dietrich & Co., Regina.

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*Nov. 4
Dec. 19

HER MAJESTY THE QUEEN .....APPELLANT;

AND

HERBERT CARKER .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Unlawful and wilful damage to public property—Defence of having acted under threat—Whether trial judge erred in ruling evidence of compulsion inadmissible—Whether accused in danger as a result of threats—Criminal Code, 1953-54 (Can.), c. 51, ss. 7, 17, 371, 372.

The respondent was convicted of having unlawfully and wilfully damaged public property. At trial, he admitted having damaged the plumbing fixtures in the cell where he was incarcerated but, through his counsel, he sought to introduce evidence to show that he had committed this offence under the compulsion of threats and was therefore entitled to be excused by virtue of s. 17 of the *Criminal Code* and that he was also entitled to avail himself of the *Common Law* defence of "duress" by virtue of s. 7 of the Code. The nature of this evidence, as outlined by counsel for the accused, was that the offence had been committed during a disturbance in the course of which a substantial body of prisoners, shouting in unison from their separate cells, threatened the respondent, who was not joining in the disturbance, that if he did not

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

break the plumbing fixtures in his cell he would be kicked in the head, his arms would be broken and he would get a knife in the back at the first opportunity. The trial judge ruled that the proposed evidence did not indicate a defence or excuse available at law and ruled the evidence inadmissible. The Court of Appeal held that the evidence should have been presented to the jury, quashed the conviction and ordered a new trial. The Crown appealed to this Court.

Held: The appeal should be allowed, and the conviction restored.

The trial judge was right in deciding that the proposed evidence did not afford an excuse within the meaning of s. 17 of the *Criminal Code*. The question of whether immediate threats of future death or grievous bodily harm constitute an excuse for committing a crime within the meaning of s. 17 of the Code and the question of whether a person can be present within the meaning of that section when he is locked in a separate cell from the place where the offence is committed are both questions which depend upon the construction to be placed on section 17 and they are therefore questions of law and not questions of fact for the jury. Accepting the outline made by defence counsel as being an accurate account of the evidence which was available, there was nothing in it to support the defence that the act was not done wilfully within the meaning of ss. 371(1) and 372(1) of the Code, and there was accordingly no ground to justify the trial judge in permitting the proposed evidence.

Droit criminel—Dommage à un bien public causé illégalement et volontairement—Défense de contrainte exercée par des menaces—Le juge au procès a-t-il erré en décidant que la preuve de contrainte était inadmissible—L'accusé était-il en danger comme résultat des menaces—Code Criminel, 1953-54 (Can.), c. 51, arts. 7, 17, 371, 372.

L'intimé a été trouvé coupable d'avoir causé illégalement et volontairement du dommage à un bien public. Lors du procès, il a admis avoir endommagé la tuyauterie dans la cellule de la prison où il était détenu mais, par l'entremise de son avocat, il a tenté d'introduire une preuve démontrant qu'il avait commis cette offense sous l'effet de la contrainte exercée par des menaces et qu'il avait droit en conséquence d'être excusé en vertu de l'art. 17 du *Code Criminel* et qu'il avait aussi le droit de se prévaloir de la défense de droit commun de «coercition» en vertu de l'art. 7 du Code. La nature de cette preuve, telle qu'exposée par son avocat, était à l'effet que l'offense avait été commise à l'occasion d'un tumulte durant lequel une partie considérable des prisonniers, criant tous ensemble à tue-tête de leurs cellules respectives, avaient menacé l'intimé, qui ne s'était pas joint au tumulte, que s'il ne brisait pas la tuyauterie de sa cellule on le frapperait à la tête, on lui briserait les bras et on le poignarderait dans le dos à la première occasion. Le juge au procès décida que la preuve que l'on voulait offrir ne démontrait pas une défense ou une excuse disponible en droit et rejeta la preuve comme n'étant pas admissible. La Cour d'appel jugea que la preuve aurait dû être présentée au jury, cassa le verdict de culpabilité et ordonna un nouveau procès. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité rétabli.

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Le juge au procès a eu raison de décider que la preuve que l'on voulait offrir n'était pas une excuse selon le sens de l'art. 17 du *Code Criminel*. La question de savoir si des menaces immédiates de mort future ou de lésions corporelles graves constituent une excuse pour commettre un crime dans le sens de l'art. 17 du Code et la question de savoir si une personne peut être présente dans le sens de cet article lorsqu'elle est enfermée sous clef dans une cellule séparée de l'endroit où l'offense est commise, sont deux questions qui dépendent de l'interprétation de l'art. 17 et qui sont en conséquence des questions de droit et non pas des questions de fait pour le jury. Si l'on accepte l'exposé fait par l'avocat de l'accusé comme étant un récit fidèle de la preuve qui était disponible, il n'y a rien dans cet exposé pour supporter la défense que l'offense n'avait pas été commise volontairement dans le sens des arts. 371(1) et 372(1) du Code, et en conséquence il n'y avait aucune raison justifiant le juge au procès de permettre la présentation de cette preuve.

APPEL de la Couronne d'un jugement de la Cour d'appel de la Colombie-Britannique[1], ordonnant un nouveau procès. Appel maintenu.

APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia[1], ordering a new trial. Appeal allowed.

W. G. Burke-Robertson, Q.C., for the appellant.

Frank G. P. Lewis, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal by the Attorney General of British Columbia from a judgment of the Court of Appeal[1] of that Province, from which Mr. Justice MacLean dissented, and by which it was ordered that the respondent's conviction for unlawfully and wilfully damaging public property and thereby committing mischief, should be set aside and that a new trial should be had.

At the trial the respondent admitted having damaged the plumbing fixtures in the cell where he was incarcerated at Oakalla Prison Farm in British Columbia but, through his counsel, he sought to introduce evidence to show that he had committed this offence under the compulsion of threats and was therefore entitled to be excused for committing it by virtue of the provisions of s. 17 of the *Criminal Code*

[1] (1966), 48 C.R. 313, 4 C.C.C. 212.

and that he was also entitled to avail himself of the common law defence of "duress" having regard to the provisions of s. 7 of the *Criminal Code*.

Under the latter section it is provided that:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act . . . *except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.*

The italics are my own.

I agree with the learned trial judge and with MacLean J.A. that in respect of proceedings for an offence under the *Criminal Code* the common law rules and principles respecting "duress" as an excuse or defence have been codified and exhaustively defined in s. 17 which reads as follows:

> 17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

At the outset of the proceedings at the trial in the present case and in the absence of the jury, Mr. Greenfield, who acted on behalf of the accused, informed the Court that he intended to call evidence of compulsion and duress and he elected to outline the nature of this evidence which was that the offence had been committed during a disturbance, apparently organized by way of protest, to damage property at the Prison Farm in the course of which a substantial body of prisoners, shouting in unison from their separate cells, threatened the respondent, who was not joining in the disturbance, that if he did not break the plumbing fixtures in his cell he would be kicked in the head, his arm would be broken and he would get a knife in the back at the first opportunity.

The question which the learned trial judge was required to determine on Mr. Greenfield's application was whether the proposed evidence which had been outlined to him indicated a defence or excuse available at law; he decided

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that it did not and the majority of the Court of Appeal having taken a different view, the Attorney General now appeals to this Court.

There can be little doubt that the evidence outlined by Mr. Greenfield, which was subsequently confirmed by the evidence given by the ringleaders of the disturbance in mitigation of sentence, disclosed that the respondent committed the offence under the compulsion of threats of death and grievous bodily harm, but although these threats were "immediate" in the sense that they were continuous until the time that the offence was committed, they were not threats of "immediate death" or "immediate grievous bodily harm" and none of the persons who delivered them was present in the cell with the respondent when the offence was committed. I am accordingly of opinion that the learned trial judge was right in deciding that the proposed evidence did not afford an excuse within the meaning of s. 17 of the *Criminal Code*.

In the course of his most thoughtful judgment in the Court of Appeal, Mr. Justice Norris had occasion to say:

> The question of whether or not a person threatening was present goes to the question of the grounds for the fear which the appellant might have. In my opinion a person could be present making a threat although separated by the bars of the cell. These are all matters which should have gone to the jury, as was the question of whether or not the threat of death or grievous bodily harm was an immediate one—a question of degree. They might well consider that the threat was immediate as being continuous, as it was in this case, that it would be all the more frightening because of the uncertainty as to when it actually might happen, and therefore force him to act as he did.

With the greatest respect it appears to me that the question of whether immediate threats of future death or grievous bodily harm constitute an excuse for committing a crime within the meaning of s. 17 and the question of whether a person can be "present" within the meaning of that section when he is locked in a separate cell from the place where the offence is committed are both questions which depend upon the construction to be placed on the section and they are therefore questions of law and not questions of fact for the jury. *See Vail v. The Queen*[1] and *The Queen v. Sikyea*[2].

[1] [1960] S.C.R. 913 at 920, 33 W.W.R. 325, 129 C.C.C. 145.

[2] [1964] S.C.R. 642 at 645, 49 W.W.R. 306, 44 C.R. 266, 2 C.C.C. 129, 50 D.L.R. (2d) 80.

In support of the suggestion that the threat in the present case was "immediate and continuous" Mr. Justice Norris relied on the case of *Subramaniam v. Public Prosecutor*[1], in which the Privy Council decided that the trial judge was wrong in excluding evidence of threats to which the appellant was subjected by Chinese terrorists in Malaya. In that case it was found that the threats were a continuous menace up to the moment when the appellant was captured because the terrorists might have come back at any time and carried them into effect. Section 94 of the Penal Code of the Federated Malay States, which the appellant sought to invoke in that case provided:

> 94. Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; . . .

The distinctions between the *Subramaniam* case and the present one lie in the fact that Subramaniam might well have had reasonable cause for apprehension that instant death would result from his disobeying the terrorists who might have come back at any moment, whereas it is virtually inconceivable that "immediate death" or "grievous bodily harm" could have come to Carker from those who were uttering the threats against him as they were locked up in separate cells, and it is also to be noted that the provisions of s. 17 of the *Criminal Code* are by no means the same as those of s. 94 of the Penal Code of the Federated Malay States; amongst other distinctions the latter section contains no provision that the person who utters the threats must be present when the offence is committed in order to afford an excuse for committing it.

Both Mr. Justice Norris and Mr. Justice Branca in delivering their separate reasons for judgment in the Court of Appeal, expressed the view that the evidence which was tendered should have been admitted on the issue of whether the respondent acted wilfully in damaging the prison plumbing or whether he was so affected by the threats uttered against him as to be incapable of adopting any other course than the one which he did.

[1] [1956] 1 W.L.R. 965.

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The relevant provisions of the *Criminal Code* read as follows:

372(1) Every one commits mischief who wilfully

(*a*) destroys or damages property, . . .

(3) Every one who commits mischief in relation to public property is guilty of an indictable offence and is liable to imprisonment for fourteen years.

On this phase of the matter, Mr. Justice Norris had this to say:

> In making the ruling which he did the learned trial judge deprived the appellant of what could be a substantial defence to the charge or an excuse under s. 17 without hearing the evidence. The jury could not decide whether the act was in fact wilful. This was not a matter on which the judge might rule. The length to which the evidence might go to disprove the essentials of the charge or to prove the requirements of s. 17 could never in the absence of the evidence of witnesses be apparent either to the learned judge or to the jury.

With the greatest respect, this portion of Mr. Justice Norris' reasons for judgment appears to overlook the fact that "the length to which the evidence might go . . ." was fully outlined to the learned judge by counsel for the respondent when he was making the application.

In this regard it is important to bear in mind the fact that "wilful" as it is used in Part IX of the *Criminal Code* is defined in s. 371(1) which reads, in part, as follows:

> 371(1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The evidence outlined to the learned trial judge discloses that the criminal act was committed to preserve the respondent from future harm coming to him, but there is no suggestion in the evidence tendered for the defence that the accused did not know that what he was doing would "probably cause" damage. Accepting the outline made by defence counsel as being an accurate account of the evidence which was available, there was in my view nothing in it to support the defence that the act was not done "wilfully" within the meaning of s. 371(1) and 372(1) of the *Criminal Code* and there was accordingly no ground to justify the learned trial judge in permitting the proposed evidence to be called in support of such a defence.

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In view of all the above, I would allow this appeal, set aside the judgment of the Court of Appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: G. L. Murray, Vancouver.

Solicitor for the respondent: D. E. Greenfield, Vancouver.

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*Juin 15
Déc. 6

LA CITÉ DE STE-FOY ..... APPELANTE;

ET

LA SOCIÉTÉ IMMOBILIÈRE ENIC INC. ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Expropriation—Lots non subdivisés—Indemnité basée sur la subdivision—Déduction pour frais de subdivision—Code de Procédure Civile, art. 1066.

La municipalité a exproprié, en vue d'établir un parc de loisirs, un terrain appartenant à l'intimée. Ce terrain n'était pas subdivisé en lots à bâtir, mais son usage commercial le plus efficace était la subdivision et la vente de lots à bâtir. La Régie des Services publics a établi la valeur de ces lots, une fois pourvus des services essentiels, à $0.65 le pied carré. Ce chiffre n'est pas contesté par l'expropriée devant cette Cour. La Régie a alors fait une déduction de 33 pour cent pour l'aménagement des services aux lots à subdiviser, basée sur sa propre expérience des questions de ce genre, et a accordé la somme de $60,000. La Cour d'appel a jugé que la Régie ne pouvait, en l'absence de preuve à cet effet devant elle, faire cette déduction, a cassé le jugement homologuant la décision de la Régie et a accordé $96,920. La municipalité en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et l'indemnité de $60,000 accordée par la Régie, rétablie.

La Régie était justifiée de faire la déduction de 33 pour cent pour l'aménagement des services aux lots à subdiviser, en se basant sur son expérience. En donnant à la Régie la juridiction arbitrale de fixer l'indemnité dans tous les cas d'expropriation, la législature a reconnu la qualité d'expert, la compétence et l'expérience particulière des membres qui la composent et a voulu l'utilisation, la mise en œuvre de ces qualifications spéciales dans l'exercice de cette juridiction arbitrale. Il n'a pas été démontré que la Régie a erré en droit ou commis une erreur manifeste en fait, en accordant la compensation en question.

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*CORAM: Le Juge en chef Taschereau et les Juges Fauteux, Abbott, Martland et Hall.

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Expropriation—Property not subdivided—Indemnity based on subdivision —Deduction for cost of subdivision—Code of Civil Procedure, art. 1066.

The municipality expropriated, for use as a public park, a property belonging to the respondent. This property was not subdivided in building lots, but its most effective commercial use was the subdivision and the sale of building lots. The Public Service Board found the value of these building lots, once provided with the essential services, to be $0.65 per square foot. This figure is not contested by the respondent before this Court. The Board then made a deduction of 33 per cent for the cost of subdivision, based on its own experience in these matters, and awarded a sum of $60,000. The Court of Appeal ruled that the Board could not, in the absence of evidence to that effect, make that deduction, quashed the judgment homologating the decision of the Board and awarded $96,920. The municipality appealed to this Court.

Held: The appeal should be allowed and the indemnity of $60,000 awarded by the Board restored.

The Board was justified in making the deduction of 33 per cent for the cost of subdivision, relying on its own experience. By conferring on the Board an arbitrary jurisdiction to fix the indemnity in all expropriation cases, the legislature has recognized the expert knowledge, the competence and the particular experience of the members of the Board and has sought the practicable application of these special qualifications in the exercise of that jurisdiction. It has not been shown that the Board erred in law or committed a manifest error in fact, in making the award in question.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], in an expropriation matter. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], dans une matière d'expropriation. Appel maintenu.

Louis-N. Laroche, pour l'appelante.

Jacques Flynn, C.R., pour l'intimée.

Le jugement de la Cour fut rendu par

ABBOTT J.:—Il s'agit d'un appel d'un jugement majoritaire de la Cour du banc de la reine[1] rendu le 30 septembre 1965, cassant et annulant le jugement rendu à Québec, le 22 juillet 1964, par la Cour supérieure, homologuant une ordonnance de la Régie des Services Publics, prononcée le 22 juin 1964, dans une affaire d'expropriation.

[1] [1965] B.R. 1034.

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Cette ordonnance maintient l'offre de l'expropriatrice-appelante et fixe à $60,000 avec intérêt l'indemnité qui doit être payée à l'expropriée-intimée, chaque partie payant ses frais.

Le jugement majoritaire de la Cour d'Appel fixe l'indemnité à $96,920 avec intérêt, le tout avec dépens des deux Cours et de la Régie contre l'expropriatrice-appelante. Messieurs les juges Taschereau et Choquette, dissidents, auraient confirmé l'ordonnance de la Régie.

Cette expropriation est faite par l'expropriatrice-appelante, dont le droit d'expropriation n'est pas contesté en l'instance, pour «permettre à l'expropriante d'établir sur les étendues de terrain» en question «un parc de loisirs dans le cadre de l'organisation des loisirs pour la paroisse Notre-Dame de Foy, situé sur le territoire de l'expropriante». Il était de notoriété publique, depuis près d'un an avant la date de l'expropriation, que l'expropriatrice-appelante avait décidé d'acquérir le terrain dont il est ici question pour y installer un terrain de jeux.

Il convient d'ajouter aussi, que le terrain exproprié, ayant une superficie de 227,535 pieds carrés, n'est pas subdivisé en lots à bâtir, mais que, advenant une telle subdivision, la superficie exploitable convenue entre les parties serait de 166,800 pieds carrés.

Dans son ordonnance, la Régie a discuté les circonstances dans lesquelles l'intimée a acquis le terrain exproprié. Le passage de l'ordonnance à ce sujet se lit ainsi qu'il suit:

> De la preuve faite, il ressort que le 22 mars 1963, MM. Paul Racine, Guy Racine et Joseph-Henri Dussault ont acquis de M. Joseph Dussault, père de M. Joseph-Henri Dussault, une étendue de terrain couvrant une superficie d'environ 982,000 pieds carrés faisant partie du lot non-subdivisé n° 81 du cadastre officiel de la paroisse de Ste-Foy, Cité de Ste-Foy, division d'enregistrement de Québec. Cette vente a été faite pour la somme de $150,000.00, dont $15,000.00 comptant et le solde payable en dix versements annuels égaux et consécutifs de $13,500.00 en capital, dont le premier versement devenait dû et exigible dans un an de la date d'achat. Le taux d'intérêt était fixé à 4% l'an. Dans le contrat de vente du 22 mars 1963, «le vendeur transporte aux acquéreurs, pour considération comprise dans le prix de vente...tous droits aux indemnités qui peuvent être actuellement dues et qui pourront le devenir à la suite et comme conséquence de l'expropriation par le Ministère de la Voirie de partie du lot quatre-vingt-un (81 Ptie) dudit cadastre appartenant auparavant au vendeur». Le contrat mentionne également que «l'immeuble vendu est également sujet à un jugement d'homologation rendu en faveur de la Cité

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de Ste-Foy et enregistré à Québec sous le n° 520752 le 30 janvier 1963 le vendeur transportant tous ses droits de propriété et d'indemnité relativement à la lisière ainsi affectée».

Le 22 mars 1963, la Société Paul Racine, Guy Racine et Joseph-Henri Dussault a vendu 235,245 pieds carrés du terrain, qu'elle avait acquis le même jour de Joseph Dussault (un peu moins du quart) à la Société Immobilière Enic Inc. dans laquelle sont intéressés Paul Racine et Guy Racine. Suivant le contrat de vente, le prix est de $125,000.00 dont $5,000.00 payés comptant et le solde de $120,000.00 payable en douze versements égaux et consécutifs de $10,000. Le premier versement de capital devenait dû et exigible le premier janvier 1964 et le taux d'intérêt était fixé à 4% l'an.

Le terrain vendu à la Société Immobilière Enic Inc. est pratiquement celui qui apparaît à la description technique produite au dossier et que la Cité de Ste-Foy exproprie. A ce sujet, il importe de signaler que les autorités de la Cité de Ste-Foy, ayant été mises au courant de l'achat projeté par l'expropriée, faisaient parvenir à M. Guy Racine, président de ladite société, une offre de $60,000.00 pour l'acquisition de ce terrain. Cette offre, contenue dans une lettre du greffier de la Cité de Ste-Foy, en date du 19 mars 1963, a été produite au dossier comme exhibit I-11. Cette offre d'ailleurs suit d'un jour la résolution adoptée par les autorités de la Cité de Ste-Foy à l'effet d'autoriser son procureur, M° Louis N. LaRoche, à exproprier si les offres d'achat n'étaient pas acceptées par les propriétaires des lots 81 partie, 76-17 et 82-14 (exhibit P-1 du dossier de la Cour Supérieure). Devant une telle concordance de faits relativement au terrain sous examen, la Régie en vient logiquement à la conclusion que la transaction de Joseph-Henri Dussault, Paul et Guy Racine à la Société Immobilière Enic Inc. ne peut représenter la valeur réelle de la propriété expropriée, étant donné que les intéressés connaissaient l'imminence de l'expropriation.

Après avoir discuté la preuve faite devant la Régie par des experts, quant à la valeur de la propriété expropriée, l'ordonnance se lit ainsi qu'il suit:

La régie en vient à la conclusion que les ventes les plus représentatives, pour des lots subdivisés, sur lesquelles elle peut se baser pour établir l'indemnité qui doit être accordée à l'expropriée, sont la vente à 65 cents qui apparaît sur l'exhibit P-9 (vente lot 82-84 en 1963) et la vente effectuée sur le lot n° 82-14 également au prix de 65 cents. La Régie adopte donc comme base le prix de 65 cents le pied carré pour un lot subdivisé.

Il importe de souligner que, pour subdiviser un terrain, il faut y aménager des rues et qu'une partie d'environ 25 à 30% doit être utilisée à cette fin. Dans le cas présent, les parties ont convenu que sur les 227,535 pieds carrés de terrain exproprié une superficie nette d'environ 166,800 pieds carrés pouvait être subdivisée en lots, après avoir enlevé la superficie requise pour les rues. Dans ce cas, la perte pour les rues s'établit à 27% $(227{,}535 - 166{,}800 = 60{,}735;\ \frac{60{,}735 \times 100}{227{,}535})$.

En plus, l'expérience courante a démontré que les frais de subdivision, de mise en forme des rues, de vente, de publicité, d'arpentage, etc., se chiffrent en moyenne à 33% de la valeur des lots vendus.

Compte tenu de la perte de terrain pour les rues et des frais encourus, la valeur du terrain non-subdivisé, dans le présent cas, s'établirait à 40% de celle d'un lot subdivisé, soit:

Perte pour les rues	27%
Frais de subdivision, etc.	33%
	60%
Valeur nette 100%—60% =	40%

Comme le prix de base d'un lot subdivisé a été fixé à 65 cents le pied carré, le lot exproprié non-subdivisé aurait une valeur de 26 cents le pied carré (40% de 65 cents). L'indemnité pour le lot exproprié s'établirait donc à la somme de $59,159.10 (227,535 × 26 cents). Toutefois, il a été admis que pour subdiviser son terrain, l'expropriée aurait eu à acheter un lot adjacent subdivisé ayant une superficie de 7,200 pieds carrés, ce qui, à 65 cents le pied carré, aurait entraîné un déboursé de $4,680.00. Ce déboursé doit être soustrait de l'indemnité de $59,159.10 laissant une indemnité nette de $54,479.10 ($59,159.10—$4,680.00).

La Régie considère que l'offre de l'expropriante au montant de $60,000.00, qui est de l'ordre de 10% supérieur aux chiffres établis ci-dessus, est tout à fait équitable.

La Régie a constaté que l'usage commercial le plus efficace auquel le terrain exproprié pourrait être utilisé, était la subdivision et la vente de lots à bâtir. Ainsi que je l'ai mentionné, les parties ont convenu que, sur les 227,535 pieds carrés de terrain exproprié, il resterait une superficie de 166,800 pieds carrés à subdiviser en lots à bâtir, après avoir enlevé la superficie requise pour les rues. La Régie a établi la valeur de ces lots, une fois pourvus des services usuels, etc., à 65 cents le pied carré. Ce chiffre n'est pas contesté par l'expropriée-intimée devant cette Cour.

En établissant l'indemnité pour l'expropriation de la propriété en bloc, la Régie a fait une déduction basée sur le passage de l'ordonnance qui se lit ainsi:

> En plus, l'expérience courante a démontré que les frais de subdivision, de mise en forme des rues, de vente, de publicité, d'arpentage, etc., se chiffrent en moyenne à 33% de la valeur des lots vendus.

Tous les juges de la Cour du banc de la reine sont d'avis que, en l'absence de preuve à cet effet devant elle, la Régie ne pouvait pas faire la déduction qu'elle a effectuée, basée simplement sur sa propre expérience dans les questions de ce genre.

En tout respect, et pour les raisons que j'énumérerai dans un instant, je ne partage pas cet avis.

Le prix de 65 cents le pied carré, établi par la Régie, a été accepté par les juges majoritaires de la Cour du banc de la reine. Après avoir déduit un montant de $7,000, représen-

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tant le coût de l'aménagement des services requis par le terrain une fois subdivisé qui, selon eux, était justifié d'après la preuve, ils ont établi une indemnité de $96,920. Pour établir cette somme, cependant, on n'a pas tenu compte de la valeur des 60,735 pieds carrés qui, dans la subdivision, doivent être utilisés pour les rues. Les juges dissidents sont d'avis qu'aucune preuve satisfaisante n'établit le coût des services en question, mais soutiennent que, d'après la preuve devant la Régie, l'expropriée-intimée n'a pas réussi à établir que le montant était basé sur des principes erronés. Ils auraient confirmé le jugement.

J'adopterais l'exposé qui suit de monsieur le juge Taschereau à la Cour du banc de la reine:

> Challies, Law of Expropriation, p. 100, dit avec raison à ce sujet:
>
> The price at which the property or part of the property expropriated was acquired may and usually does constitute cogent evidence of value.
>
> Or, moins d'un mois avant l'avis d'expropriation, chacun des pieds carrés du terrain exproprié, pour lequel l'appelante réclame une indemnité de 0.75 cts, ne lui avait coûté qu'environ 0.15 cts. Comme ce dernier chiffre doit servir de base à l'évaluation de la propriété et que, par ailleurs, la Régie a alloué à l'appelante un montant 0.26 cts le pied carré, je ne puis en arriver à la conclusion que l'indemnité est manifestement erronée et qu'il y a lieu pour cette cour d'intervenir.

Comme je l'ai dit, à mon avis et en l'absence de preuve que la Régie trouve satisfaisante, elle était justifiée de faire une déduction pour l'aménagement des services aux lots à subdiviser, etc., basée sur sa propre expérience des questions de ce genre, une expérience qui en fait est considérable.

L'article 1066f du *Code de procédure civile* prescrit que dans une expropriation comme la présente, la Cour supérieure doit déférer le dossier à la Régie des Services Publics comme arbitre pour fixer l'indemnité. D'une façon générale, c'est la Régie qui fixe l'indemnité dans tous les cas d'expropriation de la province de Québec, à moins qu'il en soit autrement prescrit par des lois particulières. Je suis d'avis qu'en conférant cette juridiction arbitrale à la Régie, la Législature a reconnu la qualité d'expert, la compétence et l'expérience particulière des membres qui la composent et voulu l'utilisation, la mise en œuvre de ces qualifications spéciales dans l'exercice de cette juridiction arbitrale.

Des vues similaires paraissent applicables dans les provinces de droit commun. Dans «Russell on Arbitration», 17e éd., le savant auteur s'en exprime ainsi à la page 183:

Where the parties employ an arbitrator who has expert knowledge, and authorize him to make use of that knowledge, it is of course proper for him to do so; and it would seem that the court will tend to presume such authority from the mere fact of employment of a specially qualified person as arbitrator.

In such a case it will be no objection to an award that the evidence actually tendered by the parties is insufficient to support it, if there are materials upon which the arbitrator himself could have supplied the deficiency.

La compensation déterminée par la Régie repose sur le principe que pour chaque pied carré de terrain exproprié, ayant une valeur de 65 cents le pied carré lorsque vendu comme lot à bâtir, doit être déduit

(1) 27% par pied carré pour la valeur du terrain utilisé comme rues et

(2) 33% par pied carré pour les dépenses de subdivision, vente, etc.

Ce qui laisse une valeur nette de 26 cents (40% de 65 cents). Je ne puis voir d'objection en droit à cette méthode d'évaluation pour établir la valeur de la propriété entière avant la subdivision.

En matière d'expropriation, le montant de la compensation est une question qui relève particulièrement des arbitres—en l'occurrence la Régie des Services Publics. Sur une telle question, les arbitres ont droit de faire leur propre opinion et ne sont tenus d'accepter aucun des chiffres mentionnés dans la preuve faite devant elle—voir *Cedar Rapids Manufacturing & Power Company v. Lacoste*[1]. Comme le dit Lord Warrington of Clyffe à la page 285 «the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture». Pareillement, le juge en chef Challies dans son ouvrage «The Law of Expropriation», 2e éd., à la page 94, dit ce qui suit:

One can lay down as many rules as one likes, but in the last analysis 'the value of any particular expropriated property still remains to a large extent a matter of opinion'. It is impossible to fix the valuation with mathematical accuracy.

[1] (1929), 47 Que. K.B. 271 at 284-285, [1928] D.L.R. 1.

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Je suis d'opinion qu'il n'a pas été demontré que la Régie des Services Publics a erré en droit ou commis une erreur manifeste en fait.

Je maintiendrais l'appel avec dépens devant cette Cour et devant la Cour du banc de la reine et rétablirais la décision de la Régie accordant à l'expropriée-intimée la somme de $60,000 avec intérêt au taux légal à compter du 16 mai 1963.

Appel maintenu avec dépens.

Procureur de l'appelante: L. N. Laroche, Québec.

Procureurs de l'intimée: Prévost, Gagné, Flynn, Chouinard & Jacques, Québec.

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*Nov. 17, 18, 21

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Jan. 24

EDITH ALICE DUTHOIT, as Executrix of the last Will and Testament of W. H. Duthoit, Deceased, and EDITH ALICE DUTHOIT (*Applicants*) .....APPELLANTS;

AND

THE PROVINCE OF MANITOBA (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Compensation—Appraisers' valuations of expropriated lands not accepted by arbitrator—Court of Appeal right in varying arbitrator's award and in accepting appraisal of one of the appraisers as furnishing proper basis on which to fix compensation.

The Province of Manitoba expropriated certain property of the appellants. The property in question comprised three parcels of land. These parcels whilst not contiguous were close together and approximately 2 miles distant from the resort area of Grand Beach on the eastern shore of Lake Winnipeg. Prior to the expropriation there were reports in the press of statements by the Minister of Industry and Commerce in the Provincial Government as to plans by that government to develop the Grand Beach area as an outstanding resort and recreational area. The arbitrator, appointed pursuant to s. 17(1) of *The Expropriation Act*, R.S.M. 1954, c. 78, found that the best use to which all three parcels could be put was subdivision into building lots for summer cottages.

At the hearings before the arbitrator two appraisers were called, one by the appellants and one by the respondent. The respective valuations arrived at were $187,136 and $25,800 and the difference being so great it was agreed, at the urging of the arbitrator, to call a third appraiser.

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

The latter estimated the value of the lands at $27,070. The arbitrator accepted none of these valuations but made an award of $58,242. On appeal, the Court of Appeal reached the conclusion that the appraisal of the third appraiser should be adopted. Accordingly, by a unanimous judgment of that Court the compensation allowed to the appellants was fixed at $27,000 plus interest from the date of taking possession. An appeal from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed to the extent of substituting for the sum of $27,000 fixed by the Court of Appeal the sum of $28,953.85.

This was not a case in which the arbitrator enjoyed any particular advantage over the Court of Appeal by reason of having seen and heard the witnesses. The Court of Appeal was right in varying the award and in accepting the appraisal made by the third appraiser as furnishing the proper basis on which to fix the compensation. That appraiser, as pointed out by Guy J.A., had dealt carefully and methodically with the principles governing the fixing of compensation to be paid for expropriated property and applied them to the lands in question. The arbitrator had been led into error by attributing undue importance to the statements of the Minister of Industry and Commerce.

In arriving at his valuation of Parcel No. 3, which was $6,350, the third appraiser assumed that when subdivided it would yield only 39 lots. It was, however, agreed by counsel and stated in a letter to the arbitrator that this number should have been 51 instead of 39. In view of this admission the figure of $8,303.85 should be substituted for that of $6,350 and consequently the total awarded by the Court of Appeal should be increased by $1,953.85.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from an arbitration award respecting compensation for expropriated lands. Appeal allowed to limited extent.

A. Kerr Twaddle and *George A. Brown*, for the appellants.

W. E. Norton, Q.C., for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for Manitoba[1] pronounced on June 10, 1965, allowing an appeal from an award made by His Honour Judge Molloy on December 22, 1964, and fixing at $27,000 plus interest from the date of taking

[1] (1965), 54 D.L.R. (2d) 259.

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possession the compensation allowed to the appellants for their property expropriated by the respondent. His Honour Judge Molloy had awarded the sum of $58,242. He was sitting as an arbitrator appointed pursuant to s. 17(1) of *The Expropriation Act*, R.S.M. 1954, c. 78. The appeal to the Court of Appeal was brought pursuant to s. 70 of the same Act and s. 31 of *The Arbitration Act*, R.S.M. 1954, c. 9. In this Court the appellants ask that the award of the learned arbitrator be restored.

The relevant facts are set out in detail in the reasons of the Court of Appeal and of the learned arbitrator and a very brief summary will be sufficient to indicate the basis of the decision at which I have arrived.

The land in question comprises three separate parcels referred to in the proceedings as Parcels 1, 2 & 3. These parcels whilst not contiguous are close together and approximately 2 miles distant from the resort area of Grand Beach on the eastern shore of Lake Winnipeg and about 58 miles from central Winnipeg over provincial highways.

Parcel 1 consists of a triangular piece of land containing 17.65 acres with a frontage of about 1,750 feet on Lake Winnipeg.

Parcel 2 consists of a rectangular area of 19.5 acres about 470 feet wide by 1,800 feet long which has no lake frontage, but is only a little over a quarter of a mile from the Grand Beach Lagoon.

Parcel 3 consists of a tract of 27.3 acres of irregular shape having a frontage of some 1,100 feet on the Grand Beach Lagoon.

The learned arbitrator found that the best use to which all three parcels could be put was subdivision into building lots for summer cottages.

Parcel No. 1 had been purchased by Mrs. Duthoit in 1940 for $50 but the value as sworn to by her was $500 at that time.

Parcels 2 and 3 were purchased in 1960 for $1,000 each.

The lands in question were expropriated by the respondent on March 12, 1962. At the hearings before the arbitrator an appraiser, Mr. Rhone, was called by the appellants and an appraiser, Mr. Farstad, by the respondent. The difference between their estimates of value was so great that the arbitrator urged the calling of a third appraiser and a Mr. Turpie, a man of many years experience agreed upon by the parties, was persuaded to examine the property and give his appraisal. The valuations arrived at by these three witnesses were as follows:

	Appellants' Appraiser Mr. Rhone	Respondent's Appraiser Mr. Farstad	Third Appraiser Mr. Turpie
Parcel No. 1	$100,000.00	$15,700.00	$14,120.00
Parcel No. 2	50,773.00	5,900.00	6,600.00
Parcel No. 3	36,363.00	4,200.00	6,350.00
	$187,136.00	$25,800.00	$27,070.00

The arbitrator accepted none of these figures but, as already stated, made an award of $58,242. Prior to the expropriation there were reports in the press on March 15, 1960, and August 22, 1960, of statements made by the Minister of Industry and Commerce in the Provincial Government as to a plan by that government to develop the Grand Beach area as an outstanding resort and recreational area.

Neither Mr. Duthoit nor any of the appraisers were of opinion that these statements would add significantly to the value of the expropriated lands but, as is shown in the reasons of Guy J.A. who gave the judgment of the Court of Appeal, the learned arbitrator attached great weight to them.

After having "carefully reviewed all the evidence and the exhibits filed and the reasons advanced by the learned Arbitrator for his award" and having "given anxious consideration to the arguments of both counsel", the Court of Appeal reached the conclusion that the appraisal of Mr. Turpie should be adopted.

Guy J.A. after stating concisely and accurately the rules to be observed in fixing the compensation to be paid for

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expropriated property, pointed out that Mr. Turpie had dealt carefully and methodically with these governing principles and applied them to the lands in question. He was of opinion that the learned arbitrator had been led into error in reaching a figure more than twice that arrived at by Mr. Turpie by attributing undue importance to the statements of the Minister of Industry and Commerce. In all of this I agree with Guy J.A. This is not a case in which the learned arbitrator enjoyed any particular advantage over the Court of Appeal by reason of having seen and heard the witnesses. At the commencement of his reasons, he says:

> Three appraisals of the subject land were submitted to me. The Applicants called Mr. M. R. Rhone and the Crown called Mr. E. K. Farstad. A third appraisal was made by Mr. Andrew Turpie, upon my suggestion, in view of the wide divergence in the opinions of the other appraisers. I find no reason to prefer any of these gentlemen over the others by reason of qualifications, experience or conduct as witnesses.

The task of the appellants in this Court is to satisfy us that the judgment of the Court of Appeal is wrong; but, for the reasons given by Guy J.A., I am of opinion that this is a case in which the Court of Appeal was right in varying the award and in accepting the appraisal made by Mr. Turpie as furnishing the proper basis on which to fix the compensation.

One point remains. In arriving at his valuation of Parcel No. 3, which was $6,350, Mr. Turpie assumed that when subdivided it would yield only 39 lots. It was, however, agreed by counsel and stated in a letter to the learned arbitrator that this number should have been 51 instead of 39. In view of this admission it appears to me that the figure of $8,303.85 should be substituted for that of $6,350 and consequently the total awarded by the Court of Appeal should be increased by $1,953.85.

While on this comparatively minor point the appellants succeed, the main attack on the judgment of the Court of Appeal has failed and under all the circumstances I think there should be no order as to costs in this Court.

In the result I would allow the appeal to the extent of substituting for the sum of $27,000 fixed by the Court of

Appeal the sum of $28,953.85. In all other respects I would affirm the judgment of the Court of Appeal. I would make no order as to costs in this Court.

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Appeal allowed to limited extent; no order as to costs.

Solicitor for the appellants: George A. Brown, Winnipeg.

Solicitors for the respondent: Fillmore, Riley & Company, Winnipeg.

GUARANTY TRUST COMPANY OF CANADA in the capacity of Executor of the Will of DOROTHY ELGIN TOWLE, deceased ..... APPELLANT;

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*Oct. 25, 26
Dec. 19

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Exemption—Bequest to University Medical Alumni Association—Purpose of establishing student loan fund—Whether gift absolute and indefeasible—Whether association an organization constituted exclusively for charitable purposes—Whether resources of association devoted to charitable activities—Corporations Act, R.S.O. 1960, c. 71, ss. 101, 109(1), 115(1) and (5)—Estate Tax Act, 1958 (Can.), c. 21, s. 7(1)(d)(i).

The testatrix died on July 11, 1961, and provided for the disposition of the balance of the residue of her estate by directing her trustee to pay and distribute that balance to the Medical Alumni Association of the University of Toronto to establish a student loan fund to be supervised and managed by the association for the purpose of loaning funds to women medical students of the university. The trustee claimed that the gift was an absolute gift to a charitable organization and therefore exempt from estate tax by virtue of s. 7(1)(*d*)(i) of the *Estate Tax Act*, 1958 (Can.), c. 29. The trustee had the burden of establishing that the gift was an absolute and indefeasible gift, that the association was an organization constituted exclusively for charitable purposes, that the association was an organization all or substantially all of the resources of which were devoted to charitable activities and that no part of the resources of the association were available for the benefit of any member.

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

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GUARANTY TRUST CO. OF CANADA v. MINISTER OF NATIONAL REVENUE

The Exchequer Court upheld the Minister's contention that the gift was not exempt and ruled that it had not been established that the gift was absolute and indefeasible or that the association was an organization constituted exclusively for charitable purposes and that its resources were used exclusively for such purposes. The trustee appealed to this Court where the Minister raised the further submission, based on s. 115 of the Ontario *Corporations Act*, R.S.O. 1960, c. 71, that since the association had not passed a by-law contemplated by s. 115(1), a part of its resources could, on dissolution, become available for the benefit of the members, contrary to s. 7(1)(*d*)(i) of the *Estate Tax Act*.

Held (Cartwright and Judson JJ. *dissenting*): The appeal should be allowed as well as the claim for exemption.

Per Ritchie, Hall and Spence JJ.: The purposes of the association, as described in its letters patent, "to promote and enlarge the usefulness and influence of the university" and "to promote the science and art of medicine" were exclusively charitable purposes. The other objects and purposes for which the association was incorporated were not such as to deprive it of its character as a charity. These were incidental to the two main purposes above-referred and were a means to the fulfilment of these purposes rather than an end by themselves.

In any event, the question as to whether the association was constituted exclusively for charitable purposes could not be determined solely by a reference to the objects and purposes for which it was originally incorporated. The test of whether an organization is so constituted within the meaning of s. 7(1)(*d*)(i) is one which must be applied according to the association's activities at the time of the making of the gift and of the death of the deceased. The trial judge correctly found that by far the greatest part of the association's activities during the relevant time had been devoted to charitable purposes.

Furthermore, the association came within s. 7(1)(*d*)(i) since all or substantially all of its remaining resources, after having paid for its operational and promotional expenses, were devoted to charitable activities carried on or to be carried on by it.

The gift in this case was an absolute and indefeasible gift within the meaning of s. 7(1)(*d*) of the Act. The fund making up the balance of the residue of the estate was made the subject of a vested indefeasible gift to the association and although the gift was stamped with a trust it did not contain any provision which might result in it being divested so that the association might never receive it.

The contention based on s. 115 of the *Corporations Act*, could not be sustained. A corporation with exclusively charitable objects, the letters patent of which expressly provide that any profits or other accretions to the corporation shall be used in promoting its objects, could not be one to which the provisions of s. 115 were intended to apply. The enactment of any such by-law as is contemplated by s. 115 would be redundant.

Per Cartwright and Judson JJ., *dissenting*: The gift in question was an absolute gift. However, the association was not at the date of the death of the testatrix an organization constituted exclusively for charitable purposes, and it has not been shown that all or mainly all of its resources were devoted to charitable activities.

Revenu—Impôt successoral—Exemption—Donation à une association des anciens élèves de médecine d'une université—Pour établir un fonds d'emprunt pour les étudiants—Donation est-elle absolue et irrévocable—L'association est-elle une organisation constituée exclusivement à des fins de charité—Les ressources de l'association sont-elles affectées à des œuvres de charité—Corporations Act, R.S.O. 1960, c. 71, arts. 101, 109(1), 115(1) et (5)—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 21, art. 7(1)(d)(i).

La testatrice est décédée le 11 juillet 1961 et a pourvu à la distribution du reliquat de sa succession en ordonnant à son fiduciaire de payer et de distribuer ce reliquat à l'Association des anciens élèves de médecine de l'Université de Toronto pour établir un fonds d'emprunt pour les étudiants, devant être administré par l'association, dans le but de prêter des fonds aux étudiantes en médecine de l'université. Le fiduciaire de la succession soutient que la donation était une donation absolue à une organisation de charité et qu'en conséquence elle était exempte de la taxe successorale en vertu de l'art. 7(1)(*d*)(i) de la *Loi de l'Impôt sur les biens transmis par décès*, 1958 (Can.), c. 29. Le fiduciaire avait le fardeau d'établir que la donation était une donation absolue et irrévocable, que l'association était une organisation constituée exclusivement à des fins de charité, que l'association était une organisation dont toutes ou sensiblement toutes les ressources étaient affectées à des œuvres de charité et qu'aucune partie des ressources de l'association n'était disponible à l'avantage de ses membres.

La Cour de l'Échiquier a confirmé la prétention du Ministre que la donation n'était pas exempte de la taxe et a jugé qu'il n'avait pas été établi que la donation était absolue et irrévocable ou que l'association était une organisation constituée exclusivement à des fins de charité et que ses ressources servaient exclusivement à ces fins. Le fiduciaire en appela devant cette Cour alors que le Ministre a soutenu en plus, en se basant sur l'art. 115 du *Corporations Act* de l'Ontario, R.S.O. 1960, c. 71, que puisque l'association n'avait pas passé un règlement tel qu'envisagé par l'art. 115(1), une partie de ses ressources pouvaient, lors de la dissolution, devenir disponibles à l'avantage des membres, le tout contrairement à l'art. 7(1)(*d*)(i) de la *Loi de l'Impôt sur les biens transmis par décès*.

Arrêt: L'appel doit être maintenu ainsi que la demande d'exemption, les Juges Cartwright et Judson étant dissidents.

Les Juges Ritchie, Hall et Spence: Les buts de l'association, tels que décrits dans ses lettres patentes, de promouvoir et d'étendre l'utilité et

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l'influence de l'université et aussi de promouvoir la science et l'art de la médecine, étaient des buts exclusivement charitables. Les autres objets et buts pour lesquels l'association avait été incorporée n'étaient pas tels qu'ils pouvaient priver l'association de son caractère de charité. Ceux-ci sont compris dans les deux buts déjà mentionnés et étaient des moyens d'accomplir ces buts plutôt qu'une fin en elle-même.

A tout événement, la question de savoir si l'association était constituée exclusivement à des fins de charité ne peut pas être déterminée seulement en se référant aux objets et buts pour lesquels elle avait été originellement incorporée. Le critère pour savoir si une organisation est ainsi constituée dans le sens de l'art. 7(1)(*d*)(i), en est un qui doit être appliqué en se basant sur les œuvres de l'association lors de la donation et de la mort du défunt. Le juge au procès a correctement émis l'opinion que la plus grande part des œuvres de l'association durant le temps en question avait été affectée à des fins de charité.

L'association tombait aussi sous l'art. 7(1)(*d*)(i) puisque tout ou sensiblement tout le reste des ressources de l'association, après avoir payé les dépenses d'opération et de promotion, était affecté à des œuvres de charité accomplies ou à être accomplies par elle.

La donation dans le cas présent était une donation absolue et irrévocable dans le sens de l'art. 7(1)(*d*) de la loi. Les fonds constituant le reliquat de la succession sont devenus le sujet d'une donation irrévocable dévolue à l'association, et quoique la donation soit marquée d'un fidéicommis elle ne contient aucune disposition qui pourrait avoir comme résultat de le déposséder à un point que l'association ne pourrait jamais recevoir la donation.

La prétention basée sur l'art. 115 du *Corporations Act* ne peut pas être maintenue. Une corporation ayant des buts exclusivement charitables, et dont les lettres patentes prévoient expressément que tout profit ou autre bien accru à la corporation doivent servir à promouvoir ses buts, ne peut pas être une corporation à qui les dispositions de l'art. 115 sont censées s'appliquer. Un règlement tel qu'envisagé par l'art. 115 ferait double emploi.

Les Juges Cartwright et Judson, *dissidents*: La donation en question était une donation absolue. Cependant, l'association n'était pas lors du décès de la testatrice une organisation constituée exclusivement à des fins de charité, et il n'a pas été démontré que toutes ou sensiblement toutes ses ressources étaient affectées à des œuvres de charité.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt successoral. Appel maintenu, les Juges Cartwright et Judson étant dissidents.

[1] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of estate tax. Appeal allowed, Cartwright and Judson JJ. dissenting.

Terence Sheard, Q.C., for the appellant.

G. W. Ainslie and *D. G. H. Bowman*, for the respondent.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The questions raised on this appeal, the facts and surrounding circumstances, the relevant legislation and the terms of the will of the late Dorothy Elgin Towle are set out in the reasons of my brother Ritchie which I have had the advantage of reading; I shall endeavour as far as possible to avoid repetition.

The learned trial judge stated correctly that in order to make good its contention that the value of the gift of the balance of the residue of the estate of the testatrix to the Medical Alumni Association of the University of Toronto should be deducted from the aggregate net value of the property passing on her death in accordance with s. 7(1)(*d*)(i) of the *Estate Tax Act*, it was necessary for the appellant to shew:

(*a*) that the gift in question was an absolute gift to the Medical Alumni Association within the meaning of paragraph (*d*) of subsection (1) of section 7;

(*b*) that the Medical Alumni Association, at the time of the deceased's death, was an organization constituted exclusively for charitable purposes within the meaning of sub-paragraph (i) of the said paragraph (*d*);

(*c*) that, at the time of the deceased's death, the Medical Alumni Association was an organization all or substantially all of the resources of which were devoted to charitable activities within the meaning of sub-paragraph (i) of the said paragraph (*d*);

(*d*) that no part of the resources of the Medical Alumni Association were payable to or otherwise available for the benefit of any member.

As to item (*a*), for the reasons given by my brother Ritchie, to which I have nothing to add, I agree with his conclusion that the gift in question was an absolute one.

[1] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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As to items (*b*) and (*c*), I agree with the conclusions of the learned trial judge that the Medical Alumni Association was not at the date of the death of the testatrix an organization constituted exclusively for charitable purposes and that it was not shewn that all or substantially all of its resources were devoted to charitable activities. I am in substantial agreement with the reasons of the learned trial judge for reaching these conclusions.

I find it unnecessary to deal with the question raised in item (*d*) and I express no opinion upon it.

What I have said above is sufficient to dispose of the appeal but before parting with the matter I venture to express my agreement with the submission of Mr. Sheard that the result, at which I feel bound by the words of the statute to arrive, is anomalous. The residue of the estate of the testatrix is given on a valid charitable trust. It is clear that it can never be used for any purpose other than the charitable one to which it is devoted. It is axiomatic that a validly constituted charitable trust will not be allowed to fail for lack of a trustee. In *Re Schechter*[1], the majority of this Court cited with approval the following sentence from the judgment of Lord Macnaghten in *Dunne v. Byrne*[2]:

> It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

I find it difficult to suggest any reason why the answer to the question whether a fund validly and irrevocably committed to solely charitable purposes should be exempted from the payment of estate tax should depend on the nature of the other activities carried on by the trustee who happens to be appointed to administer the fund. However, the words of the legislation are unambiguous and the anomaly, if anomaly it be, would seem to be intended by Parliament to exist; attention was focused upon it as long ago as the

[1] [1965] S.C.R. 784 at 792, 52 W.W.R. 410.
[2] [1912] A.C. 407 at 410.

decision of the Judicial Committee in *Minister of National Revenue v. Trusts and Guaranty Company*[1]. In dealing with a similarly worded provision in the *Income War Tax Act* Lord Romer said at page 149:

> Had the Dominion Legislature intended to exempt from taxation the income of every charitable trust nothing would have been easier than to say so.

Speculation as to the possible reason for enacting a piece of legislation is of no assistance in its construction if the words used are plain.

I would dismiss the appeal with costs.

The judgment of Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment rendered by Mr. Justice Cattanach in the Exchequer Court of Canada[2] affirming an assessment made by the Minister of National Revenue under the *Estate Tax Act,* 1958 (Can.), c. 29, whereby he disallowed a claim for deduction made by the executor of the estate of Dorothy Elgin Towle deceased, in respect of a gift made in the residuary clause of her will to "the Medical Alumnae Association of the University of Toronto", by which name it is agreed that the testator intended to refer to the "Medical Alumni Association of the University of Toronto" (hereinafter called the "Association"). In reaching his conclusion the Minister made the express finding that:

> ...the Medical Alumnae Association of the University of Toronto is not a charitable organization and the value of the gift made to it by the late Dorothy Elgin Towle is properly disallowed as a deduction under paragraph (*d*) of subsection (1) of section 7 of the Act for the purpose of computing the aggregate taxable value of the property passing on the death of the said Dorothy Elgin Towle.

The late Dorothy Elgin Towle, who was a physician and a member of the Association, died on July 11, 1961, having first made her last will and testament, probate of which was

[1] [1940] A.C. 138, [1939] 4 All E.R. 149.
[2] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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duly granted to the appellant, the executor therein named, and whereby she provided for the disposition of the balance of the residue of her estate by directing her trustee:

> To pay and distribute the balance of the residue of my said estate to the Medical Alumnae Association of the University of Toronto to establish a student loan fund to be known as the 'Robert Elgin Towle Loan Fund' to be supervised and managed by the said Medical Alumnae Association *for the purpose of loaning funds to women medical students of the University of Toronto who are in need of financial assistance during their course in medicine and any loan made under such fund to be paid after graduation without interest upon such terms and conditions as may be made from time to time by the said Medical Alumnae Association.*

The italics are my own.

It is agreed between the parties that the trust for which provision is made in this paragraph of the testator's will is a "trust for charitable purposes" but the learned trial judge took the view that it had not been established that the gift was "absolute and indefeasible" or that the Association was "an organization constituted exclusively for charitable purposes" within the meaning of s. 7(1)(*d*) of the Act which reads as follows:

> 7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property...such of the following amounts as are applicable:
>
> (*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to
>
> (i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada, all or substantially all of the resources of which were so devoted, or to any donee described in subparagraph (ii), and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or...

The Association was incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated April 28, 1947, for the following purposes and objects:

> (*a*) TO maintain and promote the interest of the graduates in medicine of the University of Toronto in their Alma Mater;

(*b*) TO encourage and cultivate good-fellowship among the members of the Association;

(*c*) TO promote and enlarge the usefulness and influence of the Provincial University;

(*d*) TO consider and make recommendations on matters pertaining to the welfare of the Faculty of Medicine of the University of Toronto;

(*e*) Generally to promote the science and art of medicine;

(*f*) TO administer and invest funds received from life members of the Association and any other funds and bequests of which the Association may from time to time have custody and to apply and disburse the moneys so administered in accordance with the provisions and conditions relating to the same; and

(*g*) TO do all such other things as are incidental or conducive to the attainment of the above objects.

In my view the purposes described in paras. (*c*) and (*e*) of these Letters Patent are "charitable purposes".

In the course of the judgment in the House of Lords in *Commissioners for Special Purposes of Income Tax v. Pemsel*[1], Lord Mcnaghten observed:

> That according to the law of England a technical meaning is attached to the word 'charity', and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts,' or 'charitable purposes,' cannot, I think, be denied.

and he proceeded at page 583 to define that meaning in the following terms:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

This definition has received general acceptance in this country, subject to the consideration that in order to qualify as "charitable" the purposes must, to use the words of Lord Wrenbury in *Verge v. Summerville*[2], be "For the benefit of the community or of an appreciably important class of the community". See also *In re Cox; Baker v. National Trust Company et al*[3], which was affirmed in the Privy Council[4].

[1] [1891] A.C. 531 at 580.
[2] [1924] A.C. 496 at 499.
[3] [1953] 1 S.C.R. 94, 1 D.L.R. 577.
[4] [1955] A.C. 627, 16 W.W.R. (N.S.) 49, 3 W.L.R. 42, 2 All E.R. 550, 3 D.L.R. 497.

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In light of this definition it seems to me that an organization which had as its sole object "the promotion and enlargement of the usefulness and influence of the Provincial University" would be "an organization constituted exclusively" for the charitable purpose of "the advancement of education" and this view is, in my opinion, borne out by the decision of the Court of Appeal in England in *Rex v. Special Commissioners of Income Tax; University College of North Wales*[1], where it was held that a college which was dependent for its sources of income on voluntary donations, devises and bequests and a government grant in addition to the fees paid by pupils was a charity within the meaning of the *Income Tax Acts* of 1842 and 1853.

I am equally satisfied that an organization which had as its sole object "Generally to promote the science and art of medicine" would be "an organization constituted exclusively for charitable purposes". The purpose described in para. (*e*) of the Letters Patent appears to me to come within the language used by Lord Normand in *Royal College of Surgeons of England v. National Provincial Bank Ld.*[2], where the House of Lords was required to decide whether a gift to the Royal College of Surgeons was a charitable gift so as to avoid the application of the rule against perpetuities and in so doing considered one of the recitals in the Royal Charter of the College where it was stated:

> 'It appears to us that the establishment of a College of Surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science' of surgery.

At page 641 Lord Normand said:

> . . . the next step is to construe that recital. The words 'the study and practice of the art and science' of surgery do not, in my opinion, mean 'the academic study and professional practice of the art and science of surgery'; they signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge, which is the fruit of research, and the learning of existing knowledge either by students who

[1] (1909), 78 L.J.K.B. 576, 5 Tax Cas. 408.
[2] [1952] A.C. 631, 1 All E.R. 984.

are qualifying or by qualified surgeons desirous of improving their knowledge and skill. On that construction the professed objects of the college all fall into the categories of the advancement of science or of the advancement of education, and are charitable.

It is perhaps desirable to observe that when the purpose described in para. (*e*) is read in its context, it is apparent that it relates to the "promotion of the science and art of medicine" through the medium of the Faculty of Medicine at the University of Toronto.

If the purposes described in paras. (*c*) and (*e*) of the Letters Patent are exclusively charitable as I think they are, then it remains to be determined whether the other objects and purposes for which the Association was incorporated are such as to deprive it of its character as a charity. In this regard I subscribe to the reasoning of Denning L.J. in *British Launderers' Research Association v. Hendon Rating Authority*[1], in which case the Court of Appeal was considering whether the Association with which it was concerned was "instituted for the purposes of science, literature of the fine arts exclusively" within the meaning of s. (1) of the *Scientific Societies Act*, 1843, and Denning L.J. had occasion to observe:

> It is not sufficient that the society should be instituted 'mainly' or 'primarily' or 'chiefly' for the purposes of science, literature or the fine arts. It must be instituted 'exclusively' for those purposes. The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, *merely a means to the fulfilment of those purposes*, do not deprive a society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral; that is, cease to be a means to an end, but become an end in themselves; that is, become additional purposes of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption.

In considering the other purposes and objects of the Association it seems to me, in the first place, that if the purpose referred to in para. (*d*) is not itself a charitable purpose, it is certainly incidental to "the promotion of the

[1] [1949] 1 K.B. 462 at 467, 1 All E.R. 21.

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science and art of medicine". I am satisfied that in achieving this latter object one of the essential and paramount considerations must of necessity be "to consider... matters pertaining to the welfare of the faculty of medicine at the University of Toronto" and I can only regard this purpose as being a "means of the fulfilment" of the purpose referred to in para. (*e*).

As will hereafter appear, I have also formed the opinion that the purposes referred to in paras. (*a*) and (*b*) of the Letters Patent are descriptive of means by which the continued existence of the Association is to be maintained and encouraged.

I am, however, of opinion that as the Association is a Letters Patent Company, the question of whether it was "constituted exclusively for charitable purposes" cannot be determined solely by reference to the objects and purposes for which it was originally incorporated. In this regard, I adopt the statement made by Lord Denning in *Institution of Mechanical Engineers v. Cane*[1], where the House of Lords was again concerned with the application of s. (1) of the *Scientific Societies Act*, 1843, and where he said:

> ...the first question is whether the Institution of Mechanical Engineers is a 'society instituted for the purpose of science exclusively.' I do not think this question is to be solved by looking at the royal charter alone and construing it as if you were sitting aloft in an ivory tower, oblivious of the purposes which the institution has in fact pursued. That would be proper enough if you had only to consider the purposes for which the society was *originally* instituted. But that is not the test. A society may be originally instituted for certain purposes and afterwards adopt other purposes. You then have to ask yourself this question: for what purpose is the society *at present* instituted?

That the test of whether an organization is "constituted exclusively for charitable purposes" within the meaning of s. 7 (1)(*d*)(i) of the *Estate Tax Act* is one which must be applied according to the association's activities "at the time of the making of the gift and of the death of the deceased", is clear from the wording of the section itself, and this is

[1] [1961] A.C. 696 at 723.

further borne out by the fact that in order to be entitled to the deduction, the organization is required to be one "all or substantially all of the resources of which, if any, were devoted to charitable activities *carried on or to be carried on by it* or to the making of gifts to other such organizations in Canada...". (The italics are, of course, my own.)

The evidence concerning the activities to which the Association was devoted at the relevant time is summarized by the learned trial judge in the following passage of his reasons for judgment:

> It is sufficient to summarize such evidence in general terms. The Association had a small salaried staff which worked in premises put at the disposal of the Association by the University of Toronto without charge. The Association held its annual meeting in conjunction with an annual dinner. The staff published a magazine for the members and supplied services to the members of the various graduating years to encourage them to have reunion meetings. The staff carried on the usual activities designed to induce members to pay their annual fees and to subscribe to the funds administered by the Association. It was manifest, however, that by far the greatest part of the Association's effort, during recent years in any event, was the operation of scholarship, bursary and loan funds for medical students at the University of Toronto, making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities and other activities designed to supplement the work of the Faculty of Medicine at the University of Toronto.

I am of opinion that this excerpt from the learned trial judge's reasons for judgment constitutes a finding, with which I agree, that by far the greatest part of the Association's effort during recent years has been devoted to charitable purposes.

Counsel on behalf of the respondent contended that the "making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities" did not constitute the making of gifts for charitable purposes and in so doing he referred to the well-known case of *Dunne v. Byrne*[1], but in this regard I take the principle to have been accurately

[1] [1912] A.C. 407.

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stated by Jenkins L.J. in *In re Spensley's Will Trusts*[1], where he adopted the language suggested by counsel in that case and after referring to the cases summarized in *In re Flinn*[2], he went on to say:

> The principle deducible from those authorities was thus stated by counsel: 'Where there is a gift to a person who holds an office the duties of which are in their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for the charitable purposes inherent in the office.'

This statement of principle was reiterated by Jenkins L.J. in *Re Rumball*[3].

The same question was dealt with in this Court by Judson J. in *Blais v. Touchet*[4], where there was a gift to the "Bishop of Prince Albert, for his works, but for such of the works as would aid the cause of the French Canadians of his diocese". After having referred to the judgment of Evershed M.R. in *In re Rumball, supra,* Mr. Justice Judson went on to say:

> A recent author, Keeton in The Modern Law of Charities (1952) p. 65, has commented that this branch of the law of charities is suffering from over-technicality. I join with others who have said that they do not wish to add to it. I therefore follow the line of reasoning in *In re Garrad,* (1907 1 Chancery 382) *In re Flinn* and *In re Rumball* and hold that this particular gift to the bishop is charitable by virtue of his office and that the testator did not step outside the charitable field in imposing the limitation to work among French Canadians.

As I have indicated, I regard the "gifts to be spent by the Dean...and the President of the University to be expended in their official capacities" as charitable.

Having found, as I think he did, that by far the greatest part of the Association's effort was charitable, the learned trial judge went on to say:

> However, there is no evidence upon which I can make a finding that the carrying on of activities such as those referred to in the immediately preceding sentence constitutes the exclusive object of the Association and

[1] [1954] 1 All E.R. 178 at 183.
[2] [1948] Ch. 241, 1 All E.R. 541.
[3] [1955] 3 All E.R. 71 at 79, [1956] Ch. 105.
[4] [1963] S.C.R. 358, 45 W.W.R. 246, 40 D.L.R. (2d) 961.

that the other activities of the Association are merely subsidiary and incidental thereto. While such activities may have tended to overshadow, at times, in the minds of the officers of the Association, the activities that were designed, for example, 'to encourage and cultivate good-fellowship among the members of the Association', these latter activities, and probably others, in my view, never ceased to have their place as principal reasons for the existence of the Association.

In my view the *activities* of the Association which are calculated to ensure its continued existence are to be distinguished from the *purposes* for which it exists. If, as I think to be the case, the objects of *promoting* the usefulness and influence of the University and generally *promoting* the science and art of medicine are exclusively charitable purposes, then it seems to me to be clear that the means by which these purposes are to be *promoted* constitute an essential ingredient of the purposes themselves.

It having been established "that by far the greatest part of the Association's effort" was devoted to charitable purposes "at the time of the making of the gift and the time of the death of the deceased" it remains to be determined whether the other purposes of the Association can be said to be "an end in themselves" to use the language employed by Lord Denning in the *British Launderers' Research Association* case. In this regard I only find it necessary to refer to the objects and purposes described in paras. (*a*) and (*b*) of the objects clause of the Letters Patent of the Association.

The object described in paragraph (*a*), i.e. "To maintain and promote the interest of the graduates in medicine of the University of Toronto in their Alma Mater", appears to me to be one which is singularly ill adapted to being described as an end in itself. I find it difficult to attach any reality to the task of maintaining and promoting the interests of the graduates of a university in their alma mater unless that interest is being maintained and promoted for some purpose. On the other hand, the fulfilment of this object in my opinion provides an obvious means to promote

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and enlarge "the usefulness and influence of the Provincial University". I think, therefore, that the object described in para. (*a*) is to be treated as being "a means to the fulfilment" of the purpose described in para (*c*).

With the greatest respect for those who may hold a different opinion, I also have the very greatest difficulty in viewing the object described in para. (*b*), i.e., "To encourage and cultivate good fellowship among the members of the Association" as being an end in itself. It is true that many associations do exist for the purpose of good fellowship alone, but the Medical Alumni Association of the University of Toronto is composed of doctors of medicine whose common bond is an interest in their profession and in the University of which they are graduates, and as by far the greatest part of its effort is devoted to "activities designed to supplement the work of the Faculty of Medicine at the University of Toronto" it appears to me to be inappropriate to proceed on the assumption that the cultivation of good fellowship as an end in itself has any place in the structure of such an association.

The Association holds an annual meeting at which the members discuss matters of common professional interest and during that meeting an annual dinner is held at some expense to the Association. It is this annual dinner which is singled out by counsel for the respondent as being emblematic of the fact that the cultivation of good fellowship for its own sake is an additional purpose of the Association which detracts from the exclusively charitable character of the purposes to which it is devoting the greatest part of its effort. In my view, social gatherings of the members are in no way inconsistent with the exclusively charitable purposes of any charitable organizations; I think, on the other hand, that the holding of dinners, luncheons, teas, receptions and other such gatherings are important "means to the fulfilment" of the purposes of such organizations and I am accordingly of the opinion that the object described in para. (*d*) of the Letters Patent does not constitute an end

in itself but is rather to be regarded as a means of furthering the purposes to which the Association's main effort is devoted.

It appears to me that the annual meeting, the annual dinner and the magazine which is circulated amongst the members are clearly designed as means of keeping the Association alive and that in this sense, they indeed "have their place as principal reasons for the existence of the Association"; but under the circumstances I do not think that these activities can be regarded as anything more than methods of achieving the charitable ends to which the learned trial judge has referred.

I am far from suggesting that all university alumni associations are "constituted exclusively for charitable purposes" but I think when the objects of the present Association are considered in conjunction with the purposes to which it has been found to have been devoting the greatest part of its effort, that it is one to which the provisions of s. 7(1)(*d*)(i) do apply. I am of opinion also that after having paid for its operational and promotional expenses "all or substantially all" of its remaining resources "were devoted to charitable activities carried on or to be carried on by it...".

The learned trial judge was, however, also of opinion that the deduction for which provision is made in s. 7(1)(*d*) of the Act could not be allowed in respect of the gift here in question because it was in his opinion not established "to have been absolute and indefeasible". In this regard the learned trial judge said, in part:

> Dealing first with the question whether the direction in the testatrix's will to pay the residue of her estate to the Medical Alumni Association to establish a student loan fund for the purpose of loaning funds to women medical students, created an absolute gift to the Association within the introductory portion of paragraph (*d*) of subsection (1) of section 7 of the *Estate Tax Act*, I am relieved of the necessity of deciding the character of the monies in the hands of the Association by agreement between the parties, in effect, that the monies are received by the Association in trust for charitable purposes. That being so, I am of the opinion that there was no 'gift' to the Association and certainly therefore no 'absolute' gift to the Association within the meaning of paragraph (*d*). The purpose of the said

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paragraph (*d*) is to provide a means whereby gifts for charitable purposes can be made so as not to attract estate tax but Parliament has not seen fit, in the *Estate Tax Act*, to provide an exemption for charitable trusts.

In support of this proposition, the learned trial judge refers to the case of *Minister of National Revenue v. Trusts and Guarantee Company, Limited*[1]. In that case the contention that the donee was a charitable institution was found to be "obviously absurd" and with the greatest respect this factor appears to me to distinguish it from the present case. In my respectful opinion, the reasons for judgment of Thurlow J. in *Halley Estate v. M.N.R.*[2] which were endorsed without further comment by this Court[3] appear to me to be entirely relevant to the present case and I adopt them as explaining the true meaning of the word "absolute" as used in s. 7(1)(*d*). Mr. Justice Thurlow there said of the provisions of s. 7(1)(*d*) as it then read:

> The intention of this provision is apparently to permit the deduction of the value of what is given to the particular recipients and with this in mind it seems to me that it is more natural to interpret the word 'absolute' in the paragraph from the point of view of the recipient than from the point of view of the deceased and as referring to the irrevocable and undefeatable vesting of the subject matter of the gift in the recipient rather than to the unlimited extent of the interest given to the recipient . . . . Moreover while I can see no reason why Parliament should have intended to draw a distinction between a gift of an unlimited interest and an indefeasible gift for a lesser interest and to permit deduction of the value in the one case but not in the other it is not difficult to understand that in authorizing the deduction of the value of a gift to such a body Parliament would be concerned to ensure that the deduction should not be permitted when because of the provisions attaching to the gift, the body referred to in s. 7(1)(*d*) might never receive it. The word used is an apt one to make such a distinction and secure this object. I am accordingly of the opinion that the word 'absolute' in s. 7(1)(*d*) should be interpreted as meaning vested and indefeasible.

In the present case the fund making up "the balance of the residue" of the estate was made the subject of a vested indefeasible gift to the Association and although the gift

[1] [1940] A.C. 138 at 149, [1939] 4 All E.R. 149.
[2] [1963] Ex. C.R. 372, 63 D.T.C. 1090.
[3] (1963), 63 D.T.C. 1359.

was stamped with a trust it did not contain any provision which might result in it being divested so that the Association might never receive it. It was an indefeasible gift of something less than an unlimited interest and accordingly, in my view, it was "absolute and indefeasible" within the meaning of the section.

Counsel for the Minister of National Revenue advanced a further argument in support of his contention that s. 7(1)(*d*)(i) did not apply to this Association and in so doing referred to the provisions of s. 115(1) and (5) of the *Corporations Act*, R.S.O. 1960, c. 71, which read as follows:

115(1) A Corporation may pass by-laws providing that upon its dissolution and after the payment of all debts and liabilities its remaining property or part thereof shall be distributed or disposed of to charitable organizations or to organizations whose objects are beneficial to the community.

(5) In the absence of such by-law and upon the dissolution of the corporation the whole of its remaining property shall be distributed equally among the members or, if Letters Patent, Supplementary Letters Patent or by-laws so provide, among the members of a class or classes of members.

It was argued that as no such by-law had been passed by the Association, a part of its resources could on dissolution become available for the benefit of a member thereof and that it was therefore not an organization entitled to the benefit of the deduction for which provision is made in s. 7(1)(*d*)(i).

The fallacy of this argument appears to me to be that Part III of the *Corporations Act*, in which s. 115 appears, applies to two different kinds of corporations. This is apparent from the provisions of s. 101 which read as follows:

A corporation may be incorporated to which Part V or Part VI applies *or* that has objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature. (The italics are my own).

In the case of corporations other than Co-operative Corporations (Part V) and Insurance Corporations (Part VI) the members are expressly excluded from participation

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in "any profits or other accretions to the corporation" by s. 109(1) which reads:

> A corporation, *except a corporation to which Part V or VI applies,* shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent shall so provide. (The italics are my own).

Such a provision is contained in the Letters Patent of the Association here in question.

It seems to me that a corporation with exclusively charitable objects, the Letters Patent of which expressly provide that "any profits or other accretions to the corporation shall be used in promoting its objects", cannot be one to which the provisions of s. 115 were intended to apply. On the dissolution of such a corporation "its remaining property" is in my opinion, under the terms of its Letters Patent, required to be used in promoting objects "beneficial to the community" and the enactment of any such by-law as is contemplated by s. 115 would therefore be redundant.

For all these reasons I would allow this appeal with costs, set aside the assessment of the Minister of National Revenue and allow the claim for deduction made by the Executor of the estate of Dorothy Elgin Towle in respect of the gift made in the residuary clause of her will to "the Medical Alumnae Association of the University of Toronto".

Appeal allowed with costs, CARTWRIGHT *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: McMaster, Steele, McKinnon, MacKenzie & Collins-Williams, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

HECTORS LTD. ..... APPELLANT;

AND

THE MANUFACTURERS LIFE INSURANCE CO. and CITY INVESTMENT CORPORATION LTD. ..... RESPONDENTS.

1966
*Dec. 2
1967
Jan. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mechanics' liens—Contract to supply certain material for fixed price—Whether subsequent supply of material outside contract will keep mechanic's lien alive—The Mechanics Lien Act 1960 (Alta.), c. 64.

By a quotation dated January 23, 1964, the appellant offered to supply a contractor with a quantity of welded wire mesh. The offer was accepted in writing on February 3, 1964. From time to time these materials were delivered under the contract as the builder required them, and the last materials supplied under the contract were delivered in June 1964. The builder, from time to time, telephoned individual orders for special material—prefabricated lintel angles. These lintel angles were supplied as the telephone orders were received. The last of these orders was filed on October 14, 1964, and the appellant filed a lien on November 16, 1964, for a claim which included the balance owing on the original contract together with whatever was owing on the lintel angles.

In the submission of the appellant, the supply of lintel angles kept the lien alive and the claim, having been filed within thirty-five days after the last of the materials was furnished, as required by *The Mechanics Lien Act*, 1960 (Alta.), c. 64, was in time. This submission was ruled against at trial, and, on appeal, the decision of the trial judge was affirmed by a majority of the Court of Appeal. A further appeal was then brought to this Court.

Held: The appeal should be dismissed.

There was a finding of fact by the Courts below that the lintel angles subsequently supplied by the appellant were unrelated to the material supplied under the original contract—welded wire mesh. In a situation such as found here, where there was a contract to supply certain material for a fixed price and the subsequent supply of material outside the contract, the lien claimant could not tack on the subsequent supply of materials outside the contract and thus keep the lien alive. *Rathbone v. Michael* (1909), 19 O.L.R. 428, affirmed (1910), 20 O.L.R. 503; *Fulton Hardware Co. v. Mitchell* (1923), 54 O.L.R. 472; *Whitlock v. Loney*, [1917] 3 W.W.R. 971, followed; *Hurst v. Morris* (1914), 32 O.L.R. 346; *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.* (1929), 64 O.L.R. 94, distinguished.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Milvain J. Appeal dismissed.

[1] (1966), 56 W.W.R. 449, 57 D.L.R. (2d) 581, *sub nom. Inglewood Plumbing & Gasfitting Ltd. v. Northgate Development Ltd. et al. and Hectors Ltd.*

*PRESENT: Fauteux, Martland, Judson, Ritchie and Spence JJ.

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John A. S. McDonald, Q.C., for the appellant.

R. J. G. McBain, for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The problem involved in this appeal is whether in a case where there is a contract to supply certain material for a fixed price, the subsequent supply of material outside the contract will keep a mechanic's lien alive. Milvain J. decided that it would not. His judgment was affirmed by the Court of Appeal[1] with McDermid J.A. dissenting. In my opinion, the judgment of the Appellate Division should be affirmed.

By a quotation dated January 23, 1964, Hectors Limited, the appellant in this Court, offered to supply Willmar Construction with 8,500 square feet of welded wire mesh (approximately 120 tons) for $24,821. This offer was accepted in writing on February 3, 1964. From time to time these materials were delivered under this contract as the builder required them, and there is a finding of fact that the last materials supplied under this contract were delivered in June 1964. No lien was filed until November 1964. If there had been no other dealings between the parties, the filing of the lien was clearly out of time, for the statute requires it be filed "within thirty-five days after the last of the materials is furnished".

However, from time to time the builder telephoned individual orders for special material—pre-fabricated lintel angles. These lintel angles had nothing to do with the original quotation for the supplying of welded wire mesh. They cannot be regarded as extras to that contract. They were supplied as the telephone orders were received. The last of these orders was filled on October 14, 1964 and the lien was filed on November 16, 1964 for a claim which included the balance owing on the original contract together with whatever was owing for the lintel angles. If the supply of lintel angles kept the lien alive, then the claim, being filed within a period of thirty-five days from October 14, 1964, was in time. This is the submission of the appel-

[1] (1966), 56 W.W.R. 449, 57 D.L.R. (2d) 581, *sub nom. Inglewood Plumbing & Gasfitting Ltd. v. Northgate Development Ltd. et al. and Hectors Ltd.*

lant, Hectors Limited, and it is this submission that has been ruled against both at trial and on appeal.

The Appellate Division founded its judgment on the general principles stated in *Whitlock v. Loney*[1], a decision of the Supreme Court of Saskatchewan *en banc*. These general principles are stated in 13 C.E.D. (Ont. 2nd), p. 347, as follows:

> Where material is supplied under a prevenient arrangement or under a continuing or entire contract, it makes little difference how long a time elapses between deliveries, so long as the lien is filed, within thirty-seven days after the furnishing or placing of the last material "so furnished or placed," and the date of the last material being furnished is all that is of importance. Under s. 21(2), it becomes wholly immaterial whether the material is furnished under but one contract or under fifty; and it will be seen that this is independent of the completion of the work but if there is a contract to supply certain material for a fixed price, the subsequent supply of material outside the contract will not keep the lien alive.

The Supreme Court of Saskatchewan in the *Whitlock* case found that the facts proved what has been referred to as a prevenient arrangement or a continuing or entire contract. For that reason they upheld the lien. But they recognized that in a situation such as we find here, and which the Alberta Courts have expressly found to exist, a lien claimant cannot tack on the subsequent supply of materials outside the contract and thus keep the lien alive.

There are decisions to the same effect, both before and after the *Whitlock* case, in the Ontario Court of Appeal —*Rathbone v. Michael*[2]; and *Fulton Hardware Co. v. Mitchell*[3].

In *Rathbone v. Michael* there was a contract to furnish certain specified materials for the sum of $1,700. The last delivery under this contract was September 16, 1908. Further material was supplied between August 1 and October 8, 1908, on separate orders from time to time. A divisional Court first found that this further material was outside the contract and that the time of delivery of material outside the contract did not extend the time for filing the lien to include a claim under the original contract. On an application to adduce further evidence before the same Court, it was found that the additional material had been improperly charged as an extra outside the original con-

[1] [1917] 3 W.W.R. 971, 38 D.L.R. 52, 10 S.L.R. 377.
[2] (1909), 19 O.L.R. 428.
[3] (1923), 54 O.L.R. 472.

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tract and that it should have been charged under and as part of the original contract. The lien was, therefore, upheld. This admission of new evidence and the affirmance of the lien was upheld on an appeal to the Court of Appeal; see: *Rathbone v. Michael*[1]. The underlying assumption of all the judgments is that if the materials had not been supplied as part of the contract, the filing of the lien would have been out of time.

Fulton Hardware Co. v. Mitchell, supra, is to the same effect. Here there were two contracts, one for a roof for $3,806, and another for a skylight. There were also materials supplied not connected with either of these contracts. The point in issue is stated in the judgment of Meredith C.J.O. at p. 473:

> It is contended on the appellant's behalf that, inasmuch as all the work done and materials supplied for purposes of the two contracts, as well as the materials supplied for purposes outside the two contracts, were charged for in one running account, and work was done on the roof contract within the 30 days, the lien for the materials is saved.

Meredith C.J.O. approved the principles enunciated in *Whitlock v. Loney.* The judgment of the Court is contained in the following paragraph from p. 474:

> There is nothing in the evidence to indicate that all the work which was done and all the materials that were supplied were done and furnished under one continuing contract; but on the contrary, the work done and the materials supplied for the roof contract were furnished under a separate contract from that as to the skylight and that as to the materials. What was supplied under the last mentioned contract would, no doubt, come within the principle relied on by the appellant, and it is to such a contract that the language of Riddell, J., in *Hurst v. Morris* (1914), 32 O.L.R. 346, at p. 351, must have had reference.

Counsel for the appellant relied entirely on *Hurst v. Morris*[2] and *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.*[3]. These are not cases where, as here, there was a contract to supply certain material for a fixed price and the subsequent supply of material outside the contract. They were cases where the material was supplied under a prevenient arrangement as required from time to time. As Meredith C.J.O. pointed out, this was the situation that Riddell J. was referring to in *Hurst v. Morris* when he said:

> Thus it becomes wholly immaterial whether the material is furnished under one contract or under fifty, and it will be seen that this is

[1] (1910), 20 O.L.R. 503. [2] (1914), 32 O.L.R. 346.
[3] (1929), 64 O.L.R. 94.

independent of the completion of the work. Most of the difficulty in this case arises from not considering the language of the Statutes.

Here we have a finding of fact by the Alberta Courts that the lintel angles subsequently supplied by Hectors Limited were unrelated to the material supplied under the original contract—welded wire mesh. Consequently, they followed the principle stated in *Rathbone v. Michael* and *Fulton Hardware Co. v. Mitchell* and held that *Hurst v. Morris* and *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.* had no application.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Cohen, McDonald, Filer & Sallenback, Calgary.

Solicitors for the respondent, Manufacturers Life Insurance Co.: Burnet, Duckworth, Palmer & Tomblin, Calgary.

Solicitors for the respondent, City Investment Corporation Ltd.: Barron, Barron & McBain, Calgary.

ORION INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

ROBERT CRONE, VIOLET CRONE and ROBERT CRONE PICTURES LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1966
*Oct. 19, 20
1967
Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Aircraft liability insurance—Injuries received in crash of chartered aircraft—Whether unsatisfied judgment against charterer one for which indemnity provided in policy—Exclusion clause—Whether flight conducted "in accordance with licences issued to insured"—The Insurance Act, R.S.O. 1960, c. 190, s. 95(1).

RC and his wife VC were awarded damages for personal injuries sustained when an aircraft, in which they were passengers and which had been chartered by their employer from Airgo Ltd. for a flight to Washington, crashed at night near Elmira, Pennsylvania. Airgo Ltd. was the proprietor of a commercial air service and was insured with the defendant company under a policy of aircraft liability insurance. In an

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

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action brought pursuant to s. 95 of *The Insurance Act*, R.S.O. 1960, c. 190, in respect of the unsatisfied judgment recovered by the plaintiffs against Airgo Ltd., judgment at trial was rendered in favour of RC and VC. The trial judgment having been affirmed by the Court of Appeal, a further appeal was brought to this Court.

The defence was limited to the interpretation of an exclusion clause in the Declarations of the policy. It was contended on behalf of the insurer that the flight in which RC and VC were injured was not one for which indemnity was provided in the policy because it was not conducted "in accordance with the licences issued to the insured" in that it was an international flight for which no authorization had been obtained from the appropriate authorities contrary to the provisions of Airgo's operating licence and it was a night flight which the company was not authorized to make under the conditions of its operating certificate.

Held: The appeal should be dismissed.

On the evidence of the regulations governing "navigation of foreign civil aircraft within the United States", the nature of the authorization required from "the appropriate authorities" was a permit according to the aircraft in question "the privilege of taking on or discharging passengers, cargo or mail subject to the right of the state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable." The Court held that failure to obtain this authorization was not such a breach of a condition as to result in the aircraft being used for a purpose not authorized by Airgo's licence, and that it did not have the effect of invalidating the licence.

As to the submission that "night flying" was excluded from the coverage provided by the policy, the words in the operating certificate "under day Visual Flight Rules only" related exclusively to the rules as to visibility from time to time in force for daytime flights and it followed that conformity with these rules, which was not disputed in the present case, constituted conformity with the operating certificate in that regard, whether the flight was conducted by day or by night. At the time of the accident the aircraft in question was being used under Visual Flight Rules which were "in accordance with the licences issued to the insured by the Air Transport Board" and was accordingly in this regard being used for a purpose within the terms of the policy.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Stewart J. Appeal dismissed.

Alastair R. Paterson, Q.C., for the defendant, appellant.

William R. McMurtry, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal by Orion Insurance Company from a judgment rendered in

[1] [1966] 1 O.R. 221, 53 D.L.R. (2d) 98.

favour of Robert and Violet Crone by Stewart J. at the trial of an action brought by the respondents pursuant to the provisions of s. 95 of *The Insurance Act*, R.S.O. 1960, c. 190, in respect of an unsatisfied judgment recovered by them against Airgo Limited, the proprietor of a commercial air service which was insured with the appellant under a policy of aircraft liability insurance.

Section 95 of *The Insurance Act* reads as follows:

> Where a person incurs a liability for injury or damages to the person or property of another and is insured against such liability and fails to satisfy a judgment against him in respect of his liability and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy but subject to the same equities as the insurer would have if the judgment had been satisfied.

Robert and Violet Crone sustained bodily injuries on May 19, 1961, when an aircraft, in which they were passengers and which had been chartered by Robert Crone Pictures Limited from Airgo Limited for a flight to Washington, crashed at night in a wooded area near Elmira in the Commonwealth of Pennsylvania, U.S.A. At the time of the crash the aircraft was being operated by one Leo Brando a servant and agent of Airgo Limited.

In the action brought by Robert Crone, Violet Crone and Robert Crone Pictures Limited against Airgo Limited and its servant Brando, the first two plaintiffs claimed damages for personal injuries resulting from the negligent operation of the aircraft and breach of contract in failing to carry them safely on the chartered trip, and the Robert Crone Company claimed damages for loss of the services of its employees. No appearance was entered by either defendant and on an assessment of damages Mr. Justice Walsh awarded $7,452.93 to Robert Crone, $15,000 to Violet Crone and $15,500 to Crone Pictures Limited. Execution against Airgo Limited in respect of these damages was returned unsatisfied and its servant Brando has left the country.

When the present action was brought before Stewart J. pursuant to s. 95 of *The Insurance Act*, he gave judgment against the insurers for the damages awarded to Mr. and Mrs. Crone in the Airgo action together with interest from the date of the award, but held that the claim by the Crone

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Company was not one for which the statutory action could lie. This latter finding was not made the subject of appeal by the Crone Company either to the Court of Appeal for Ontario or to this Court, and accordingly the sole remaining issue in the present appeal is whether the judgment of Mr. and Mrs. Crone against Airgo Limited is one for which indemnity is provided in the Aircraft Liability Policy issued by the appellant.

The relevant portion of the insuring agreements recited in the policy reads as follows:

> NOW, THEREFORE, IN CONSIDERATION OF the payment of the specified premium total and the Declarations contained herein and subject to the Limits, Exclusions, Terms and Conditions and other provisions of this policy including its endorsements, if any, the Insurer hereby agrees with the Insured, to pay on behalf of the Insured in respect to such Coverages as are specified in paragraph 3 hereof, all sums which the Insured shall become legally obligated to pay as damages resulting from: ... COVERAGE C—Passenger Bodily Injury Liability Bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any passenger, caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft referred to in the Schedule.

The coverage specified in para. 3 of the policy in respect of the aircraft in question specified limits of $100,000 for each person and $300,000 for each occurrence.

The policy in question is made subject to certain exclusions which form a part thereof and include the following:

> This insurance does not apply ...
>
> (6) while the Aircraft is (a) used for any purpose other than as stated in Item 6 of the Declarations; (b) operated in flight by other than the pilot or pilots specified in Item 7 of the Declarations; (c) used for instruction unless specified in Item 6 of the Declarations; ...

The defence advanced by the appellant is, by the terms of its notice of appeal to this Court, limited to the interpretation of Item 6 of the Declarations of the policy which reads as follows:

> Item 6. Purposes. This insurance applies only while the aircraft is used for the following purpose(s).
>
> *Flight Training and Aircraft Rental, in accordance with Licenses issued to the Insured by the Air Transport Board, Private Business and Private Pleasure.*

The italics are my own.

By the terms of s. 15(1) of the *Aeronautics Act*, 1952 R.S.C., c. 2, it is provided that, subject to the approval of

the Minister, the Air Transport Board may issue a license to operate a commercial air service to any person applying therefor, but notwithstanding the issuance of such a license it is stipulated by s. 15(5) that:

> No carrier shall operate a commercial air service unless he holds a valid and subsisting certificate issued to him by the Minister certifying that the holder is adequately equipped and able to conduct a safe operation as an air carrier over the prescribed route or in the prescribed area.

The certificate pursuant to which Airgo Limited was carrying on its operations at the time of the accident was originally issued on August 21, 1959, and at that time had reference only to a license to operate a commercial air service between points within Canada and to recreational flying and aerial advertising from a base at Toronto, Ontario. This certificate was, however, on October 13, 1959, endorsed so as to refer to a license No. 251/59, dated September 15, 1959, which was in force at the time of the accident, by which Airgo Limited was "licensed ... subject to the conditions herein stated to operate a Class 9-4 International Non-Scheduled Charter commercial air service to transport persons and/or goods from a base at Toronto, Ontario." The flight in question was an "International Non-Scheduled Charter commercial air service ..." of the type authorized by this License, one of the conditions of which provides that:

> Prior to conducting an international flight under this Licence, the Licensee must obtain the required authorization from the appropriate authorities of the foreign government concerned.

It is to be noted also that the operating certificate issued to Airgo Limited certified that that company was "adequately equipped and able to conduct a safe operation as an air carrier from a base at Toronto (Island Airport), Ontario with the types of aircraft and under the conditions hereinafter set forth:

> Non-scheduled charter, recreational flying, and aerial advertising commercial air services, using landplanes and seaplanes, under day Visual Flight Rules only."

It is contended on behalf of the appellant that the flight in which the Crones were injured was not one for which indemnity is provided in the policy in question because it

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was not conducted "in accordance with the licences issued to the insured" in that it was an international flight for which no authorization had been obtained from the appropriate authorities contrary to the provisions of Airgo's operating licence and it was a night flight which the company was not authorized to make under the conditions of its operating certificate.

The submission that "night flying" was excluded from the coverage provided by the policy is based entirely on the contention that the words "under day Visual Flight Rules only" as they occur in the condition which forms a part of the operating certificate are to be read as meaning that the certificate was only valid in respect of daytime flights and that an aircraft which was being used at night was therefore not being used for a purpose "in accordance with the licences issued to the insured by the Air Transport Board" as required by Item 6 of the Declarations.

It appears to me, however, that the words "under day Visual Flight Rules only" are to be construed as limiting the use of the insured aircraft to periods when the conditions as to visibility conform to the rules established for daytime flying under the provisions of the Air Regulations and by directions made by the Minister in that behalf. Whether these rules differ from the rules, if any, governing night flying is, as it seems to me, a matter which must depend on the Air Regulations and ministerial direction made pursuant to the *Aeronautics Act* which are from time to time in force. The Visual Flight Rules which appear to have been in force at the time of the flight in question make no distinction between day and night flying. (See Air Regulations 540 and 541 and Air Navigation Order Series 5 No. 3).

In this regard it is admitted in the factum filed on behalf of the appellant that the "Visual Flight Rules apply equally by day and night" and it is further stated that:

> The Appellant has never sought to deny liability under the contract of insurance on the grounds that at the time of the accident the aircraft was being operated in conditions which were below the weather minima for VFR flights. The Appellant's position is that it was a condition of the relevant Operating Certificate No. 1571 that *all* operations of Airgo Limited should be by *day* only and it is common ground that at the time of the accident the aircraft was being operated at *night*.

I am, as I have indicated, of opinion that the words "under day Visual Flight Rules only" relate exclusively to the rules as to visibility from time to time in force for daytime flights and it appears to me to follow that conformity with these rules, which is not disputed in the present case, constitutes conformity with the operating certificate in that regard, whether the flight be conducted by day or by night. I am accordingly of opinion that when conducting the flight in question, Airgo Limited was the holder of a valid and subsisting operating certificate as described in subs. 5 of s. 15 of the *Aeronautics Act* and that at the time of the accident the aircraft in question was being used under Visual Flight Rules which were "in accordance with the licences issued to the insured by the Air Transport Board" and was accordingly in this regard being used for a purpose contemplated in Item 6 of the Declarations.

In support of the contention that the coverage afforded by the policy did not extend to an aircraft conducting an international flight for which the licencee had not obtained "authorization from the appropriate authorities of the foreign government concerned", the appellant tendered the evidence of the Assistant Executive Director of the Aeronautics Board in Washington who produced as an exhibit the Special Regulations governing "navigation of foreign civil aircraft within the United States". From a perusal of this evidence and of the relevant regulations, it appears to me that the nature of the authorization required from "the appropriate authorities" was a permit according to the aircraft in question "the privilege of taking on or discharging passengers, cargo or mail subject to the right of the state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable. (Regulation 375.42).

By s. 6(*d*) of the *Aeronautics Act* "commercial air service" is defined as meaning "any use of an aircraft in or over Canada for hire or reward" and I am of opinion that "international . . . charter commercial air service" must therefore be treated as meaning "use of the aircraft . . . for hire or reward" which in my view constitutes "aircraft rental" within the meaning of Item 6 of the Declarations which forms a part of the policy and which, as has been

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stated, limits the "purposes" for which the aircraft is insured to "flight training and aircraft rental in accordance with licences issued to the insured . . .".

I do not, however, think that the words "in accordance with" as they are employed in this context are to be construed as requiring strict compliance with all the conditions which are attached to the operating licence issued to the insured, but I am rather of the opinion that they are to be treated as synonymous with "authorized by" and that if the flight is of a kind for which the insured holds a valid and subsisting operating licence it does not cease to be used for one of the purposes for which indemnity is provided in the policy simply because the insured has not complied with all the terms of the conditions which are attached to that licence.

In the present case, as has been indicated, the licence authorizing the insured to operate "international non-scheduled charter commercial air service . . ." was issued subject to the conditions therein stated, but one of those conditions stipulated that "unless otherwise provided herein the licence shall remain in effect until suspended or cancelled". This is to be contrasted with the wording of the Certificate of Airworthiness which was considered in *Survey Aircraft Ltd. v. Stevenson et al*[1]. In that case there appeared above the signature on the certificate the words: "This Certificate is only valid subject to the above compulsory conditions being fulfilled and until the date shown on page 4 hereof."

There are two conditions in the operating licence in the present case breach of which would, in my opinion, result in the aircraft being used for a purpose not authorized by the licence and therefore not covered by the policy. One of these is the condition that the licencee "*shall not operate* unless he holds a valid and subsisting operating certificate . . .", and the other prohibits the licencee from undertaking any forms of operation except within the limits of continental North America and the territorial waters thereof.

I am, however, of opinion that failure to obtain "the required authorization from the appropriate authorities of the foreign government concerned" is not such a breach of a condition as to result in the aircraft being used for a

[1] (1962), 30 D.L.R. (2d) 539, affirmed [1962] S.C.R. 555.

purpose not authorized by the licence, and that it does not have the effect of invalidating the licence.

I am accordingly of opinion that the insured aircraft at the time of the accident in question was being used for "international ... charter commercial air service" for which the insured held a valid and subsisting licence and I am reinforced in this view by a consideration of s. 15(10) and (11) of the *Aeronautics Act* which provides:

> (10) Where in the opinion of the Board an air carrier has violated any of the conditions attached to his licence, the Board may cancel or suspend the licence.
>
> (11) Any air carrier whose licence has been so cancelled or suspended may appeal to the Minister.

For these reasons I am of opinion that the aircraft was being used for one of the purposes for which indemnity was provided in the policy and that under the circumstances and by virtue of s. 95 of *The Insurance Act*, Mr. and Mrs. Crone were entitled to recover from the appellant the amount of the judgments which they obtained against Airgo Limited.

I am in agreement with Mr. Justice Stewart and with the Court of Appeal in awarding to the respondents interest on the original judgment obtained by them in their action against Airgo Limited.

Having regard to all the above I would dismiss the appeal with costs.

It should perhaps be mentioned that although the judgment in favour of Mr. Crone was for a sum of less than $10,000, it was agreed by all concerned that leave to appeal against this judgment should be granted.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the plaintiffs, respondents: Bassel, Sullivan, Holland & Lawson, Toronto.

1966
*Dec. 7
1967
Jan. 24

ROBERT JACKSON and WALTER KERN (*Defendants*) ..... APPELLANTS;

AND

ALBERT MISSIAEN and MARY MISSIAEN (*Plaintiffs*) ..... RESPONDENTS.

ROBERT JACKSON and WALTER KERN (*Defendants*) ..... APPELLANTS;

AND

HELEN BAST, an infant by her next friend, ANTHONY BAST and ANTHONY BAST (*Plaintiffs*) ..... RESPONDENTS.

AND

ALBERT MISSIAEN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages—Collision of motor vehicles—Personal injuries—Assessment of general damages increased by Supreme Court of Canada—Applicable principles.

On appeal to this Court from judgments rendered by the Supreme Court of Alberta, Appellate Division, in two actions arising out of a motor vehicle collision, the Court, at the conclusion of argument on the question of liability, retired and on returning gave judgment as follows:

In this Court it is not questioned that the collision out of which this appeal arises was caused in part by the gross negligence of the driver of the appellants' car.

The question whether or not the respondent Albert Missiaen was guilty of contributory negligence is one of fact and we find ourselves unable to say that we should interfere with the concurrent findings in the Courts below absolving him from blame. The appeals will therefore be dismissed with costs.

In the first action, a cross-appeal by the respondent Albert Missiaen (referred to hereunder as AM) as to the amount of general damages awarded to him was then fully argued and judgment was reserved.

Held: The appeals should be dismissed; in the first action the cross-appeal should be allowed and the judgment at trial varied by substituting for the sum of $12,000 general damages awarded to the respondent AM the sum of $22,000.

---

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Spence JJ.

The sum of $12,000 at which the trial judge assessed the general damages of AM included (i) loss of salary from one year after the accident to the date of trial, (ii) his prospective loss of salary, (iii) the prospective payments to a housekeeper plus the cost of feeding her, (iv) damages for pain and suffering, (v) damages for loss of the amenities of life. Assuming that the life expectancy of AM at the date of the trial was only three years, the shortest period suggested in the "guess" of a medical witness, the total of items (i), (ii) and (iii) exceeded by more than $3,000 the total award of general damages and nothing remained to compensate him in regard to items (iv) and (v), that is to say for the fact that from a healthy and active old age the accident had turned him into an invalid, practically never free from pain.

In these circumstances, the amount at which the general damages were assessed was so inordinately low as to be a wholly erroneous estimate. The proper amount was not susceptible of precise calculation. It was the duty of the Court to endeavour to deal with the matter as would a properly instructed jury acting reasonably, not attempting to award "a perfect compensation" but seeking to fix an amount reasonably proportionate to the gravity of the injuries suffered. The Court was of the opinion that the general damages should be increased by $10,000.

APPEALS and CROSS-APPEAL from judgments of the Supreme Court of Alberta, Appellate Division, dismissing appeals and a cross-appeal from judgments of Farthing J. in two actions brought as a result of a motor vehicle accident. Appeals dismissed; cross-appeal in the first action allowed.

W. B. Williston, Q.C., and *R. B. Tuer*, for the appellants.

Arnold F. Moir, Q.C., and *John A. Weir*, for the respondents, A. Missiaen and M. Missiaen.

Adrian G. Smith, for the respondents, H. Bast and A. Bast.

The judgment of the Court was delivered by

CARTWRIGHT J.:—On June 1, 1963 at about 10 p.m., an automobile owned by the appellant Kern, driven with his consent by the appellant Jackson and in which Helen Bast was a passenger was in collision with an automobile owned and driven by the respondent Albert Missiaen in which the respondent Mary Missiaen was a passenger. Albert Missiaen, Mary Missiaen and Helen Bast all suffered personal injuries.

As a result of the collision two actions were brought, the first by the Missiaens against Jackson and Kern and the second by Helen and Anthony Bast against Jackson, Kern and Albert Missiaen.

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Cartwright J.

These two actions were tried together by Farthing J. who found that the collision was caused by the gross negligence of Jackson, absolved Albert Missiaen from blame and awarded damages against Jackson and Kern jointly and severally as follows:

To Albert and Mary Missiaen, special damages	$ 8,624.49
To Albert Missiaen, general damages	$12,000.00
To Mary Missiaen, general damages	$ 5,000.00
To Helen Bast and Anthony Bast, special damages	$ 1,605.80
To Helen Bast, general damages	$10,000.00

The second action as against Missiaen was dismissed with costs but it was ordered that the plaintiffs should recover from Jackson and Kern the costs which they were required to pay to Missiaen.

In each action Jackson and Kern appealed as to the findings in regard to liability and as to the quantum of general damages.

In the first action Albert Missiaen cross-appealed asking that the amount of the general damages awarded to him should be increased. The Appellate Division of the Supreme Court of Alberta dismissed the appeals and the cross-appeal with costs.

In the first action, Jackson and Kern appeal to this court and Albert Missiaen cross-appeals asking that the award of general damages to him be increased.

In the second action, Jackson and Kern appeal; there is no cross-appeal, Helen Bast and Anthony Bast ask that the judgment of the Appellate Division be affirmed.

At the commencement of the hearing in this Court we requested counsel to deal first with the question of liability. Counsel for the appellants did not argue that the concurrent findings of gross negligence against Jackson should be disturbed but submitted that the greater part of the blame should be placed upon Albert Missiaen. At the conclusion of the arguments of all counsel on this branch of the matter the Court retired and on returning gave judgment as follows:

> In this Court it is not questioned that the collision out of which this appeal arises was caused in part by the gross negligence of the driver of the appellants' car.

The question whether or not the respondent Albert Missiaen was guilty of contributory negligence is one of fact and we find ourselves unable to say that we should interfere with the concurrent findings in the Courts below absolving him from blame. The appeals will therefore be dismissed with costs.

The cross-appeal of Albert Missiaen as to the amount of general damages awarded to him was then fully argued and judgment was reserved.

The findings of the learned trial judge as to the physical results of the injuries suffered by Albert Missiaen are amply supported by the evidence and are as follows:

At the time of the accident on 1st June, 1963 he was 82 years of age and in remarkably good health. He was working every day. He did his own gardening and that of three of his sons, and looked after their cottages at Pigeon Lake. A few months before the accident he had no trouble passing a medical exam for his driver's licence. His most serious injuries are those affecting his legs. Before the accident he said he could walk "miles and miles". Now his left leg is tired and the right hurts in the hip where it was dislocated. He can only walk with two sticks and only about 100 feet at a time. He can't tie his shoe laces. He always has to sleep with a cushion under his left knee. Pain in his leg makes sleep difficult. He gets pain in his neck if he lies on his right side. He still enjoys his meals. He can't go out in the winter now but still enjoys getting out in good summer weather.

Dr. F. G. Day, an orthopaedic surgeon, said that Mr. Missiaen was very severely injured, the main injury being to the hip joint and clavicle. In hospital he developed chest trouble from having to stay so long in bed. His right hip is his principal trouble at present. It is almost fixed in one position because there is no fusion. If there were, he would be much better off. The only remedy would be to remove the head of the femur and replace it with an artificial one. The doctor said he would not recommend such major surgery for a man of his age as he would hardly have the necessary "drive" to put him through the post-operative period. Dr. Day said that Mr. Missiaen suffered a great deal of pain, so much so that he cannot walk or sit or lie in bed without suffering. The doctor fixed his disability at 50 percent of total, which is just about double the degree he had ever before estimated. He said he was surprised to hear that Mr. Missiaen had said in evidence that he could walk about a hundred feet at one time—a longer distance than the doctor would have thought possible.

From his own evidence and that of Dr. Day, it was made quite clear that this unfortunate old man is anything but a malingerer. From a remarkably healthy and active old age this accident has turned him into an invalid who is practically never free from pain—even his sleep being frequently interrupted thereby.

The learned trial judge also found that prior to the accident Mr. Missiaen, who had farmed for the greater part of his life, had always been an extremely active man, that after he retired he kept himself busy at work not too heavy for him, that he kept the grounds in front of his sons'

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Cartwright J.

company office in proper shape, that he did a lot of work at the summer cottage of one of his sons, 54 miles away, driving himself out there in the morning and back to Edmonton in the evening, that he was employed as the caretaker of the sons' business premises at a salary of $210 a month although possibly during the two or three years prior to the accident this may have been an over-payment made because of the family relationship. For one year following the accident, the sons' company continued to pay the monthly salary but since then Mr. Missiaen has not received any salary. Because of the physical condition of himself and his wife resulting from the accident, he has to employ a housekeeper at a salary of $150 a month to care for the two of them.

At the trial the witness, F. G. Missiaen, produced a list of items of special damage and supporting vouchers totalling $8,624.49. This was not seriously challenged in cross-examination and neither the list nor the vouchers were made an exhibit. However from an examination of the evidence of this witness and the comments of counsel it would seem that this total (which was the amount at which the learned trial judge assessed the special damages) does not include any loss of salary or any expense for feeding the housekeeper but does include the amounts paid to the housekeeper up to the date of the trial.

From this it follows that the sum of $12,000 at which the learned trial judge assessed the general damages of Mr. Missiaen includes (i) loss of salary from one year after the accident to the date of trial, (ii) his prospective loss of salary, (iii) the prospective payments to the housekeeper plus the cost of feeding her, (iv) damages for pain and suffering, (v) damages for loss of the amenities of life.

Item (i) would be in round figures $2,520.

Items (ii) and (iii) together, even excluding any allowance for the food and lodging of the housekeeper, would amount to approximately $4,300 a year.

At the time of the trial, in June 1965, Dr. Day was asked in cross-examination as to Mr. Missiaen's life expectancy; he replied that while he would "only like it recorded as a guess", he thought "it would not be much longer than three or four years"; later in his evidence while emphasizing that

it was a guess rather than an estimate, he suggested the possibility of the period being ten years.

If one assumes that Mr. Missiaen's life expectancy at the date of the trial was only three years, the shortest period suggested in Dr. Day's "guess", it is at once obvious that the total of items (i), (ii) and (iii) exceeds by more than $3,000 the total award of general damages and that less than nothing remains to compensate him in regard to items (iv) and (v), that is to say for the fact that, to quote again the words of the learned trial judge:

> From a remarkably healthy and active old age this accident has turned him into an invalid who is practically never free from pain—even his sleep being frequently interrupted thereby.

In these circumstances, it appears to me that the amount at which the general damages were assessed is so inordinately low as to be a wholly erroneous estimate. The proper amount is not susceptible of precise calculation. It is, I think, our duty to endeavour to deal with the matter as would a properly instructed jury acting reasonably, not attempting to award "a perfect compensation" but seeking to fix an amount reasonably proportionate to the gravity of the injuries suffered. In my opinion the general damages should be increased by $10,000.

In the first action, the appeal is dismissed with costs, I would allow the cross-appeal with costs in this Court and in the Appellate Division and direct that the judgment at trial be varied by substituting for the sum of $12,000 general damages awarded to the respondent Albert Missiaen the sum of $22,000. In the second action the appeal is dismissed with costs.

Appeals dismissed with costs; cross-appeal in first action allowed with costs.

Solicitors for the appellants: Clement, Parlee, Irving, Mustard & Rodney, Edmonton.

Solicitors for the respondents, A. Missiaen and M. Missiaen: Wood, Moir, Hyde & Ross, Edmonton.

Solicitors for the respondents, H. Bast and A. Bast: Stack, Smith & Bracco, Edmonton.

1966
*June 23
1967
Feb. 7

KALMEN MAPA and ISADORE GOLDIST (*Applicants*) ..... APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH YORK and S. G. BECKETT, Building Commissioner (*Respondents*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Application for separate building permits for foundation and superstructure of apartment hotel—Permit issued for foundation—Subsequent passage of amendment to zoning by-law to prevent construction of apartment hotels in area—Whether building plans approved by inspector prior to passage of amending by-law—The Planning Act, R.S.O. 1960, c. 296, s. 30(7)(b).

The appellants were builders who intended to build an apartment hotel on a lot which they purchased, conditional upon their ability to obtain a building permit. Later, having been informed by the respondent municipality that a permit would be issued, they waived the condition and became bound to purchase the land. On March 2, 1964, they applied for two permits, one for the foundation and one for the superstructure. This was in accordance with the established practice which allowed the applicant to commence work sooner and avoided the delay which would ensue if all plans and drawings had to be examined in complete detail before work could commence. The deficiencies, if any, with relation to the superstructure would normally be worked out between the parties as the work progressed.

A permit for the foundations was issued on April 2, 1964, and as a result the appellants entered into construction contracts. An endorsement on the plans indicated that they were approved on or about March 18, 1964. On April 6, 1964, the township passed an amending zoning by-law, the object of which was to prevent the appellants and others from building apartment hotels on sites already chosen by them.

An application for mandamus to compel the issue of the building permit was dismissed as to the permit for the superstructure. On consent of the parties, the judge who heard the application was asked to enlarge it to include a prayer for a declaration that the plans for the building had been approved by the building inspector prior to the date of the passing of the amending by-law and that the plans were therefore approved within the meaning of s. 30(7)(*b*) of *The Planning Act*, R.S.O. 1960, c. 296. This declaration was granted.

The Court of Appeal allowed the appeal of the municipality and held that the proposed building was not an apartment hotel within the meaning of that term as defined in the zoning by-law prior to its amendment, and that consequently, its erection was prohibited by the provisions of the by-law even before amendment. On appeal to this Court, the appellants sought restoration of the declaratory judgment given by the trial judge.

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

Held (Martland and Hall JJ. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Judson and Spence JJ.: The application for the building permit was in conformity with the by-law prior to its amendment.

As submitted by the appellants, the approval contemplated by s. 30(7)(*b*) of *The Planning Act* was approval with relation to zoning questions. The plans for the proposed apartment hotel were approved by the building inspector prior to the date of the passing of the amending by-law. The plans were therefore approved within the meaning of s. 30(7)(*b*) of the Act.

Per Martland and Hall JJ., *dissenting:* Approval of the plans of a building, within the meaning of s. 30(7) of *The Planning Act,* meant that kind of approval by the building inspector which would be requisite for the issuance of a building permit. No such approval was ever given in this case, nor were the appellants ever in a position to demand that it be given.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Brooke J. Appeal allowed, Martland and Hall JJ. dissenting.

B. J. MacKinnon, Q.C., and *J. E. Sexton,* for the appellants.

J. T. Weir, Q.C., and *M. McQuaid,* for the respondents.

The judgment of Taschereau C.J. and Judson and Spence JJ. was delivered by

JUDSON J.:—The appellants are builders who intended to build an apartment hotel on a lot which they purchased for $199,500, conditional upon their ability to obtain a building permit. They brought an application for mandamus to compel the issue of the permit. Brooke J., who heard the application, dismissed it as to the permit for the superstructure of the building. A permit had already been granted for the foundations. On consent of the parties, the judge was asked to enlarge the application to include a prayer for a declaration that the plans for the building had been approved by the building inspector prior to the date of the passing of an amending by-law No. 18758 and that the plans were therefore approved within the meaning of s. 30(7)(*b*) of *The Planning Act.* The judge made this declaration.

The Court of Appeal allowed the appeal of the municipality and held that the proposed building was not an apartment hotel within the meaning of that term as defined in the zoning by-law No. 7625, and that consequently, its erection was prohibited by the provisions of the by-law even

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Judson J.

as it stood before an attempted amendment which I will deal with later.

On this appeal the appellants seek the restoration of the declaratory judgment given by Brooke J. Mandamus has disappeared from the litigation.

Before making the conditional contract for the purchase of the land, the appellants had ascertained that it was zoned "General Commercial" according to zoning by-law No. 7625 of the municipality and that apartment hotels were a permitted use. On March 2, 1964, they applied for permits for the foundation and excavation and for the superstructure. They delivered at the same time two sets of architectural and structural plans, together with a sketch of survey. The plans were for a 231-suite apartment hotel.

Before waiving the condition in their agreement of purchase and thereby binding themselves to complete, the appellants, wishing to be satisfied that a permit for the apartment hotel would be issued, made enquiries of the municipality and were informed on the 28th and 30th days of March, 1964, that a permit would be issued. Relying upon this information, they immediately waived the condition and became bound to purchase the land.

The practice of applying for two permits, one for the foundation and one for the superstructure, requires explanation. It had become well established and was based on convenience. It allowed an applicant to commence work sooner and avoided the delay which would ensue if all plans and drawings had to be examined in complete detail and approved in their entirety before work could commence. The deficiencies, if any, with relation to the superstructure would normally be worked out between the architect and engineer on one side and the corporation on the other as construction went along.

On April 2, 1964, permit No. 60133 was issued to the appellants to excavate and erect the foundation for the proposed building. The endorsement on the plans indicated that they were approved on or about March 18, 1964. The plans, as filed, did not offend the zoning by-law prior to its amendment. As a result of the issue of the permit on April 2, 1964, the appellants entered into construction contracts for amounts exceeding $350,000. They had also already entered into engineering and architectural contracts.

On April 13, 1964, the council of the respondent instructed the building commissioner not to "process any applications for building permits for apartment hotels which have been or may hereafter be submitted to the Building Department". On April 15, the building commissioner wrote the appellants that the plans did not comply with the zoning by-law No. 7625, as amended by by-law No. 18758, which amendment was purportedly passed by the township on April 6, 1964, four days after the granting of the permit to the appellants. The object of the amending by-law was to prevent the appellants and others from building apartment hotels on sites already chosen by them.

The submission of the appellants is that they were entitled to build a high-rise apartment hotel under by-law No. 7625. The Court of Appeal has found that they were not so entitled for reasons that counsel for the municipality is not prepared to support. I will set out the relevant definitions in the zoning by-law:

> "Apartment Hotel" shall mean a building or portion of a building used mainly for the purpose of furnishing living quarters for families by the month or more than a month, and not for any period of less than a month, and having at least six suites of rooms for rent, and having a restaurant or dining room, but shall not include an hotel or ordinary lodging house.
>
> "Dwelling Apartment House" shall mean a building containing more than four (4) dwelling units each unit having access only from an internal corridor system.
>
> "Dwelling Unit" shall mean a separate set of living quarters designed or intended for use or used by an individual or one family alone, and which shall include at least one room and separate kitchen and sanitary conveniences, with a private entrance from outside the building or from a common hallway or stairway inside.
>
> "Hotel" shall mean a building or part of a building in which a minimum of six rooms is provided for renting as dwellings, usually on a temporary or transient basis, with no facilities for cooking or housekeeping therein; but with a public dining room.

The ratio of the Court of Appeal is that the intended building was not an apartment hotel but a "dwelling apartment house"; that such a building even on a site within a C1 Zone could not be erected under by-law No. 7625 unless it conformed to the provisions applicable for a building in an RM zone. This is expressed in the following passage from its reasons for judgment:

> Having concluded that the projected building is a "dwelling, apartment house", and that as such it clearly does not conform to the

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Judson J.

provisions applicable to such a building in a RM5 zone, its erection on a site within a C1 zone was not permissible under By-law 7625 as it stood at the date of the application for the building permit.

At the time of the applications for building permits the municipal officers thought that they were in conformity with the zoning by-law; that the proposed buildings were apartment hotels within the terms of the by-law and that they could be built on land which was zoned (C-1)—General Commercial Zone—as this land was. No one thought of classifying these buildings as Dwelling Apartment Houses restricted to a height of three stories, and counsel for the municipality, in this Court, made no attempt to argue this. I think that it is clear that when these excavation and foundation permits were granted, the applications were in conformity with the by-law prior to its amendment.

The next branch of the appeal is the submission of the appellants that their plans were approved within the meaning of that word as found in s. 30(7)(*b*) of *The Planning Act,* R.S.O. 1960, c. 296, prior to the passing of the amending by-law 18758. Section 30(7)(*b*) of *The Planning Act* reads as follows:

> No by-law passed under this section applies,
> (*b*) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have, prior to the day of the passing of the by-law, been approved by the municipal architect or building inspector...

The appellants say that the approval contemplated by s. 30(7)(*b*) is approval with relation to zoning questions. On the other hand, the municipality says that the approval of plans contemplated by s. 30(7)(*b*) is the issue of the building permit. In other words, if a builder cannot get a mandamus for the issue of a building permit, then he must lack the necessary approval under s. 30(7)(*b*). The judge favoured the submission of the appellants. I think that he was right in making this declaration. The building permit for the foundations and excavation was actually issued. The plans for the superstructure were in the hands of the municipality. The very issue of the excavation and foundation permit indicates that whatever objections there might be to the plans of the superstructure were of such a character, being deficiencies with respect to the building by-law alone, that they would normally be worked out

between the parties as the work progressed. I think that these appellants had the approval of the municipality and that the judgment of Brooke J. should be restored.

The appeal should be allowed with costs and para. 1 of the order of Brooke J. to the following effect should be restored:

IT IS DECLARED AND FOUND that the plans as submitted by the Applicants for the proposed apartment hotel were approved by the Building Inspector prior to the date of the passing of the amending by-law, being By-law 18758 of the Respondent Municipality, and that the plans were therefore approved within the meaning of Section 30(7)(*b*) of the Planning Act.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—This case relates to one of three applications which were disposed of at the same time by Brooke J., each seeking an order by way of mandamus, directed to the respondent corporation and to the respondent Beckett, its building commissioner, to issue a building permit to permit the applicant to build an apartment hotel. The other two applicants were Ample Investments Limited and Tashan Limited. Reasons were delivered in respect of the application of Ample Investments Limited, which also applied to the other two applications. Brooke J. refused to make the order requested, but, on consent of the parties, enlarged the application to include a prayer for a declaration that the plans for the building had been approved by the respondent Beckett before passage of amending by-law No. 18758. This declaration was granted. His decision was reversed on appeal. The appeals from the judgments of the Court of Appeal for Ontario in respect of all three applications were argued at the same time before us.

The facts are stated in the reasons of my brother Judson. In each case the applicant had obtained a permit limited to the excavation and erection of the foundation of a building. These were issued, in the case of the appellants, on April 2, 1964, in the case of Tashan, on April 3, 1964, and in the case of Ample, on April 6, 1964. By-law No. 18758 was enacted on April 6, 1964, and its effect was to prevent the construction in each case of a building of the type contemplated in the area where it was proposed to be erected, in that, *inter alia*, a limitation as to height was imposed.

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Martland J.

The respondents contend that this amending by-law was applicable in each case. The appellants contend that it did not apply because of the provisions of s. 30(7) of *The Planning Act*, R.S.O. 1960, c. 296, which provides as follows:

> 30. (7) No by-law passed under this section applies,
>
> (*a*) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; or
>
> (*b*) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have, prior to the day of the passing of the by-law, been approved by the municipal architect or building inspector, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the erection of such building or structure is commenced within two years after the day of the passing of the by-law and such building or structure is completed within a reasonable time after the erection thereof is commenced.

The application of that subsection depends upon whether or not the respondent Beckett had, prior to the enactment of by-law No. 18758, approved the plans of the appellants' proposed building.

The learned trial judge summarizes the evidence of Beckett on this point as follows:

> Mr. Beckett in his evidence stated that the plans of the superstructure were considered prior to the issue of the permit for excavation and foundation, but only in so far as they related to excavation and foundation. The plans for the excavation and foundation, which are some of the plans filed, are clearly stamped over the signature of Mr. Beckett "approved for building permit for excavation and foundation only." There is no stamp of approval marked on the rest of the plans filed. As to the application for the building permit for the superstructure, Mr. Beckett states that there was a preliminary examination made of these plans but that they were returned to the owner with a notice endorsed on them, "Need further lay-out plans for superstructure permit" to advise that there were deficiencies in the documents submitted for this purpose. It appears from the cross-examination that this objection relates to one of the plans which is entitled a typical floor plan and on which it is noted that on alternate floors this plan would be reversed. For clarity, the building inspector has required a separate plan for the alternate floors. Mr. Beckett stated that at the time of the launching of this application further examinations were made of the plans and they revealed a number of deficiencies, some of which were touched upon in his cross-examination. In addition he stated, on cross-examination, that no specifications for the superstructure had been filed and as a result certain aspects of the construction were not clear, e.g., while the plans called for brick, there were no specifications as to the type of brick.

The learned trial judge found that the building plans had been examined and approved as to their compliance with the zoning by-law No. 7625 as it then stood. He further stated that:

> The plans in so far as they related to the superstructure had received consideration and had undergone preliminary examination prior to the issuing of the permit for excavation and foundation.

He concluded that there had been approval within the meaning of s. 30(7) of *The Planning Act*.

It was contended by counsel for the appellants that approval of the plans as to compliance with the zoning by-law was an approval within the meaning of subs. (7). I do not accept this submission. Paragraph (*b*) of the subsection refers to approval of the plans of a building or structure. In my opinion this means the approval of the plans in relation to the issuance of a building permit. Subsection (7) was intended to remove from the application of a zoning by-law a building already constructed and in use, and a proposed building which, in the absence of the by-law, the owner of the land was legally entitled to construct on the day the by-law was passed. An opinion by the building inspector that a building of the kind proposed in a set of plans would not offend an existing zoning by-law is not an approval of the plans of the building in this context.

The requirements to be met before the approval of plans of a building and the issuance of a building permit are described in Chapter 1, Section 6, of By-Law No. 6110 of the respondent. It provides, in part:

> 6. DUTIES OF THE BUILDING COMMISSIONER
>
> The Building Commissioner shall:
>
> (*a*) Examine all applications for permission to do work in connection with building;
>
> (*b*) When the prescribed fee has been paid, and the application, drawings, specifications and block plan or survey conform to the requirements of this By-law, and all other applicable governmental regulations, stamp the drawings and specifications with the approval stamp of the Building Department, issue the permit together with one set of the approved drawings and specifications to the applicant, and retain the other set. . .
>
> (*c*) If the matters mentioned in any application for a permit or if the drawings, specifications or block plan or survey submitted with the application indicate to the Building Commissioner that the work proposed to be done will not comply in all respects with the provisions of this By-law and all applicable governmental regulations, refuse to issue a permit therefor and no permit shall be

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> issued until the application, drawings, specifications and the block plan are made to conform to the requirements of this By-law and all applicable governmental regulations.

Section 6(*b*) clearly contemplates the submission of both drawings and specifications before the drawings can be approved, and the approval of both, at the same time, before a building permit may be issued. The respondent Beckett, on the date of the enactment of by-law No. 18758, had no authority to approve the building plans, because on that date not only were there deficiencies in the plans filed, but, in addition, no specifications had been filed.

It is clear that on that date the appellants were not in a position to demand the issuance of a building permit because the learned trial judge expressly refused to grant an order by way of mandamus to require the issuance of such permit, and no appeal was taken from that decision. He said:

> Accepting the statements made by Mr. Beckett as to the deficiencies in the material and having considered the provisions of the building by-law, particularly as to the need for filing specifications, I cannot in these circumstances at this time require the respondent municipality to issue the building permit sought.

In my opinion, approval of the plans of a building, within the meaning of s. 30(7) of *The Planning Act*, means that kind of approval by the building inspector which would be requisite for the issuance of a building permit. No such approval was ever given in this case, nor, in view of the decision of the learned trial judge, were the appellants ever in a position to demand that it be given.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal allowed with costs, MARTLAND *and* HALL JJ. *dissenting.*

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondents: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

AMPLE INVESTMENTS LIMITED (*Applicant*) ..... APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH YORK and S. G. BECKETT, Building Commissioner (*Respondents*) ..... RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Brooke J. wherein it was declared that the plans as submitted by the applicant for a proposed apartment hotel had been approved within the meaning of s. 30(7)(*b*) of *The Planning Act*, R.S.O. 1960, c. 296. Appeal allowed, Martland and Hall JJ. dissenting.

W. B. Williston, Q.C., R. J. Rolls and *D. S. Affleck*, for the appellant.

J. T. Weir, Q.C., and *M. McQuaid*, for the respondents.

The judgment of Taschereau C.J. and Judson and Spence JJ. was delivered by

JUDSON J.:—For the reasons given in *Kalmen Mapa and Isadore Goldist v. The Municipal Corporation of the Township of North York and S. G. Beckett, Building Commissioner*[1], I would allow this appeal with costs and make the same order.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—For the reasons given in *Kalmen Mapa and Isadore Goldist v. The Municipal Corporation of the Township of North York and S. G. Beckett, Building Commissioner*[1], I would dismiss this appeal with costs.

Appeal allowed with costs, MARTLAND *and* HALL JJ. *dissenting.*

Solicitors for the appellants: Fasken, Calvin, MacKenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondents: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

[1] [1967] S.C.R. 172.

1966
*June 23
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Feb. 7

TASHAN LIMITED (*Applicant*) .....APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH YORK and S. G. BECKETT, Building Commissioner (*Respondents*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Brooke J. wherein it was declared that the plans as submitted by the applicant for a proposed apartment hotel had been approved within the meaning of s. 30(7)(*b*) of *The Planning Act*, R.S.O. 1960, s. 296. Appeal allowed, Martland and Hall JJ. dissenting.

W. B. Williston, Q.C., R. J. Rolls and *D. S. Affleck*, for the appellant.

J. T. Weir, Q.C., and M. McQuaid, for the respondents.

The judgment of Taschereau C.J. and Judson and Spence JJ. was delivered by

JUDSON J.:—For the reasons given in *Kalmen Mapa and Isadore Goldist v. The Municipal Corporation of the Township of North York and S. G. Beckett, Building Commissioner*[1], I would allow this appeal with costs and make the same order.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—For the reasons given in *Kalmen Mapa and Isadore Goldist v. The Municipal Corporation of the Township of North York and S. G. Beckett, Building Commissioner*[1], I would dismiss this appeal with costs.

Appeal allowed with costs, MARTLAND and HALL JJ. *dissenting.*

Solicitors for the appellant: Fasken, Calvin, MacKenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondents: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

[1] [1967] S.C.R. 172.

G. W. HAROLD MILLICAN, THOMAS WILLIAM SNOWDON, and HOWARD COOK, carrying on business under the firm name and style of MILLICAN, SNOWDON & COOK and the said MILLICAN, SNOWDON & COOK (*Defendants*) .....APPELLANTS;

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AND

TIFFIN HOLDINGS LTD. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Solicitors—Professional negligence—Solicitor retained by lender in preparation and registration of chattel mortgage on certain equipment as security for loan—Later discovery that equipment not at reported location and probably not owned by borrower—Whether solicitor negligent in failing to anticipate borrower's criminal conduct.

On Thursday, July 17, 1958, the appellant S, a partner in the appellant firm of solicitors at Calgary, was asked to represent the respondent in the preparation of a chattel mortgage on some industrial equipment as security for a loan of $13,000 to be made by the respondent to one A. The latter in describing the equipment gave a serial number which S, on making inquiry, discovered could not be the proper number. T, who controlled and was the president of the respondent, was advised by S to make a personal inspection of the equipment but he said that he did not have time. He intimated to S that the matter was urgent, as A required the funds promptly in order to accept an option.

A told S that the location of the equipment was at Hinton, Alberta. This would necessitate registration of the chattel mortgage in Edmonton. He also gave the name of the company which he said was using the equipment. S telephoned to his agents in Edmonton, giving the information which he had obtained and asking them to check it.

At a further meeting the next day A furnished what he alleged was the correct serial number of the equipment. S was advised by a finance company that they had financed equipment for A in the past of the kind described by him. This information was confirmed in writing by the company on Monday, July 21. The confirmation gave the serial number of the equipment and stated that a lien of $22,000 had been satisfactorily retired by the debtor.

On the Friday, the chattel mortgage was drawn and executed and was forwarded to S's agents at Edmonton for registration with a letter asking that it be ascertained that there was no prior encumbrance against it. T delivered to S the respondent's cheque for $13,000 payable to the appellant firm. S was instructed to deposit with the bank on which it was drawn a letter confirming the registration of the chattel mortgage in order to have it certified.

The chattel mortgage was registered on Monday, July 21, and, after certification of the respondent's cheque, S delivered to A the appellant firm's cheque for $13,000. At the time he had received the written confirmation of the finance company. On the same day, in the late afternoon and subsequent to delivery of the cheque, S received a

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

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telegram from his Edmonton agents advising that they were unable to locate the officers of the company which, according to A, had been using the equipment.

It later transpired that the equipment was not at Hinton, and probably was not owned by A. The sum of $5,000 was collected by the respondent from him. The respondent's action against the appellants for the balance of $8,000 advanced, and interest, was dismissed by the trial judge, who held that S was not negligent in failing to anticipate criminal acts on the part of A. The trial judgment was reversed on appeal, and an appeal was then brought to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

S had explained to T that it was impossible to obtain absolute proof of ownership of the equipment. His understanding of his duty was that he was to ascertain that there was a properly described piece of equipment, that he was to register a chattel mortgage against it, not subject to any prior encumbrance, and that if he had some evidence of ownership which he considered satisfactory the money could be released. He felt that the information from the finance company did constitute evidence of ownership, sufficient to satisfy him that, within the terms of his instructions, the money could be disbursed.

In the light of these circumstances the Court was not prepared to disturb the finding with respect to negligence made by the trial judge.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J., dismissing an action against solicitors for professional negligence. Appeal allowed.

W. R. Brennan, Q.C., for the defendants, appellants.

G. R. Forsyth, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an action for professional negligence brought by the respondent company against a firm of solicitors in Calgary in respect of the payment of certain funds of the respondent to one Arnoldussen.

On Thursday, July 17, 1958, R. W. Tiffin, who controlled and was the president of the respondent, attended at the office of the appellants along with Arnoldussen to consult Mr. T. W. Snowdon, a partner in the appellant firm. Snowdon was asked to represent the respondent in the preparation of a chattel mortgage on some industrial equipment, in the principal amount of $16,000, as security for a loan of $13,000 to be made by the respondent to Arnoldussen. A question arose as to the proper description of the equipment. Arnoldussen gave a serial number, which

[1] (1965), 53 W.W.R. 505, 53 D.L.R. (2d) 674.

Snowdon checked, by telephone, which he learned could not be the proper number for equipment of the kind described. Arnoldussen then undertook to get the proper description the next day.

Snowdon suggested to Tiffin that he go and actually examine the equipment's serial number and determine its existence, but was told that Tiffin did not have time and also that time was not available if Arnoldussen was to be accommodated. It was intimated to Snowdon that the matter of the loan to Arnoldussen was urgent, because he required the funds to accept an option before it expired on the following day. Later, according to Tiffin, the option was extended until Monday, July 21.

Arnoldussen told Snowdon that the location of the equipment was at Hinton, Alberta. This would necessitate registration of the chattel mortgage in Edmonton. He also gave the name of the company which he said was using the equipment. Snowdon telephoned to his agents in Edmonton, giving the information which he had obtained and asking them to check it.

A further meeting occurred on the following day, Friday, July 18. At this time Arnoldussen gave the serial number of the equipment and referred to prior financing of the equipment by a finance company with an office in Calgary. Snowdon checked this information with the finance company by telephone, and was advised that they had financed equipment for Arnoldussen in the past of the kind described by him. This information was confirmed in writing by the company on Monday, July 21. The confirmation gave the serial number of the equipment and stated that a lien of $22,000 had been satisfactorily retired by the debtor.

On the Friday, the chattel mortgage was drawn and executed and was forwarded to the Edmonton agents for registration with a letter asking that it be ascertained that there was no prior encumbrance against it. Tiffin delivered to Snowdon the respondent's cheque for $13,000, payable to the appellant firm. Snowdon was instructed to deposit with the bank on which it was drawn a letter confirming the registration of the chattel mortgage in order to have it certified.

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The chattel mortgage was registered on Monday, July 21, and, after certification of the respondent's cheque, Snowdon delivered to Arnoldussen the appellant firm's cheque for $13,000. At that time he had received the written confirmation of information from the finance company. On the same day, in the late afternoon and subsequent to delivery of the cheque, Snowdon received a telegram from his Edmonton agents advising that they were unable to locate "officers of Pinto". This was the name of the company which, according to Arnoldussen, had been using the equipment.

It later transpired that the equipment was not at Hinton, and probably was not owned by Arnoldussen. The sum of $5,000 was collected by the respondent from him. The respondent sued the appellants for the balance of $8,000 advanced, and interest.

The action was dismissed by the learned trial judge, who pointed out that Snowdon had been advised by Tiffin that the transaction had to be completed by the Friday, later extended to the Monday; that Snowdon had advised Tiffin that there was no way of determining absolute ownership on the part of Arnoldussen; that Tiffin had been advised to make a personal inspection of the equipment, but did not do so; that Tiffin feared a possible claim by Arnoldussen if the moneys were not advanced within the time promised; that Snowdon did make inquiries and believed Arnoldussen owned the equipment; that Snowdon was never instructed not to pay over the money to Arnoldussen, but the matter was left to Snowdon's discretion, Tiffin's conduct throughout being one of indecision; and that Arnoldussen had sworn an affidavit as to his ownership of the equipment, clear of encumbrances. He held that Snowdon was not negligent in failing to anticipate criminal acts on the part of Arnoldussen.

This judgment was reversed on appeal[1]. The reasons for the decision of the Appellate Division are summarized in the following passages from the judgment:

> In the instant case Tiffin stated he told the solicitor his concern about the integrity of Arnoldussen. A manager of an acceptance corporation to whom enquiries were directed by Tiffin stated he told the solicitor over the telephone "to be extremely careful, make sure that the security

[1] (1965), 53 W.W.R. 505, 53 D.L.R. (2d) 674.

involved in this deal exists and that Arnoldussen is in a position to give clear title to it". Arnoldussen at the first meeting had given false serial numbers for the equipment in question. There can be no doubt that the solicitor knew he was dealing with a possible rogue, as indeed Arnoldussen turned out to be.

* * *

In a case such as this the solicitor should have anticipated that Arnoldussen might try to defraud the appellant (now respondent). The solicitor here was employed to prevent the very thing that happened. I do not think it is any defence to the solicitor that the acts of Arnoldussen were criminal.

The statement by Tiffin to Snowdon concerning Arnoldussen was said to have been made in a telephone conversation on the Friday morning, July 18. Concerning this conversation Tiffin gave the following answer on cross-examination:

Q. But you never did tell Mr. Snowdon that you were concerned because of past experience with Mr. Arnoldussen as to Arnoldussen's integrity?

A. I don't know if I said it in so many words but I think I said we should be very careful.

It is also important to note that it was after this conversation that the meeting occurred on Friday afternoon at which the arrangements for the loan were agreed upon. Whatever concern Tiffin may have had, he was quite prepared to proceed with the loan, to be made on Monday, July 21.

The telephone conversation with the manager of the acceptance company occurred after that meeting. It appears that subsequent to that meeting Tiffin telephoned a Mr. Forster in Lethbridge, the manager of an acceptance corporation, who says that he phoned Snowdon on Saturday morning, July 19, and told him to be absolutely sure the security was in existence and that Arnoldussen was in a position to give clear title to it.

The error as to the serial number has already been mentioned. However, Arnoldussen did, on the Friday, furnish the serial number which checked with that of the equipment which had been subject to the finance company lien.

Tiffin's evidence is that he had known Arnoldussen for three to four years and that he had had previous business dealings with him. It was he who brought Arnoldussen to Snowdon's office. This appears to have been the first time that Snowdon had met either of them, as the evidence

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shows that, on this occasion, Tiffin did not take the matter to the solicitor who usually looked after legal matters for him. It was indicated by Tiffin to Snowdon that the matter was urgent, as Arnoldussen required the funds promptly in order to accept an option.

Snowdon's evidence is that the deal had been completed on the Friday, subject to the confirmation to be obtained from the finance company.

The learned trial judge, who heard all of the evidence, reached the conclusion that negligence could not be imputed to Snowdon for failing to anticipate Arnoldussen's criminal conduct. In my opinion, it was open to him, on the evidence, to reach this conclusion, and I do not think that it should be disturbed.

The Appellate Division has defined the terms of Snowdon's retainer in the terms of the following question put to Snowdon, and his answer to it, on cross-examination:

> Q. Now, sir, in summary do I understand it is your evidence that Mr. Tiffin on behalf of the plaintiff Tiffin Holdings Ltd. left it up to you as that company's solicitor to obtain and establish satisfactory proof of ownership before the funds were advanced as well as, of course, obtaining satisfactory proof of registration of the chattel mortgage?
>
> A. Yes, to my satisfaction, that is correct.

The words used by Snowdon are "to my satisfaction" and, in my view, the answer should not be considered in isolation, but in the context of the other evidence. Snowdon had explained to Tiffin that it was impossible to obtain absolute proof of ownership of the equipment. His understanding of his duty was that he was to ascertain that there was a properly described piece of equipment, that he was to register a chattel mortgage against it, not subject to any prior encumbrance, and that if he had some evidence of ownership which he considered satisfactory the money could be released. He felt that the information from the finance company did constitute evidence of ownership, sufficient to satisfy him that, within the terms of his instructions, the money could be disbursed. He understood that the deal was completed on the Friday, subject to the confirmation from the finance company.

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In the light of these circumstances I would not be prepared to disturb the finding with respect to negligence made by the learned trial judge.

In my opinion, the appeal should be allowed and the judgment at trial restored. The appellants should be entitled to costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the plaintiff, respondent: Howard, Bessemer, Moore, Dixon, Mackie & Forsyth, Calgary.

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* Dec. 5, 6

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PERINI PACIFIC LIMITED (*Plaintiff*) ...APPELLANT;

AND

GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Building contract—Action for damages brought by contractor—Loss by way of overhead alleged to have been sustained because contract completion date extended by delays on part of owner—Claim prevented by clause in contract.

Under a contract between the appellant and the respondent the appellant agreed to construct a sewage disposal plant within six hundred days next ensuing from the date of receiving notice from the respondent to proceed with the work. Pursuant to the provisions of the contract, the completion date, initially November 25, 1962, was extended to January 10, 1963. Various delays occurred in the course of the work, and the project was not completed before March 4, 1963.

In an action brought by the appellant against the respondent for damages the former alleged that it had been delayed in the construction by various breaches of the agreement by the respondent. The respondent counter-claimed for $53,000, the contract having stipulated for payment by the appellant of the sum of $1,000 per day for each day by which the putting into operation of the plant was delayed beyond the completion date.

The action was dismissed at trial and judgment was given in favour of the respondent on the counterclaim for the amount of $8,000. On appeal,

*PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

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the appellant's appeal was dismissed, save as to the counterclaim, the counterclaim being dismissed by the Court of Appeal. On appeal to this Court, the counterclaim was not in issue.

Held: The appeal should be dismissed.

What the appellant was seeking, in the way of damages, was compensation for loss which it claimed to have sustained, by way of overhead, because the contract completion date had been extended by reason of breaches of the contract by the respondent. This argument could not succeed by reason of a clause in the contract which read in part: "...the Contractor shall have no claim or right of action against the Corporation for damages, costs, expenses, loss of profits or otherwise...by reason of any delay in the fulfilment of the contract within the time limited therefor occasioned by any cause or event within or without the Contractor's control, and whether or not such delay may have resulted from anything done or not done by the Corporation under this contract."

The appellant was seeking compensation for loss which it claimed to have sustained by reason of delay in the fulfilment of the contract within the time limited, and it was exactly that kind of loss which the above clause said could not be claimed even if it resulted from anything done or not done by the respondent under the contract.

The appellant also appealed from the decision of both Courts below in respect of a second action brought by the appellant against the respondent for holdback moneys alleged to be due under the contract. This action was consolidated with the first one. The Court agreed with the reasons given by Davey J.A. for holding that this claim failed.

APPEAL from a judgment of the Court of Appeal for British Columbia, dismissing an appeal from a judgment of Collins J. Appeal dismissed.

J. S. Maguire, Q.C., and *K. S. Fawcus*, for the plaintiff, appellant.

R. M. Hayman and *B. W. F. Fodchuk*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action was brought by the appellant against the respondent for damages in respect of various alleged breaches by the respondent of a contract between them in which the appellant agreed to construct for the respondent a sewage disposal plant on Iona Island in the Fraser River. The appellant agreed to construct the plant within six hundred days next ensuing from the date of receiving notice from the respondent to proceed with the work. Pursuant to the provisions of the contract, the completion date, initially November 25, 1962, was extended to January 10, 1963. Various delays occurred in the course of

the work, and it was common ground that the work was not completed before March 4, 1963.

The appellant alleged that it had been delayed in the construction by various breaches of the agreement by the respondent. The respondent counterclaimed for $53,000, the contract having stipulated for payment by the appellant of the sum of $1,000 per day for each day by which the putting into operation of the plant was delayed beyond the completion date.

The action was dismissed at trial and judgment was given in favour of the respondent on the counterclaim for the amount of $8,000. On appeal, the appellant's appeal was dismissed, save as to the counterclaim, the counterclaim being dismissed by the Court of Appeal. The counterclaim was not in issue before this Court.

On the argument before this Court, the number of breaches of contract which the appellant alleged to have occurred had been reduced to three. In each instance it was claimed that the appellant's work had been delayed, and the periods of delay claimed were 3½ days, 14 days and 69 days respectively. In respect of the first item, the majority of the Court of Appeal held that delay had not been proven. With regard to the second, it was held unanimously that delay had not been proven. The Court found that the respondent had caused delay for a period of 12 days in respect of the third matter, but also held, in respect of this claim, that the appellant had not proved the resulting damage.

The damages in each case claimed by the appellant were for increased overhead costs resulting from the delays. The proof of its loss consisted in determining the average daily overhead costs for the entire period of the work, from commencement to conclusion. The loss for each period of delay was then said to consist of the number of days' delay multiplied by that average daily figure.

This was rejected by the trial judge and by all the members of the Court of Appeal. The position of the Courts below may be summarized in the following passage from the reasons of Bull J.A., in the Court of Appeal:

> The *quantum* of these items claimed was arrived at by translating the respondent's fault into the number of days' delay caused thereby and multiplying the result by a daily average "overhead" (including indirect

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costs) over the lifetime of the whole construction period, such daily average being calculated by taking the total of those items of overhead and indirect costs incurred from the beginning of the work to its completion and dividing same by the number of the days in that period. Obviously, as found by the learned trial Judge, the overhead referred to continued for other works bearing no relevance to that in respect to which the delays occurred, and the appellant made no effort at all to establish that such overhead (whether in gross or daily average) was increased in any respect by, or had included therein, any amount that could be said to have been sustained either directly or indirectly by the breaches of contract of the respondent. This difficulty was brought to the attention of the appellant by the learned trial Judge during the trial, when he indicated that such daily average overhead claimed was no proof of any amount of loss sustained by the appellant through the delays caused by the respondent, and that he required some evidence of increases in overhead resulting therefrom. This evidence was not forthcoming, and in fact one witness for the appellant said it was not possible to break down the overhead and indirect cost figures to show what was allocatable to the respondent's breaches of contract. This same difficulty was raised by this Court on the appeal before us, and again we were not directed to any evidence to show any such attributable damage, the appellant maintaining throughout that it was entitled to damages on the basis of the daily average overhead for each day's delay caused by the respondent.

With deference, I am in agreement with what the learned trial Judge in effect held that an average daily overhead amount calculated on the total overhead over the whole construction period divided by the number of days of construction, was not in the circumstances of this case, a proper measure of damages.

The appellant's submission to this Court, in answer to these reasons, was stated in its factum, as follows:

The Appellant submits that once it has proved that the contract completion date has been extended by reason of a breach of contract by the Respondent, it is entitled to damages calculated on the basis advanced by the Appellant at the trial. The method adopted at the trial by the Appellant was to show the amount of all the items of expenses or costs for the whole construction period that were extended by the passage of time. To find the cost per day, the Appellant divided this total by the number of days in the construction period. The cost per day was found to be $738.47.

The Appellant submits that such a method is the only reasonable method of calculating the cost of the delay because the effect on cost of the breach of contract extends beyond the period in which the breach occurs. In any event, it is submitted that the method of calculation by the Appellant would have been acceptable to the learned Justices in the Courts below if they had appreciated that the result of the Respondent's breaches of contract caused delay in the overall completion of the contract, or in other words, increased the number of days required by the Appellant to complete the contract.

This contention makes it clear that what the appellant is seeking, in the way of damages, is compensation for loss which it claims to have sustained, by way of overhead,

because the contract completion date had been extended by reason of breaches of the contract by the respondent.

In my opinion this argument cannot succeed in view of the provisions of clause 6-04 of the general conditions of the contract. This clause is one of a group of clauses headed "PROSECUTION OF WORK" and it reads as follows:

6-04. No Claim against Corporation

Unless otherwise particularly provided in the contract, the Contractor shall have no claim or right of action against the Corporation for damages, costs, expenses, loss of profits or otherwise howsoever because or by reason of any delay in the fulfilment of the contract within the time limited therefor occasioned by any cause or event within or without the Contractor's control, and whether or not such delay may have resulted from anything done or not done by the Corporation under this contract.

The opening words of the portion of the argument above quoted—"once it has proved that the contract completion date has been extended by reason of a breach of contract by the Respondent"—make it clear that what the appellant is seeking is compensation for loss which it claims to have sustained by reason of delay in the fulfilment of the contract within the time limited, and it is exactly that kind of loss which clause 6-04 says cannot be claimed even if it results from anything done or not done by the respondent under the contract.

The claim in respect of the last item of delay was in respect of the failure by the respondent promptly to furnish, and set on the foundations constructed under the contract, six engine generator units, which it was required to furnish under clause 7-05(2) of the specifications. These generators were supplied by a supplier, under contract with the respondent, and proved to be defective. This resulted in delay of the appellant's work while the necessary repairs were being made.

The specifications did not provide any specific date for furnishing them. It must be implied that they should be furnished within a reasonable time so as to permit the appellant to proceed with its work within the contract period. The respondent would, in my opinion, only be legally responsible for such delay in performing this obligation as would prevent the appellant from completing its work within the stipulated period. But for loss occasioned by

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that kind of delay there can be no claim because of clause 6-04 of the general conditions.

Clause 6-04 was referred to in the reasons for judgment of the learned trial judge, but with no specific expression of opinion as to whether it was applicable. In the Court of Appeal, the majority held that it was not applicable, while Davey J.A. did not find it necessary to deal with it. Bull J.A. discusses its application in the following passage in his reasons:

> As I have indicated earlier, it is not too clear from the learned trial Judge's reasons for judgment as to what importance he placed on the relieving provisions of article 6-04 of the General Conditions of the contract in dismissing the claims being discussed. As it is my view that the claim was properly dismissed on the grounds set out above, the question of whether it was barred by the provisions of the article need not be considered. However, should I be wrong in my conclusions, or a higher court should consider that nominal damages should have been awarded or a new assessment of damages had, I consider that it might be useful to express my views as to the proper construction of that article. Accordingly I have come to the conclusion that the respondent could not with respect to this particular claim, rely on these provisions. The relief to the respondent is only against damages (*inter alia*) "because of or by reason of any delay in the fulfilment of the contract within the time limited therefor," notwithstanding that such delay may be the sole fault of the respondent. The claim for damages for the delay being considered has nothing to do with the revised contract completion date of January 10, 1963. It is damages for breach of contract and it is immaterial to that claim whether the contract was completed before, at or after the time limited for completion thereof. The relief given by the article does not purport to cover damages for any delay other than one involving the time limit for completion. Although of no relevance in this appeal, it would appear that the article was designed to and would protect the owner from any claim or set-off by a contractor for liquidated damages or penalties payable by it under an unrelieved completion clause when breach thereof was caused by the owner's actionable breach of contract; such situations have not been unusual.

In view of the position taken by the appellant before us, to which I have already referred, I am not able to agree that:

> The claim for damages for the delay being considered has nothing to do with the revised contract completion date of January 10, 1963. It is damages for breach of contract and it is immaterial to that claim whether the contract was completed before, at or after the time limited for completion thereof.

As already indicated, my understanding of the appellant's position in respect of the claims urged before us is that, because the delays caused by the respondent extended the work period beyond the contract completion date, full overhead can be recovered for the number of days' delay which

led to that result. I interpret clause 6-04 as preventing the making of that kind of claim. I understand this clause to mean that if the appellant complains that, because of causes or events outside its control, it has not been able to complete the contract within the contract period and has thereby incurred expense, it shall not be entitled to recover such expense from the respondent, even though the respondent had caused such delay.

The appellant also appealed from the decision of both Courts below in respect of a second action brought by the appellant against the respondent for payment of the holdback money. That action was consolidated with the other one. The nature of this claim is described in the following extract from the reasons of Davey J.A. and I agree with the reasons which he gives for holding that that claim fails:

> The plaintiff commenced a second action to recover the holdback money. That action was consolidated with the first one. General condition 7-02 provides that the defendant shall pay the balance of the contract price to the plaintiff 40 days after presentation of the engineer's certificate that he has accepted the work, and upon delivery by the plaintiff of, *inter alia*, releases of all its claims and demands under the contract or in connection with its subject matter. The delivery of such a release and payment of the holdback money are thus to be concurrent acts. The plaintiff delivered only a qualified release, which reserved all its claims in respect of the specific matters that have been litigated. The defendant refused to accept it. The learned trial Judge held that since the disputes had not been adjudged until after the second writ had issued and the plaintiff had not delivered or tendered an unqualified release, the cause of action for the holdback money was not complete when the second writ was issued. He dismissed that action, without prejudice to the plaintiff's bringing a new one when its cause of action was complete. The plaintiff appeals. I agree with the reasoning of the learned trial Judge. The intention of the provision seems to be that if the plaintiff does not release all outstanding claims, and wants to litigate some of them, it cannot get the holdback money until it has done so. So, if the defendant is harassed by expensive litigation, it will have security through the holdback money for its taxed costs if successful. That provision may seem harsh—I do not say it is—or unnecessary with respect to this plaintiff, but that is no ground upon which to relieve the plaintiff from the plain meaning of an otherwise lawful provision by which it has bound itself: *Roberts v. Bury Commissioners*, (1870) L.R. 5 C.P. 310 at pp. 325 and 326. I would dismiss this part of the appeal.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

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*March 8, 9, 10
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Jan. 24

TRAVER INVESTMENTS INC. (formerly known as TRAVER CORPORATION) and E. I. DUPONT DE NEMOURS AND COMPANY (*Plaintiffs*) APPELLANTS;

AND

UNION CARBIDE CORPORATION and CELANESE CORPORATION OF AMERICA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Conflicting applications—Date of invention—Priority of invention —Patent Act, R.S.C. 1952, c. 203, s. 45(8).

Pursuant to s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203, this action was brought to determine the rights of the parties in respect of their pending applications for patent containing claims which were found by the Commissioner of Patents to be in conflict. The invention concerned an apparatus and method for treating polyethylene film so as to make its surface ink-adherent. The plaintiffs alleged a date of invention by Traver, under whom they claim, in late May or early June 1949. The defendant Union Carbide Corporation alleged a date of invention by Adams and Wakefield, under whom it claims, not later than May 3, 1950. The trial judge held, *inter alia*, that by May 3, 1950, Traver had not made the invention, and in the result dismissed the plaintiffs' action and allowed in part the counterclaim of the defendant Union Carbide. The plaintiffs appealed to this Court. The finding of the trial judge that by May 3, 1950, the invention in question had been made by Adams and Wakefield was not seriously challenged before this Court.

Held: The appeal should be dismissed.

The trial judge was right in holding that by May 3, 1950, Traver had not made the invention. The onus of proof that Traver had made the invention and the date by which he had made it was upon Traver not only because he was asserting an affirmative but also because all the subject matter of these allegations lay particularly within his knowledge. In so far as the judgment at trial deals with the dates on which Traver obtained successful results, even empirically, the trial judge did not believe his testimony or that of those witnesses who sought to support it. The trial judge was justified in rejecting Traver's evidence. The finding of fact as to the priority of invention made by the trial judge should not be disturbed.

Brevets—Conflit de demandes—Date d'invention—Priorité de l'invention —Loi sur les Brevets, S.R.C. 1952, c. 203, art. 45(8).

Conformément aux dispositions de l'art. 45(8) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, la présente action a été instituée en vue de déterminer les droits des parties relativement à leurs demandes pour brevets, en suspens, contenant des revendications que le Commissaire

*PRESENT: Cartwright, Abbott, Martland, Hall and Spence JJ.

des Brevets a jugé être en conflit. L'invention se rapporte à un appareil et à une méthode de traiter les films de polyéthylène de telle sorte que l'encre puisse y adhérer. Les demandeurs ont allégué une date d'invention, par leur auteur Traver, à la fin du mois de mai ou au début du mois de juin 1949. Quant à la défenderesse Union Carbide Corporation, elle allègue une date d'invention, par ses auteurs Adams et Wakefield, de pas plus tard que le 3 mai 1950. Le juge au procès a décidé, *inter alia,* que le 3 mai 1950, Traver n'avait pas fait l'invention, a rejeté l'action des demandeurs et a maintenu en partie la demande reconventionnelle de la défenderesse Union Carbide. Les demandeurs en appelèrent devant cette Cour. La conclusion du juge au procès à l'effet que le 3 mai 1950, l'invention en question avait été faite par Adams et Wakefield n'a pas été sérieusement disputée devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le juge au procès a eu raison de dire que le 3 mai 1950, Traver n'avait pas fait l'invention. Le fardeau de prouver que Traver avait fait l'invention et la date qu'il l'avait faite était à la charge de Traver non seulement parce qu'il soutenait une affirmative mais aussi parce que le sujet de ces allégations était particulièrement de ses connaissances. En autant que le jugement de première instance traite des dates lors desquelles Traver a obtenu des succès, même empiriquement, le juge au procès n'a pas cru son témoignage ni celui des témoins qui ont tenté de le supporter. Le juge au procès était justifié de rejeter la preuve soumise par Traver. La conclusion de fait du juge au procès quant à la priorité de l'invention ne doit pas être changée.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], dans une action de conflit de demandes en matière de brevets. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an action on conflicting applications for patents. Appeal dismissed.

Gordon F. Henderson, Q.C., and *R. G. McClenahan,* for the plaintiffs, appellants.

Harold G. Fox, Q.C., and *Donald F. Sim, Q.C.,* for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Gibson J. pronounced on February 18, 1965, in an action brought pursuant to s. 45(8) of the *Patent Act,* R.S.C. 1952, c. 203, as amended, hereinafter referred to as "the Act", for the determination of the rights of the parties in respect of their pending applications for patent containing

[1] [1965] 2 Ex. C.R. 126, 30 Fox Pat. C. 21, 47 C.P.R. 124.

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claims which were found by the Commissioner of Patents to be in conflict.

The claims in conflict were numbered C-1 to C-94 inclusive and C-107; they are set out in Schedule B to the reasons of the learned trial judge. After the procedure prescribed by subsections 1 to 7 of s. 45 of the Act had been followed neither of the parties was satisfied with the determination made by the Commissioner and this action followed in which the appellant, E. I. Dupont de Nemours and Company, hereinafter referred to as "Dupont", in its Statement of Claim and the respondent Union Carbide Corporation, hereinafter referred to as "Union Carbide", in its counter-claim each asserts that it is entitled to the claims.

The respondent Celanese Corporation of America was a defendant in the action but did not appear in the Exchequer Court and the appellants obtained a default judgment against it on April 16, 1964. It takes no part in this appeal.

The main issue between the parties is who, as between George W. Traver (under whom the appellants claim) on the one hand and George M. Adams and Sidney J. Wakefield (under whom the respondent Union Carbide claims) on the other hand, was the first to invent an apparatus and method for treating polyethylene film so as to make its surface ink-adherent.

Prior to 1949 polyethylene film became available in substantial quantities and was widely used as a wrapping material, especially for foods. Its suitability for this purpose was lessened because printing or decoration would not adhere to the film. This created a problem for the whole industry. The invention which is in dispute between the parties furnishes a solution of this problem.

The two pending applications which were placed in conflict by the Commissioner were Serial number 650,205 filed by George Traver on July 2, 1953, all rights in which were assigned to the appellant Dupont and Serial number 627,046 filed by the respondent Union Carbide on February 18, 1952, based on an invention made by Adams and Wakefield.

The respondent Union Carbide alleges a date of invention by Adams and Wakefield not later than May 3, 1950. The finding of the learned trial judge that by that date the invention in question had been made by Adams and Wakefield is amply supported by the evidence and was not seriously challenged; but the appellants contend that Traver had already made the invention in late May or early June, 1949.

The learned trial judge decided that Union Carbide was entitled to the issue of a patent of invention on its application Serial number 627,046 containing claims C-3, C-6, C-9, C-12, C-87, C-88, C-89, C-92 and C-93. Each of these claims describes the treatment of polyethylene by exposing its surface to a high voltage electrical stress accompanied by corona discharge to render the surface adherent to subsequently imprinted ink impressions. The disposition made of the other claims in conflict will be referred to later.

The finding of the learned trial judge as to what constitutes the invention is expressed as follows:

> Dealing first with the invention, I find, on a consideration of the whole of the evidence that the invention was the discovery that the phenomenon which made polyethylene film receptive to ink so the ink adhered to the film was produced by exposing the polyethylene film to a form of electrical discharge; and that the form of this discharge which is essential to the process is aptly described as corona discharge.
>
> The corona discharge that I refer to is the term used in its colloquial meaning, and not in its classical meaning, as discussed in the evidence. I find that most experts in the field at all material times used and at present use the term corona discharge in its colloquial meaning to describe the phenomenon which produces the successful result in this matter. In this sense the words "corona discharge" are used in these reasons, and this use of the words "corona discharge" correctly describes the material phenomenon which is referred to in the relevant specifications and claims in issue and in the evidence adduced in this action.

Elsewhere in the reasons of the learned trial judge it is explained that the colloquial meaning of the words "corona discharge" as used in this passage and throughout his reasons, is a form of electrostatic discharge producing a corona which is a physical manifestation resulting when a gas, usually air, has been stressed until a condition is maintained wherein some ionization of the gas is present and oxygen molecular re-arrangement takes place forming ozone, the presence of which may be detected by its pungent odour; a purplish discharge or glow may be seen under

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reduced light in the vicinity of the metallic parts charged and a sound described as a crackling or frying noise is heard.

At the trial and before us counsel for both parties demonstrated the way in which the process works by the use of an apparatus, set up in the Court room, illustrating the fundamental equipment employed to give the necessary treatment to polyethylene film. As was stated by the learned trial judge many variations of this equipment may be devised to produce the desired result and the apparatus demonstrated to us was merely illustrative of the kind of apparatus which may be used for that purpose. It consisted of two electrodes, the first being an oxy-dry tube, that is a glass tube filled with argon gas, and the second being a conductive metal plate placed below the oxy-dry tube and at a distance from it of one-eighth of an inch. Both electrodes were connected to a source of electric current derived from that supplied to the Court room, said to be about 110 volts, and stepped up by means of a transformer to 10,000 volts. The film to be treated was placed on the metal plate and when the current was turned on a corona discharge as described above took place between the two electrodes. It was common ground that this accomplished the desired treatment of the film. As the invention was developed for production of treated polyethylene film on a commercial basis a metal roller was substituted for the metal plate as the second electrode and instead of a single oxy-dry tube several of such tubes were used as the first electrode.

The first question which we have to determine is whether the learned trial judge was right in holding that by May 3, 1950, Traver had not made the invention.

Traver was a witness at the trial and was examined and cross-examined at great length. He testified that the idea of the invention came into his mind early in 1949 and that in May or June of 1949 he caused a printing machine known as a Meisel Press used by Traver Corporation (of which he was an officer and which he controlled) to be equipped with oxy-dry tubes and adapted so that by its use polyethylene film could be, and was, successfully treated. On conflicting evidence, including that of the witness Stopp, who had been the designer of the Meisel Press and stated that it

would not be practicable to adapt it in the manner described by Traver, the learned trial judge rejected Traver's evidence on this point. He concluded his review of the relevant evidence as follows:

> In my opinion, therefore, the story that successful treatment was had be employing the Meisel Press as told by Traver is not true and I so find.

Traver also gave evidence that in or about June, 1949, he caused Fred J. Pool, an employee of Traver Corporation, and Arthur Groh, the superintendent of the production department, to set up an apparatus substantially similar to that which was used in the demonstration before the Court, that the gap between the electrodes was one-eighth of an inch, that a current of 10,000 volts was used and that polyethylene film was successfully treated. This apparatus was sometimes referred to in argument as "Traver's one-tube set-up".

Traver went on to state that he thereupon directed Pool to build an apparatus similar to the one-tube set-up by using eight tubes instead of one and a metal foil instead of a plate as the second electrode and that this apparatus also treated the film successfully. This apparatus was referred to as "the multiple-tube set-up".

Neither of these two apparatuses was produced at the trial. Traver said that they had been taken apart and were no longer in existence but that reproductions of both of them had been made in 1955, which was after the controversy between the parties had developed, and photographs of these reproductions were filed as exhibits at the trial.

Traver said that having obtained successful results with these two machines he instructed Pool to adapt a machine known as a Cameron slitter so that it could be used to treat polyethylene film. The Cameron slitter was used for cutting rolls of paper or film into strips and was adapted for slitting film from a master roll into smaller rolls and rewinding these on separate shafts in such a way as to prevent them from intertwining. When in operation it caused a roll of film on a master band to pass over and under certain rollers before it was rewound.

Traver said he told Pool to take the knives out of the Cameron slitter and install a bank of several oxy-dry tubes on the top roller so placed that they would be about one-

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eighth of an inch from the metal roller immediately below with the result that the tubes on the top rollers would correspond to the first electrode and the metal roller below them would correspond to the second electrode in the apparatus which was used in the demonstration before us.

Traver said that the Cameron slitter was successfully adapted in this way in about September 1949, that he received a letter from Pool regarding it in February 1950, that he himself saw it in operation in April 1950 and that it was used intermittently from as early as February 1950 until early in 1951 to render treated polyethylene film available in commercial quantities, the reason that it was used only intermittently for this purpose being that it was required to carry out the work for which it was designed that is the slitting of film or other material. It was said that the task of adapting it from one form of operation to the other was a simple one which did not take up a great deal of time. It was said that in 1951 an apparatus was built and used exclusively to treat polyethylene film on a commercial basis and presumably thereafter it was unnecessary to make use of the Cameron slitter for this purpose.

It was sought to strengthen the appellants' case in regard to the matters of fact set out in the three preceding paragraphs by the production of certain "job pockets". Evidence was given that the procedure at Traver Corporation was to make an envelope described as a job pocket for each order filled, to place in it a sample of the product sold to the customer and to note on the outside of the pocket information as to the name of the customer, the date of the order, the colour specification, bag size and date of shipment. It was said that polyethylene film successfully treated on the Cameron slitter was sold commercially in March 1950 and samples of treated film and the job pockets in which they were said to have been located were produced at the trial and filed as exhibits.

These job pockets were not retained by Traver. They with other records of Traver Corporation were turned over to Container Corporation which purchased certain assets of Traver Corporation. They were said to have been found by one Kritchever when he searched the records at the

premises of Container Corporation on the instructions of Mr. Dawson who was patent attorney for Traver.

It will be observed that, as is not unnatural, all the evidence in support of the date of invention claimed by Traver was as to matters in the knowledge of the appellants and as to which the respondent had no means of knowledge.

In his elaborate reasons the learned trial judge examined in great detail the evidence which I have endeavoured to summarize briefly above, as to what, if anything, Traver invented and when he invented it and reached the conclusion that he expressed as follows:

> The only conclusion therefore that can be reached is that Traver did not nor did anyone under his direction cause to be formulated verbally or in writing a description which afforded the means of making that which Traver alleged he invented, at least up to October 17, 1950.
>
> It is a proper conclusion to find that up to that date Traver and the others under his direction were experimenting. But now, in retrospect Traver is saying that he used the oxy-dry tube, 10,000 volts and $\frac{1}{8}$" spacing set-up to get successful treatment and disclosed it, because he now knows that that particular set-up will produce successful treatment, in that corona discharge will be present.
>
> But it is clear that all the evidence adduced on behalf of the plaintiffs (Traver) was directed to the attempt to prove that sometime early in 1950, and at least prior to the alleged material date of Adams and Wakefield (defendant Union Carbide), namely, May 3, 1950, that Traver successfully treated polyethylene film so as to make it ink-adherent using a process in which the phenomenon of corona discharge was present and that he knew and disclosed this factor as the critical one, and disclosed both verbally and in writing a description which afforded the means of making that which was invented.
>
> The attempt was not successful.
>
> Certainly, neither Traver nor anyone acting under Traver's directions discovered at least until after October 17, 1950, that isolating corona discharge as the critical factor was the invention.
>
> I therefore find that the evidence adduced by and on behalf of Traver did not establish that Traver at any time was the inventor of the treatment process involving the phenomenon of corona discharge; and as stated, that alone is the invention which is the subject of these proceedings. Indeed, the evidence adduced by and on behalf of Traver affirmatively established that he was not the inventor of this treatment process.

Counsel for the appellants do not merely attack this finding as not supported by the evidence; they submit that its wording and that of other passages in the reasons of the learned judge shew that he was mistaken in law in the tests which he applied in determining whether or not Traver was the first inventor.

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They argue that on the evidence it should be found that prior to the making of the invention by Adams and Wakefield, Traver and his assistants had actually constructed an apparatus which would, and did, produce corona discharge and which treated polyethylene film successfully. Their argument proceeds that the learned trial judge mistakenly held that Traver had not made the invention merely because he did not describe its operation as producing corona discharge and did not discover that any discharge within the corona range would give effective treatment.

In support of the submission set out in the last sentence the appellants rely on the judgment of Thorson P. in *Ernest Scragg & Sons Ltd. v. Leesona Corporation*[1], and particularly the following passage at pages 676 and 677, where the learned President quoted the following statement from the judgment of this Court in *Christiani and Nielsen v. Rice*[2]:

> The holding here, therefore, is that by the date of discovery of the invention is meant the date at which the inventor can prove he has first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public.

and continued:

> It was not intended, in my opinion, that the test laid down in the statement should be all-inclusive. It is clear, of course, that if an inventor can prove that he formulated a description of his invention, either in writing or verbally, at a certain date then he must have made the invention at least as early as that date. It is also clear that the requirement that there must be proof of the formulation of a description of the invention, either in writing or verbally, is neither apt nor necessary in the case of an invention of an apparatus where the inventor can prove that at the asserted date he had actually made the apparatus itself, although there was no formulation of a written or oral description of it. Nor was it intended that the test laid down in the statement should replace the general statement in the *Permuti v. Borrowman* case (supra) that before a man can be said to have invented a process he must have reduced the idea of it to a definite and practical shape. Consequently, even although the test of proof of the formulation of a description of the invention, either in writing or verbally, at a particular date might be appropriate in determining the date of an invention of a process, it cannot have been intended to exclude proof that the process was actually used at the asserted date, even although there was no formulation of a written or oral description of it at such date. Thus the statement in *Christiani v. Rice* case (supra) to which I have referred should not be interpreted as laying down a rule that proof that an invention was made at an asserted date must be confined to evidence that a written or oral description of it

[1] [1964] Ex. C.R. 649.

[2] [1930] S.C.R. 443 at 456, 4 D.L.R. 401.

had been formulated at such date. It may also be proved, in the case of an invention of an apparatus, that the apparatus was made at such date, or in the case of an invention of a process, that the process was used at such date. The essential fact to be proved is that at the asserted date the invention was no longer merely an idea that floated through the inventor's brain but had been reduced to a definite and practical shape. The statement to which I have referred should be construed accordingly.

The argument proceeds that if in fact Traver and his assistants had, prior to the date of the invention by Adams and Wakefield, adapted the Cameron slitter and successfully treated polyethylene film with it, in the manner described by Traver in his evidence, then he would have been the first inventor of that apparatus and process, because he would have actually made an apparatus which worked and afforded a solution to the problem which was baffling the industry. He would not, in the supposed circumstances, have been any the less the first inventor because he neither identified the electrostatic discharge created during the operation of the machine as "corona discharge" nor realized that successful treatment could be obtained regardless of any variation of the arrangement of the component parts of the apparatus and of the voltage used so long as corona discharge resulted. He would have attained the desired result empirically.

I do not find it necessary to reach a final conclusion as to the validity in law of this argument because in my view it fails on the findings of fact made by the learned trial judge. As I understand his reasons, he has stated that the appellants have failed to satisfy him that Traver had done, even empirically, what the invention does until some time after the complete invention had been made by Adams and Wakefield. The learned trial judge in no way exaggerates the onus that lay upon Traver at the trial to prove that he had made the invention and the date by which he had made it. The onus of proof of these matters was upon Traver not only because he was asserting an affirmative but also because all the subject matter of these allegations lay particularly within his knowledge. It was still however the onus in a civil case and the learned trial judge so instructed himself. In speaking of the conflicting evidence of certain experts he says:

> The Court is left with the usual legal standard of proof, namely, more probably than not, or as it is sometimes put, the preponderance of

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believable evidence. And this was the test employed in reaching the conclusions in these reasons where it was necessary to resolve any conflict in such expert testimony.

and later he speaks of examining:

(*a*) the oral or verbal evidence adduced at this trial, and

(*b*) the written evidence,

for the purpose of determining what credible evidence was adduced to the satisfaction of the Court to enable it to make a finding on the balance of probabilities as to issue of priority of invention.

From a reading of the whole of his reasons it appears to me that the learned trial judge found himself unable to believe the evidence of Traver and those witnesses who, to some extent, supported his story. I have already quoted at some length from those reasons and now repeat one of the paragraphs quoted because it appears to me to contain a clear indication of the view which the learned trial judge took as to the trustworthiness of Traver.

> It is a proper conclusion to find that up to that date (October 17, 1950), Traver and the others under his direction were experimenting. But now, in retrospect Traver is saying that he used the oxy-dry tube, 10,000 volts and ⅛" spacing set-up to get successful treatment and disclosed it, because he now knows that that particular set-up will produce successful treatment, in that corona discharge will be present.

A little later in his reasons the learned trial judge says:

> I have also taken into consideration that it may be that Traver, without any knowledge of what any other inventor was doing, *sometime in 1950, after the month of October,* did discover that successful treatment could be had by employing the Cameron slitter process, Exhibit 42, providing a ⅛" gap was used (although there is some doubt that there was any precise knowledge or understanding that the width of the gap was critical using this particular apparatus.)

The significant words in this passage are those which I have italicized.

If, as argued for the appellant, the learned trial judge was of the view that even if Traver's evidence as to the successful treatment of film by use of the "one-tube set-up", "the multiple tube set-up" and the adapted Cameron slitter were accepted, Traver still could not be held to be the first inventor by reason of his failure to identify corona discharge as the essential element in the process, then it would have been unnecessary for the learned judge to consider the evidence as to the job pockets. He does, however, examine this evidence with care and reaches the conclusion which he expresses as follows:

On this evidence, I find it is impossible to believe that the Cameron slitter was employed to give successful treatment on any commercial production basis during the year 1950 or that the plastic bags allegedly found in these so-called job pockets were actually in these pockets since 1950 or were from a production run of plastic bags successfully treated by the Cameron slitter in 1950.

It may be said that if the learned trial judge disbelieved the evidence of Traver it was unnecessary for him to examine in detail the evidence as to exactly what constituted the invention and what disclosure and claims were made by the parties in regard to it; it is true that this examination would scarcely seem to have been necessary on the sole question of who was the first inventor but it did become relevant to the question of whether the respondent was entitled to a patent and, if so, what claims it should contain.

When the learned trial judge was discussing the nature and extent of the discovery made by Adams and Wakefield he said:

On the evidence I find that it was not obvious or natural on March 21, 1950, after the first successful result was obtained, to discover and isolate the corona that was present as the element and the only element that would produce successful treatment of polyethylene film.

This discovery which taught that successful treatment could be accomplished by using one of the many combinations of electrodes, dielectrics, spacing and voltage so long as corona discharge was present, was genius and invention of the highest order. And it is not detracted from in the least by the fact that Mr. Traver or some other person employed or acting for him or Traver Corporation or independently, may have obtained without knowing why, even before March 21, 1950 (*which, as stated above, I do not find*) successful treatment of polyethylene film by using the particular combination of an oxy-dry tube, 10,000-volt transformer, and a $\frac{1}{8}$" spacing and confined solely to such combination, while not recognizing that corona discharge was the essential feature of the invention.

The words in the parenthesis which I have italicized strengthen the view which I have formed that in so far as it deals with the dates on which Traver attained successful results, even empirically, the learned trial judge simply did not believe his testimony or that of those witnesses who sought to support it.

Priority of invention is primarily a question of fact, and, while it is unnecessary to quote authority as to the duty of an appellate court which is asked to interfere with the findings of fact made by a trial judge who has seen and

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heard the witnesses on whose testimony the findings are based, the following words in the speech of Lord Wright in *Powell v. Streatham Manor Nursing Home*[1] appear to be peculiarly applicable to this appeal:

> Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'. And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing.

Attention has already been called to the circumstance that all the evidence on which Traver sought to obtain a finding in his favour to the effect that he had made the invention prior to Adams and Wakefield was as to matters particularly within his knowledge and as to which the respondent would normally have no means of contradicting him.

In considering whether the learned trial judge was justified in rejecting that evidence the following matters may be borne in mind. At the trial Traver told a story as to obtaining successful treatment of film by adapting the Meisel press which story the learned trial judge found to be untrue. It was shewn that in other proceedings relating to the same invention Traver had sworn to a statement as to the date of his invention which was false in fact and the learned trial judge rejected the explanation put forward in an endeavour to shew that this was done innocently. None of the apparatuses with which Traver claimed to have attained the successful result were preserved. Neither Traver nor any of his employees kept any log or systematic record of their experiments with the process. The samples of treated film said to have been marketed early in 1950 were not retained by Traver or Traver Corporation but, as has already been mentioned, were turned over with other records to Container Corporation.

While none of these matters may be of vital importance their cumulative effect adds to the difficulties in the way of the appellants' argument that we should reverse the finding of fact of the learned trial judge on the decisive question

[1] [1935] A.C. 243 at 265, 266, 104 L.J.K.B. 304.

whether Traver had made any invention prior to the date on which Adams and Wakefield had completed their discovery. I have reached the conclusion that we cannot disturb that finding of fact and since it follows from it that Traver was not the first inventor of anything with which this appeal is concerned the appeal fails.

The proceedings at trial involved a large number of claims which had been placed in conflict in addition to those as to which the learned trial judge held that the respondent was entitled to the issue of a patent but I do not find it necessary to deal with the disposition made of those other claims as there is no cross-appeal and the respondent simply seeks to support the judgment at trial.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the defendants, respondents: McCarthy & McCarthy, Toronto.

PAUL YVON NADEAU et JEAN BERNARD (*Défendeurs*) ..... APPELANTS;

ET

DAME ÉLIANE GAREAU (*Demanderesse*) .... INTIMÉE.

1966
*Déc. 15
1967
Janv. 24

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Automobile—Accident mortel—Piéton heurté la nuit sur la route qu'il traversait—Devoir du conducteur et du piéton—Faute de la victime dans le contexte de l'art. 3 de la Loi d'indemnisation des victimes d'accidents d'automobile—Code de la Route, S.R.Q. 1964, c. 231, art. 48—Loi d'indemnisation des victimes d'accidents d'automobile, S.R.Q. 1964, c. 232, art. 3—Code Civil, arts. 1053, 1103, 1106.

Le mari de la demanderesse a été fatalement blessé lorsqu'il fut frappé par une automobile appartenant au défendeur Nadeau et conduite par le défendeur Bernard. Cet accident est survenu le soir sur une route divisée en deux par un terre-plein. Peu de temps auparavant, une automobile conduite par la victime avait été impliquée dans un accident avec deux autres automobiles. Les constables enquêtant sur

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Spence.

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cet accident avaient stationné leurs véhicules, avec feux clignotants allumés, sur le terre-plein. L'accident survint lorsque, les constables étant partis, la victime quitta le terre-plein pour se diriger vers son automobile qui avait été stationnée de l'autre côté de la route. Bernard qui conduisait son automobile avec un éclairage diminué aperçut à deux mille pieds devant lui les feux clignotants et diminua sa vitesse. Il aperçut soudainement à 15 ou 25 pieds devant lui une personne immobilisée sur la route et n'a pu éviter de la frapper.

En s'appuyant sur les dispositions de l'art. 3 de la *Loi d'indemnisation des victimes d'accidents d'automobile*, S.R.Q. 1964, c. 232, le juge au procès déclara les défendeurs seuls responsables de cet accident. Porté en appel, ce jugement fut confirmé par une décision majoritaire; la dissidence aurait fait porter à la victime la moitié du blâme. D'où le pourvoi devant cette Cour.

Arrêt: L'appel doit être maintenu en partie, les Juges Cartwright et Abbott étant dissidents.

La Cour: L'article 3 de la *Loi d'indemnisation des victimes d'accidents d'automobile* n'a pas pour effet d'empêcher le propriétaire ou le chauffeur d'un véhicule qui a heurté un piéton de se prévaloir de la faute contributive de la victime.

Le Juge en Chef Taschereau et les Juges Fauteux et Spence: L'accident est imputable à la faute du conducteur et à celle de la victime. Le *Code de la Route* détermine les priorités, les droits et les obligations réciproques du piéton et du conducteur d'automobile sur un chemin public. L'article 48(2) de ce Code prévoit que tout piéton dans un cas semblable au présent cas doit céder la priorité de passage à tous les véhicules circulant sur le chemin public, et que tout conducteur doit user de prudence pour éviter de heurter les piétons. Dans l'espèce, la victime ne s'est pas souciée de la priorité de passage du véhicule et le conducteur n'a pas usé de toute la prudence à laquelle il était tenu.

Les Juges Cartwright et Abbott, *dissidents:* Dans le cas présent, les deux Cours inférieures sont tombées d'accord sur les faits non seulement que le conducteur avait été négligent mais aussi que la victime n'avait pas été coupable d'une négligence contributive qui ait été une cause directe de la fatalité. Cette concurrence sur les faits n'est pas erronée et ne doit pas être mise de côté.

Motor vehicle—Fatal accident—Pedestrian crossing highway at night—Pedestrian struck by car—Duties of driver and pedestrian—Whether Highway Victims Indemnity Act a bar to defence of contributory negligence—Highway Code, R.S.Q. 1964, c. 231, s. 48—Highway Victims Indemnity Act, R.S.Q. 1964, c. 232, s. 3—Civil Code, arts. 1053, 1103, 1106.

The Plaintiff's husband was killed when struck by an automobile belonging to the defendant Nadeau and driven by the defendant Bernard. The accident occurred in the evening on a highway divided by a grass strip. Earlier on the same evening, a car driven by the victim had been involved in an accident with two other automobiles. The constables investigating this accident had parked their two cars, with flashing lights in operation, on the grass strip. The fatal accident occurred when the victim, the police cars having left the scene, commenced to

cross the road to return to his own car which had been parked on the other side of the road. The driver Bernard who was driving his car with the lights on low beam reduced his speed when he saw at about 2,000 feet the flashing lights of the police cars. Suddenly, at a distance from 15 to 20 feet in front of him, he saw a person standing directly in front of him.

Relying on the provisions of s. 3 of the *Highway Victims Indemnity Act*, R.S.Q. 1964, c. 232, the trial judge found that the defendants alone were at fault. This judgment was affirmed by a majority decision of the Court of Appeal; the dissenting judgment would have attributed one half of the blame to the victim. The defendants appealed to this Court.

Held (Cartwright and Abbott JJ. dissenting): The appeal should be allowed in part.

Per Curiam: Section 3 of the *Highway Victims Indemnity Act* did not have the effect of depriving the owner or driver of an automobile which struck a pedestrian of the defence of contributory negligence.

Per Taschereau C. J. and Fauteux and Spence JJ.: The driver and the victim were both equally at fault. The *Highway Code* determines the priorities and the reciprocal rights and obligations of pedestrians and drivers on a highway. Section 48(2) provides that the pedestrians should yield passage to the vehicles proceeding on the highways and that drivers should use care to avoid injury to pedestrians. In the present case, the victim did not give the right of way to the vehicle, and the driver did not exercise the care required to avoid hitting the victim.

Per Cartwright and Abbott JJ., *dissenting*: In the present case, there were concurrent findings of fact not only that the driver had been negligent but also that the victim had not been guilty of contributory negligence which was a direct cause of the accident. These concurrent findings of fact were not wrong and should not be disturbed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], dismissing an appeal from a judgment of Puddicombe J. Appeal allowed in part, Cartwright and Abbott JJ. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], rejetant un appel d'un jugement du Juge Puddicombe. Appel maintenu en partie, les Juges Cartwright et Abbott étant dissidents.

A. J. Campbell, C.R., pour les défendeurs, appelants.

Gérard Deslandes, C.R., et Michel Pothier, pour la demanderesse, intimée.

Le jugement du Juge en Chef Taschereau et des Juges Fauteux et Spence fut rendu par

[1] [1966] B.R. 837.

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LE JUGE FAUTEUX:—La demanderesse a poursuivi les appelants pour leur réclamer, tant personnellement qu'en sa qualité de tutrice aux enfants mineurs nés de son mariage avec feu Nestor Lefebvre, les dommages leur résultant du décès de ce dernier. Lefebvre est décédé accidentellement dans la soirée du 22 septembre 1962 alors que, sur la route transcanadienne, entre Belœil et St-Basile, il fut frappé par une automobile conduite par Jean Bernard et appartenant au gendre d'icelui, Paul Yvon Nadeau, tous deux appelants en cette cause.

Au soutien de son action, la demanderesse a allégué dans sa déclaration que Bernard était inattentif, qu'il aurait dû, dans les circonstances, réduire sa vitesse, signaler sa venue et appliquer les freins. D'autre part, les défendeurs ont plaidé que Lefebvre fut l'artisan de son propre malheur, qu'étant sur la route, il n'a prêté aucune attention quelconque à la circulation des automobiles et qu'il était sous l'influence des spiritueux.

La preuve au dossier établit, en substance, les faits ci-après:—Cet accident eut lieu en rase campagne et dans une région où la route transcanadienne est droite, de niveau et divisée en deux par un terre-plein. Deux voies d'une largeur totale d'environ vingt-cinq pieds assurent du côté nord et du côté sud de ce terre-plein respectivement la circulation est-ouest, vers Montréal, et ouest-est, vers Belœil et St-Hyacinthe. Ce soir-là, un samedi, un peu après sept heures, Lefebvre partit seul en automobile de St-Hyacinthe pour se rendre à Montréal par la route transcanadienne. Arrivé à l'endroit même où une heure plus tard, à huit heures et trente p.m., il devait être fatalement frappé par l'automobile de Bernard, Lefebvre eut un premier accident dans lequel, outre son automobile, deux autres voitures furent impliquées. Deux agents de la Sûreté, patrouillant séparément la route, furent alors dépêchés sur les lieux. A leur arrivée, ils stationnèrent leurs véhicules, avec feux clignotants allumés, sur le terre-plein, face à Belœil. Ils procédèrent dès lors aux constatations et autres devoirs d'usage, ce qui leur prit une heure. Durant ce temps, l'agent Vary nota que Lefebvre était très nerveux et qu'il sentait la boisson. Vary fut importuné par ses agissements; non seulement Lefebvre leur nuisait, mais il s'exposait et les

exposait eux-mêmes à d'autres accidents de circulation. Dans son témoignage, cet agent de la Sûreté déclare:

> Je lui disais *ôtez-vous de sur la route, enlevez-vous, vous allez vous faire frapper, vous nous nuisez, on va avoir un accident nous autres aussi* et puis il ne semblait pas comprendre ça, il était toujours à me répéter *mon char a un accident, mon char a un accident.*

Dans un autre passage, Vary, référant toujours à Lefebvre, ajoute:

> Il était autour de nous autres, c'est-à-dire au ras nos automobiles; nous autres on allait sur la route, il y avait un char de travers sur la route, nous l'avons fait remorquer pour l'ôter de là, et puis monsieur Lefebvre était souvent sur la route. Je lui ai demandé souvent de s'ôter de sur la route, que c'était dangereux. Je lui ai dit *ne restez pas ici, ça va vite, il y a beaucoup de traffic.*

Au moins une dizaine de fois, Vary dut intervenir pour enjoindre à Lefebvre *de s'enlever et d'écouter, de s'ôter de sur la route.* Au moment où, leur travail terminé, les agents s'apprêtaient à quitter les lieux, il n'y restait que Lefebvre qui devait y attendre la venue d'un garagiste de St-Hyacinthe pour faire remorquer son automobile qui se trouvait dans le champ au nord de la route. Vary venait à peine de partir et Bécotte, après s'être assuré que Lefebvre s'en allait en direction de sa voiture endommagée, venait à peine de monter ou montait dans la sienne lorsqu'il entendit un bruit sourd, venant des lieux mêmes qu'il s'apprêtait à quitter. Il en prévint Vary par radio et celui-ci, qui n'avait parcouru qu'un demi-mille, revint sur les lieux. C'est alors que Bernard, qui avait déjà arrêté et stationné sa voiture sur le bord de la route, vint au devant des agents et leur dit qu'il venait de frapper quelque chose. On trouva le corps de Lefebvre à quelque quatorze pieds au nord du pavé.

Bernard est le seul témoin oculaire du fait immédiat de l'accident et il n'est pas sans à-propos de noter immédiatement le commentaire suivant fait à son sujet par le juge au procès:

> ...in giving his evidence Bernard impressed the Court as being completely objective reserving nothing and doing his best to describe exactly what happened.

Au moment de ce second accident, la nuit était tombée et le temps était sombre. Bernard relate qu'accompagné de son épouse et une autre personne, toutes deux alors occupées à causer, il conduisait son automobile vers Montréal sur la

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voie extrême nord, à une vitesse d'environ cinquante milles à l'heure et avec un éclairage diminué, lorsqu'il vit, à à peu près deux mille pieds devant lui, les feux clignotants des voitures de la Sûreté; il réduisit sa vitesse sans freiner et lorsqu'il passa vis-à-vis ces voitures, il allait à une vitesse d'environ quarante-cinq milles à l'heure quand, à un moment donné, il aperçut à quinze ou vingt-cinq pieds devant lui une personne immobilisée sur la route à trois pieds à droite de la ligne blanche séparant les deux voies du côté nord du terre-plein; n'ayant pas le temps d'appliquer utilement les freins, il obvia vers sa gauche mais ne put éviter de frapper Lefebvre avec l'avant droit de son automobile qu'il arrêta immédiatement près de l'accotement.

Le juge au procès déclara les appelants responsables, en s'appuyant exclusivement sur les dispositions de l'art. 3 de la *Loi d'indemnisation des victimes d'accidents d'automobile,* 1960-61 (Qué.), 9-10 Eliz. II, c. 65, dont les alinéas pertinents aux questions soulevées en cette cause se lisent comme suit:

> 3. Le propriétaire d'une automobile est responsable de tout dommage causé par cette automobile ou par son usage, à moins qu'il ne prouve
>
> *a*) que le dommage n'est imputable à aucune faute de sa part ou de la part de la personne dans l'automobile ou du conducteur de celle-ci, ou
>
> *b*) que lors de l'accident l'automobile était conduite par un tiers en ayant obtenu la possession par vol, ou
>
> *c*) que lors d'un accident survenu en dehors d'un chemin public l'automobile était en la possession d'un tiers pour remisage, réparation ou transport.
>
> Le conducteur d'une automobile est pareillement responsable à moins qu'il ne prouve que le dommage n'est imputable à aucune faute de sa part.

Le juge a d'abord considéré le cas du conducteur, puis celui du piéton. En ce qui concerne la conduite de Bernard, l'unique fait qu'il a mentionné et considéré en son jugement n'est pas celui de la vitesse, mais celui d'avoir conduit avec un éclairage diminué. L'opinion qu'il s'est formée sur cette question et la conclusion qu'il en a tirée apparaissent des extraits suivants du jugement:

> Now, I do not say that the circumstances of the headlights of the automobile driven by defendant, Bernard, i.e. on low and not on bright is a fault. What I do say is that it is up to the defendant to demonstrate that this was not a fault. And that, in my opinion, he has failed to do.

Plus loin, il ajoute:

To repeat, in my view, the fact that the defendant, Bernard, was driving with his lights low, and not full, may or may not be a fault, but the law exacts that he must demonstrate not only that such a circumstance is not a fault but also that the damage was not imputable to such fault.

Et il conclut finalement:

In the present case the driver, Bernard, has not proved that which the law requires and, therefore, must be held responsible for the damage. The same, of course, applies to the other defendant, the owner of the automobile, following the same provisions of the law.

D'où l'on voit que le juge de première instance n'a pas jugé que le fait d'avoir conduit avec un éclairage diminué constituait une faute et une faute ayant causé ou ayant contribué à causer directement l'accident, mais que Bernard n'avait pas établi, comme il en avait le fardeau, que le fait d'avoir ainsi conduit ne constituait pas une faute ayant ce caractère et c'est là la raison déterminante du jugement. En somme, le jugement ne se fonde aucunement sur une faute prouvée,—à la vérité, aucune faute n'y est même mentionnée,—mais, et ce qui est bien différent, sur le défaut de Bernard de satisfaire à *l'onus probandi.* Cette distinction, non sans pertinence en cet appel, est clairement formulée par le vicomte Dunedin dans *Robins v. National Trust Co.*[1]:

Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

D'autre part et en ce qui a trait à la conduite de Lefebvre, le juge fut d'avis qu'il avait pris des boissons alcooliques et que le degré d'intoxication, dont il était affecté au temps du second accident, n'avait guère d'importance

. . . except in so far as it explains why anyone would be so foolish as to cross a main highway at night in the face of an approaching automobile. . .

Le juge a retenu, comme établi, le fait que lorsque Bernard

[1] [1927] A.C. 515 at 520.

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aperçut Lefebvre, ce dernier était immobile au centre de la route et apprécia ainsi cette circonstance:

But given that, in the present case, the victim, Lefebvre, was imprudent as demonstrated by his presence on the highway when it was evident, from the headlights, that traffic was approaching, it still must be shown that such imprudence contributed to the damages . . . In the present case, I find it impossible to do so . . . His imprudence, if any, was the remote not the proximate cause of the accident.

L'action de la demanderesse fut ainsi maintenue et les défendeurs condamnés à l'indemniser, ainsi que ses enfants, de tous les dommages leur résultant du décès de Lefebvre.

Porté en appel, ce jugement fut confirmé par une décision majoritaire de la Cour du banc de la reine[1], constituée de MM. les juges Casey, Taschereau et Brossard. M. le juge Casey jugea que Lefebvre avait droit d'être sur la route, et que Bernard était en faute et le seul en faute parce que, ayant réalisé à plus de mille pieds qu'il y avait quelque chose d'inusité à l'avant sur son chemin, il avait conduit à une vitesse imprudente l'empêchant de contrôler sa voiture. Partageant ces vues, M. le juge Taschereau y ajouta que Bernard avait commis une imprudence en conduisant avec un éclairage diminué. M. le juge Brossard jugea que cet accident était aussi imputable à la conduite fautive de Lefebvre qu'à celle de Bernard et que celle du premier était au moins aussi grave que celle du second. Quant à Bernard, il nota que les défendeurs n'avaient nullement expliqué pourquoi il n'avait pas aperçu la victime à au moins soixante-quinze pieds, ajoutant que s'il l'avait vue, comme il eût pu la voir à cette distance, il lui eût été possible de mieux tenter de l'éviter. Quant à Lefebvre, l'opinion du savant juge appert de l'extrait suivant de ses raisons de jugement:

Dans le cas sous étude, il ne me paraît pas que la présence de Lefebvre sur la route, au moment où la collision s'est produite, n'ait été que l'occasion de la collision pour n'avoir pas été le résultat immédiat d'une faute de Lefebvre. Bien au contraire, il me paraît que ce dernier, qu'il ait été immobile sur la route ou qu'il s'y soit trouvé alors qu'il la traversait, était en faute de s'y trouver; on ne s'aventure pas ou on ne se tient pas ainsi, la nuit, sur une route, sans s'assurer qu'elle est libre et, lorsque l'on peut apercevoir les feux d'une automobile qui s'approche, si l'on ne prend garde à la distance à laquelle elle se trouve et à la rapidité avec laquelle elle s'approche, sans commettre une imprudence d'une exceptionnelle gravité; avec déférence, je ne puis souscrire à l'opinion qu'un piéton a le droit de traverser la route ou de s'y tenir dans de telles

[1] [1966] B.R. 837.

circonstances; l'imprudence qu'il commet et qui est ainsi reliée directement à l'accident qui se produit ne perd ni son caractère fautif ni son caractère de cause de l'accident pour l'unique motif que l'automobiliste eût pu, s'il n'eût pas lui-même commis une faute, éviter l'accident, la possibilité de cette faute de l'automobiliste étant prévisible par le piéton, c'est ainsi, du moins, que je comprends la jurisprudence constante de nos tribunaux dans leur application des principes de la responsabilité civile.

Enfin, M. le juge Brossard rejeta, comme mal fondée, l'opinion du juge de première instance, voulant que la victime d'un accident d'automobile ou ceux à qui la loi confère un droit d'action en cas de son décès, ne peuvent être tenus, en raison de l'art. 3, *supra,* de la nouvelle loi, de supporter la partie des dommages attribuable à la faute de la victime. Dans ces vues, M. le juge Brossard aurait accueilli l'appel et modifié le jugement de la Cour supérieure en réduisant de moitié la condamnation aux dommages. De là l'appel à cette Cour.

En toute déférence pour ceux qui entretiennent l'opinion contraire, je dirais, à l'instar de M. le juge Brossard, que ce malheureux accident est imputable à la faute de Bernard et à celle de Lefebvre. Aux raisons qu'il apporta au soutien de ses vues, j'ajouterais une référence à ces dispositions du *Code de la Route,* où la législature a précisément déterminé les priorités, les droits et les obligations réciproques du piéton et du conducteur d'automobile, sur un chemin public. En vigueur au temps de cet accident, ces dispositions sont reproduites aux *Statuts Refondus du Québec* (1964), c. 231, art. 48, dont il suffira de citer ici le troisième et quatrième alinéas de l'art. 48(2):

> Tout piéton qui traverse un chemin public ailleurs qu'à une intersection ou une zone de sécurité doit céder la priorité de passage à tous les véhicules circulant sur le chemin public.
>
> Nonobstant les dispositions ci-dessus, tout conducteur de véhicule doit user de prudence pour éviter de heurter un piéton et doit redoubler de prudence quand il s'agit d'un enfant ou d'une personne âgée ou infirme.

Tel que définit à l'article 1(17)

> les mots *chemin public* signifient la partie de tout pont, chemin, rue, place, carré ou autre terrain destiné à la circulation publique des véhicules.

Ces dispositions statutaires de l'art. 48(2) sanctionnent la justesse des observations faites par M. le juge Brossard, particulièrement en ce qui concerne la faute contributive qu'il attribua à Lefebvre. Ce sont là les dispositions de la loi qui régissaient les droits et obligations de Lefebvre et de Bernard au moment où cet accident allait incessamment

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se produire, et qui se produisit précisément parce que Lefebvre ne s'est pas plus soucié de la priorité de passage du véhicule de Bernard qu'il ne paraît s'être préoccupé de sa propre sécurité et parce que, de son côté, Bernard n'a pas usé de toute la prudence à laquelle il était tenu, pour être en position d'éviter de heurter Lefebvre. Donnant effet à cette prescription légale qui assujettissait, à la priorité de passage du véhicule de Bernard, le droit de Lefebvre de traverser la route ou de s'y tenir, Lefebvre, dans mon opinion, ne peut validement être absous de toute faute ayant contribué à causer l'accident. En terminant ces considérations sur l'imputabilité, j'ajouterais que, pour toutes les raisons qui précèdent sur la question, cet appel, à mon avis, n'est pas de ceux où il peut y avoir lieu d'appliquer la règle de non-intervention de cette Cour dans les cas où il peut apparaître, qu'en Cour supérieure et en Cour d'appel, on a été d'accord sur les faits et appliqué la loi s'y rapportant.

Reste à considérer la question de l'incidence de la faute contributive au regard de l'art. 3 de la *Loi d'indemnisation des victimes d'accidents d'automobile*. Pour soutenir la proposition qu'en raison de cet article de cette nouvelle loi, la faute contributive de la victime ne peut désormais être tenue en ligne de compte pour lui faire supporter la partie des dommages attribuables à sa propre faute, le juge de première instance a interprété les mots *tout dommage* ou *all damage,* apparaissant respectivement dans la version française et anglaise du premier alinéa de l'article, comme signifiant *tous les dommages* ou *all damages,* incluant même ceux qui, dans le cas de faute commune, sont attribuables à la faute de la victime. Une législature n'est pas présumée avoir l'intention d'apporter des modifications fondamentales à la loi au-delà de ce qu'elle déclare explicitement, soit en termes exprès ou nécessairement implicites ou, en d'autres mots, au-delà du cadre et de l'objet immédiats de la loi nouvelle. (Maxwell on Interpretation of Statutes, 11e éd., pp. 78 et 79). Accepter l'interprétation donnée par le juge de première instance serait affirmer—ce qui me paraît impossible—qu'il faut voir dans les dispositions de l'article 3 une intention de la législature de modifier les principes fondamentaux de la responsabilité, dans le cas de faute contributive, jusqu'au point de permettre que,

dans la proportion où les dommages subis par elle lui sont attribuables, la victime bénéficie de sa propre faute et que la partie qu'elle poursuit soit pénalisée.

De ce qui précède, il résulte que la condamnation aux dommages, dont le quantum fixé par la Cour supérieure n'est pas contesté, doit être réduite dans la proportion où la faute de la victime a contribué à l'accident, proportion que M. le juge Brossard a fixée à 50 pour cent et qu'il n'y a pas lieu de modifier.

J'accueillerais l'appel, en partie, infirmerais le jugement de la Cour du banc de la reine, et modifierais le dispositif du jugement de la Cour supérieure de la façon suggérée par M. le juge Brossard; avec dépens dans cette Cour et dans la Cour du banc de la reine, si demandés.

Le jugement des Juges Cartwright et Abbott fut rendu par

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side)[1] affirming by a majority a judgment of Puddicombe J. in favour of the respondent for $38,746. Brossard J., dissenting in part, would have attributed one-half of the blame for the accident out of which the appeal arises to the deceased Nestor Lefebvre, who was the husband of the respondent, and would have reduced the amount of the judgment accordingly.

No question was raised in the Court of Queen's Bench or in this Court as to the amount at which the learned trial judge assessed the total damages. Counsel for the appellant argues that it should be held that the accident was caused solely by the fault of the deceased and that the action should be dismissed or, alternatively, that at least 75 per cent of the blame should be attributed to the deceased.

The facts are not complicated. The action arises out of an accident which occurred on the highway between Belœil and Montreal on September 22, 1962, at about 8.30 P.M. (daylight saving time). The appellant Bernard, who had borrowed the automobile of his son-in-law, the appellant Nadeau, was proceeding in open country along the highway from Belœil to Montreal. This is a divided highway, there

[1] [1966] Que. Q.B. 837.

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being two lanes for traffic proceeding towards Montreal and two lanes for traffic proceeding in the other direction. The east-west and the west-east lanes are separated by a grass strip. The combined width of the two east-west lanes is about 25 feet. The night was dark but clear, the highway straight and level.

While so proceeding, Bernard suddenly saw at a distance of from 15 to 20 feet in front of him the legs of a man who appeared to be standing directly in his path about 3 feet north of the broken line dividing the northerly and southerly lanes of the east-west half of the highway. He immediately swerved to his left, but did not have time to apply the brakes before the right front of his car struck the man, killing him and throwing his body to a point about 14 feet north of the northerly edge of the highway. Bernard after bringing his automobile to a stop on the north shoulder of the highway went back to look for the victim who was eventually found. He was the deceased Lefebvre.

Earlier on the same evening Lefebvre had been involved in another accident with two other automobiles on the same highway. At the time of the accident which is in issue in this appeal, everyone concerned in the earlier accident except Lefebvre had left the scene. Lefebvre's automobile was in a roadway off the highway to the north. One of the police cars was about half a mile up the highway and the other police car had just left the scene. Lefebvre was last seen by the constable on the grass strip separating the eastbound and westbound sections of the highway.

The only eye-witness of the accident was the appellant Bernard. The learned trial judge accepted him as a credible witness telling the facts honestly as he recollected them. Bernard said that when about 2,000 feet from the point at which the accident occurred he was proceeding at a speed of about 52 miles per hour which he reduced to about 45 miles per hour because of seeing the flashing lights on the cars of the constable, that his eye-sight was good, that the brakes of the car he was driving were in excellent condition, that his lights were on low-beam and that he could give no reason for not having them on high-beam. He said that when on low-beam his light would illuminate for a distance of about 75 feet in front of his car.

As the constable Bécotte had left Lefebvre on the grass strip between the two halves of the highway it would seem probable that prior to being struck the latter had been proceeding from the grass strip towards the north side of the highway. If so he would have been in Bernard's vision while walking somewhat more than 15 feet. Equally he would have been in Bernard's vision if, for some unexplained reason, he was standing still at the point where he was struck.

It is not necessary to expatiate on the negligence of Bernard. No judge in the courts below or in this court doubts that he was properly found to be at fault and that his fault was a direct cause of the fatality. Quite apart from the statutory onus cast upon him his failure to see the victim in ample time to avoid striking him is neither explained nor to be excused.

The only question of difficulty is whether it should be held that the deceased was guilty of contributory negligence. The onus of establishing an affirmative answer to that question was, of course, upon Bernard. It was for him to prove, on the balance of probabilities, that Lefebvre was negligent and that his negligence was a direct cause of the accident.

In my opinion he failed to do this, unless it can be asserted that an inference of negligence should be drawn against any pedestrian who is struck in or near the centre of a travelled highway at night-time by a car the lights of which are burning, a proposition which I am unable to accept.

Whether it has been shown that the deceased was guilty of contributory negligence which was a direct cause of the fatality is a question of fact and upon it there are concurrent findings in the courts below. I respectfully agree with the view of Brossard J. that s. 3 of the *Highway Victims Indemnity Act*, R.S.Q. 1964, c. 232, does not have the effect of depriving the owner or driver of an automobile which has struck a pedestrian of the benefit of the defence of contributory negligence; but the contrary view on this

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question of law expressed by Puddicombe J. does not invalidate his finding of fact expressed as follows:

> Per se, it is not negligent to be on a highway even on a dark night, it may be imprudent. But given that, in the present case the victim, Lefebvre, was imprudent as demonstrated by his presence on the highway when it was evident, from the headlights, that traffic was approaching, it still must be shown that such imprudence contributed to the damages before the victim, or his heirs, can be assessed to bear part of the award. In the present instance I find it impossible to do so. This was not the familiar example of the child, or for that matter, adult, unexpectedly and unforeseeably darting out onto the highway. All the evidence before the Court is that when the defendant, Bernard, first saw Lefebvre the latter was standing, motionless, about half-way across. His imprudence, if any, was the remote, not the proximate cause of the accident.

In the Court of Queen's Bench Casey J., after briefly reviewing the facts, said:

> On these facts and without the help of any presumption I am of the opinion that Bernard alone was at fault.

Taschereau J., after stating and leaving open the question of law on which Brossard J. had differed from Puddicombe J., summarized his view of the facts in the following sentence:

> Toutefois, la question ne se pose pas dans l'espèce car, pour les motifs que j'exposerai ci-après, la preuve ne me justifierait pas de retenir une part de responsabilité contre le défunt.

If Casey J. and Taschereau J. had not reached this conclusion on the facts it would, of course, have been necessary for them to deal with the question of law which they found it unnecessary to consider.

There is no need to re-examine the authorities formulating the rule which should guide a second appellate court when asked to reverse concurrent findings of fact in the courts below; stated in the terms least favourable to the respondent, those authorities establish that such findings should be accepted unless the second appellate court is satisfied that they are clearly wrong. It is of no importance that in the case at bar the learned judges in the courts below may have reached and expressed their findings in slightly differing ways; as was pointed out by Lord Dunedin giving the judgment of the Judicial Committee in *Robins v. The National Trust Co.*[1], "the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons".

[1] [1927] A.C. 515 at 521.

Had I been charged with the task of deciding from the written record whether the defence had satisfied the onus of shewing that the deceased was guilty of contributory negligence which was a direct cause of the accident I would have reached the same conclusion as have the courts below; but that is of little importance, I am certainly not satisfied that the concurrent findings of fact made by those courts were wrong.

I would dismiss the appeal with costs.

Appel maintenu en partie avec dépens, si demandés, les Juges CARTWRIGHT *et* ABBOTT *étant dissidents.*

Procureurs des défendeurs, appelants: Brais, Campbell, Pepper & Durand, Montréal.

Procureur de la demanderesse, intimée: M. Pothier, St-Hyacinthe.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

DWORKIN FURS (PEMBROKE) LIMITED, ALLIED BUSINESS SUPERVISIONS LIMITED, ALPINE DRYWALL & DECORATING LIMITED, M. F. ESSON & SONS LIMITED, AARON'S LADIES APPAREL LIMITED ..... RESPONDENTS.

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*Nov. 15, 16, 17
Nov. 16

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Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Associated corporations—What constitutes "control"—Casting vote—Validity of Articles of Association requiring unanimous consent for motions before meetings of shareholders or directors—Income Tax Act, R.S.C. 1952, c. 148, s. 39.

The five respondent companies were assessed by the Minister on the basis that each was associated with one or more other companies within the meaning of s. 39(2), (3) and (4) of the *Income Tax Act*, R.S.C. 1952, c. 148, and was therefore not entitled to the benefit of the lower rate of tax on part of its income. The issue in all five cases was the meaning of "controlled" as found in s. 39(4) of the Act. The Exchequer Court rejected the Minister's assessment. The Minister appealed to this Court where it was ordered that the 5 appeals be heard together.

*PRESENT: Fauteux, Abbott, Judson, Hall and Spence JJ.

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In the Dworkin appeal, another company owned 48 per cent of the shares in its own name and 2 per cent in the names of Roy and Helen Saipe as its nominees. The other 50 per cent were owned by a third party. Roy Saipe was president of Dworkin but did not have a casting vote in the event of an equality of votes.

In the Allied appeal, one Aaron owned 50 per cent of the shares and, as president, had the right to exercise a second or casting vote in the event of an equality of votes.

In the Alpine Drywall appeal, one Jager owned 50 per cent of the shares and the other 50 per cent were owned by one Wagenaar. The latter attended the day-to-day operation of the business and Jager, as president, was responsible for the financing, etc. and had a casting vote.

In the M. F. Esson appeal, that company was controlled by the Esson family who also owned 50 per cent of the shares of another company. The other 50 per cent were owned by an individual who had been appointed general manager with exclusive authority and who had been given an option, exercisable some 3 years later, to buy the Esson family's shares. In the meantime, the senior Esson was president of that other company and had a casting vote in the event of an equality of votes.

In the Aaron appeal, a group held two-thirds of the shares but a provision in the company's Articles of Association required all motions put before any meeting of shareholders or directors to have unanimous consent. In the Minister's view that provision was illegal and *ultra vires*.

Held: The appeals by the Minister should be dismissed. None of the five respondent companies was an associated corporation.

In the Dworkin appeal, it was clear, in the light of *Buckerfield's Ltd. v. M.N.R.*, [1965] 1 Ex. C.R. 299, which held that "controlled" meant *de jure* control and not *de facto* control, that the respondent was not controlled by the other company.

In the Allied appeal, as was held by the trial judge, a casting vote was not the property of the holder but an adjunct of an office. That right did not give control.

The Alpine Drywall and M. F. Esson appeals did not differ from that of the Allied appeal.

In the Aaron appeal, the Article in question was neither illegal nor *ultra vires*. It is beyond question that a majority may bind the minority in a company. A contract between shareholders to vote in a given or agreed way is not illegal. The Articles of Association are in effect an agreement between the shareholders and are binding upon all shareholders.

Revenu—Impôt sur le revenu—Corporations associées—Contrôle—Voix prépondérante—Validité de règlements exigeant le consentement unanime pour les motions devant les assemblées d'actionnaires ou de directeurs—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, art. 39.

Le Ministre a cotisé les 5 compagnies intimées comme si chacune était associée avec une ou plusieurs autres compagnies dans le sens de l'art. 39(2), (3) et (4) de la *Loi de l'Impôt sur le Revenu*, S.R.C. 1952, c. 148, et n'avait pas alors droit au bénéfice du taux d'impôt moindre sur une partie de son revenu. Il s'agit de déterminer dans ces 5 appels le sens

qu'il faut donner au mot «contrôle» tel qu'il se trouve dans l'art. 39(4) de la Loi. La Cour de l'Échiquier a rejeté la cotisation du Ministre. Ce dernier en appela devant cette Cour alors qu'il fut ordonné que les 5 appels soient entendus ensemble.

Dans l'appel de la compagnie Dworkin, une autre compagnie détenait 48 pour-cent des actions de Dworkin en son propre nom et 2 pour-cent au nom de Roy et Helen Saipe en qualité de personnes désignées. L'autre 50 pour-cent était détenu par une tierce personne. Roy Saipe était président de Dworkin mais n'avait pas une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Allied, un nommé Aaron détenait 50 pour-cent des actions et, comme président, avait le droit d'exercer une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Alpine Drywall, un nommé Jager détenait 50 pour-cent des actions et l'autre 50 pour-cent était détenu par un nommé Wagenaar. Ce dernier s'occupait des affaires journalières et Jager, comme président, était responsable du financement, etc. et avait une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie M. F. Esson, cette compagnie était contrôlée par la famille Esson qui détenait 50 pour-cent des actions d'une autre compagnie. L'autre 50 pour-cent était détenu par un individu qui avait été nommé gérant général avec autorité exclusive et à qui on avait donné une option, dont l'échéance était rapportée à quelque 3 ans plus tard, d'acheter les actions de la famille Esson. Entre temps, Esson le père était président de cette autre compagnie et avait une voix prépondérante en cas de partage des votes.

Dans l'appel de la compagnie Aaron, les deux-tiers des actions étaient détenus par un groupe mais, une clause dans les règlements de la compagnie exigeait l'unanimité pour toute motion présentée à une assemblée des actionnaires ou des directeurs. Le Ministre considéra cette clause comme étant illégale et *ultra vires*.

Arrêt: Les appels du Ministre doivent être rejetés. Aucune des 5 compagnies intimées était une corporation associée.

Dans l'appel de la compagnie Dworkin, il est clair, vu la cause de *Buckerfield's Ltd. v. M.N.R.*, [1965] 1 Ex. C.R. 299, qui a décidé que le mot «contrôle» signifiait un contrôle *de jure* et non pas un contrôle *de facto*, que la compagnie intimée n'était pas contrôlée par l'autre compagnie.

Dans l'appel de la compagnie Allied, tel que décidé par le juge au procès, une vois prépondérante n'est pas la propriété de son détenteur mais est un accessoire d'un office. Ce droit ne donne pas le contrôle.

Les appels de la compagnie Alpine Drywall et de la compagnie M. F. Esson ne diffèrent pas de l'appel de la compagnie Allied.

Dans l'appel de la compagnie Aaron, le règlement en question n'était pas illégal ni *ultra vires*. Il n'y a aucun doute qu'une majorité peut lier la minorité dans une compagnie. Un contrat entre les actionnaires pour voter d'une certaine manière n'est pas illégal. Les règlements d'une compagnie sont en réalité une entente entre les actionnaires et lient tous les actionnaires.

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APPELS de 5 jugements de la Cour de l'Échiquier du Canada[1]. Appels rejetés.

APPEALS from 5 judgments of the Exchequer Court of Canada[1]. Appeals dismissed.

G. W. Ainslie and *L. R. Olson*, for the appellant.

C. S. Bergh, for the respondent, Dworkin Furs (Pembroke) Ltd.

R. B. Slater and *A. Anhang*, for the respondent, Allied Business Supervisions Ltd.

R. A. F. Montgomery, for the respondent, Alpine Drywall & Decorating Ltd.

G. B. Cooper, for the respondent, M. F. Esson & Sons Ltd.

R. B. Slater and *A. Anhang*, for the respondent, Aaron's Ladies Apparel Ltd.

The judgment of the Court was delivered by

HALL J.:—These are appeals by the Minister of National Revenue from judgments of the Exchequer Court of Canada in the following cases:

Dworkin Furs (Pembroke) Limited v. M.N.R.;
Aaron's Ladies Apparel Limited v. M.N.R.;
Allied Business Supervisions Limited v. M.N.R.;
Alpine Drywall & Decorating Limited v. M.N.R.;
M. F. Esson & Sons Limited v. M.N.R.

In the Exchequer Court the appeals of Aaron's Ladies Apparel Limited and Allied Business Supervisions Limited were heard together at Winnipeg by Thurlow J. along with appeals from eight other companies. The appeal of Alpine Drywall & Decorating Limited was heard in Calgary in conjunction with that of another company by Cattanach J. The appeal of Dworkin Furs (Pembroke) Limited was heard in Ottawa by Jackett P. and the appeal of M. F. Esson & Sons Limited was heard at Moncton by Thurlow J. The present appeal concerns the five named respondents only.

By Order of this Court dated September 20, 1966, the appeals of the Minister of National Revenue against the

[1] Dworkin Furs (Pembroke) Ltd. v. M.N.R. [1966] Ex. C.R. 228, [1965] C.T.C. 465, 65 D.T.C. 5277; Allied Business Supervisions Ltd. v. M.N.R. [1966] C.T.C. 330, 66 D.T.C. 5244; Alpine Drywall & Decorating Ltd. v. M.N.R. [1966] C.T.C. 359, 66 D.T.C. 5263; M. F. Esson & Sons Ltd. v. M.N.R. [1966] C.T.C. 439, 66 D.T.C. 5303; Aaron's Ladies Apparel Ltd. v. M.N.R. [1966] C.T.C. 330, 66 D.T.C. 5244.

five named respondents were ordered to be heard together and the appellant was granted leave to file a joint factum applicable to all five appeals. At the conclusion of the argument on behalf of the appellant, the Court said:

> For reasons which will be delivered later, the appeal in each of the above cases, except in the case of *Aaron's Ladies Apparel Limited*, is dismised with costs; with respect to the appeal in the latter case, the only points on which the Court needs to hear counsel for respondent are related to Article 6 of the Articles of Association, the Court desiring to have submissions of counsel as to the validity and effect of Article 6.

The issue in all five appeals is the meaning of "controlled" as found in subs. (4) of s. 39 of the *Income Tax Act*. Subsection (1) of s. 39 of the *Income Tax Act* provides that the tax payable by a corporation under Part 1 of the *Income Tax Act* is 18 per cent of the first $35,000 taxable income and 47 per cent of the amount by which the income subject to tax exceeds $35,000. However, subss. (2) and (3) of s. 39 provide that when two or more corporations are "associated" with each other, the aggregate of the amount of their incomes taxable at 18 per cent is not to exceed $35,000. Subsection (4) of s. 39 of the *Income Tax Act* then defines the circumstances under which a corporation is associated with another corporation. Subsection (4) of s. 39 provides in part:

> For the purpose of this section, one corporation is associated with another in a taxation year if at any time in the year,
>
> (*a*) one of the corporations controlled the other,
>
> (*b*) both of the corporations were controlled by the same person or group of persons,
>
> * * *

The word *controlled* as used in this subsection was held by Jackett P. to mean *de jure* control and not *de facto* control and with this I agree. He said in *Buckerfield's Limited et al v. Minister of National Revenue*[1]:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control

[1] [1965] 1 Ex. C.R. 299 at 302-3, [1964] C.T.C. 504, 64 D.T.C. 5301.

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by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* (1943) 1 A.E.R. 13 where Viscount Simon L.C., at p. 15, says:

> "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.* (1947) A.C. 109 per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

This definition of *controlled* applies to all five appeals.

In Dworkin Furs (Pembroke) Limited, Dworkin Furs Ltd. owned 48 per cent of the issued shares in its own name and 2 per cent in the names of Roy Saipe and Helen Saipe as its nominees. The other 50 per cent were owned by one Sadie Harris. Roy Saipe was President of this respondent, but the By-laws of the company provided that in the event of an equality of votes, the Chairman did not have a casting vote.

It is clear in the light of *Buckerfield* that in these circumstances Dworkin Furs (Pembroke) Limited was not controlled by Dworkin Furs Ltd.

In the case of Allied Business Supervisions Limited, Alexander Aaron was the owner of 50 per cent of the issued shares while two other individuals, Joseph Tomney held 31 per cent and Roy N. Hall 19 per cent respectively. Aaron and Tomney were elected directors of the company on December 17, 1959, for an indefinite period until their term of office should be changed by the shareholders at a subsequent shareholders' meeting. On the same day Aaron was elected President of the company.

This company was incorporated under the Saskatchewan *Companies Act*, R.S.S. 1953, c. 124. The company adopted as its Articles of Association *Table A* of the *Companies Act*. Article 46 of *Table A* reads:

> 46. In the case of equality of votes whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

It was urged on behalf of the appellant that the fact that Aaron as President had at meetings of Shareholders and Directors a second or casting vote gave him control of the company within the *Buckerfield* definition of *controlled*. Thurlow J. held that the existence of the right to exercise a second or casting vote did not give Aaron control. He said:

> the casting vote, unlike the votes arising from shareholding, which are exercisable without responsibility to the company or to other shareholders is in my opinion not the property of the holder, but is an adjunct of an office.

and with this I agree.

In the case of Alpine Drywall & Decorating Limited, the shareholding situation was that one William Jager owned 50 per cent of the issued shares and Clarence Wagenaar the other 50 per cent. The appellant relied on evidence which established that at the time this company was incorporated, Wagenaar and Jager had agreed:

(*a*) Wagenaar would attend to the running of the day to day business of the Respondent; and

(*b*) Jager would attend to the corporate end of the business and the arranging of the necessary financing to carry on the business.

and Jager was elected President of the Company.

Articles 43 and 45 of the respondent provided:

> 43. The president, or in his absence the vice-president (if any) shall be entitled to take the chair at every general meeting, or if there be no president or vice-president, or if at any meeting he shall not be present within fifteen (15) minutes after the time appointed for holding such meeting, the members present shall choose another director as chairman, and if no director be present, or if all the directors present decline to take the chair then the members present shall choose one of their numbers to be chairman. The chairman at any meeting of shareholders may appoint one or more persons (who need not be shareholders) to act as scrutineers.
>
> 45. Every question submitted to a meeting shall be decided in the first instance by a show of hands and in the case of an equality of votes, the chairman shall, both on a show of hands and on a poll have a casting vote in addition to the vote or votes to which he may be entitled as a member.

The arrangement or agreement between Wagenaar and Jager, while it might be said to give Wagenaar *de facto* control, did *not* give him *de jure* control, which is the true test, and this case does not differ from that of Allied Business Supervisions Limited.

The case of M. F. Esson and Sons Limited involved determining whether the company was controlled by the same group of persons who controlled Esson Motors Limited.

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It is a fact that Miller F. Esson, Sr., Miller F. Esson, Jr. and John F. Esson controlled the respondent. Prior to May 7, 1962, the shareholding of Esson Motors Limited was:

Miller F. Esson, Sr.	66
Miller F. Esson, Jr.	66
John F. Esson	66
Total	198

On May 7th, 1962, Miller F. Esson, Miller Esson, Jr., Jack Esson, and Esson Motors Limited, entered into an agreement with Edward Earle McKenna wherein it was agreed:

(*a*) McKenna was to be appointed general manager of Esson Motors Limited for a term of three years, and was given complete and exclusive authority to manage the business of Esson Motors Limited.

(*b*) The Essons were to transfer one half of the issued capital stock (99 shares) to McKenna.

(*c*) The Essons granted to McKenna an irrevocable option to purchase from them the remaining capital stock during the period 29th May, 1965 until 26th May, 1966.

Pursuant to the terms of the Agreement, the shares were transferred so that as of the 7th of May, 1962, the shareholders in Esson Motors Limited were as follows:

Miller F. Esson, Sr.	33	
Miller F. Esson, Jr.	33	
John F. Esson	33	
		99
Edward McKenna		99
Total		198

At all material times Miller F. Esson, Sr. was President, Miller F. Esson, Jr. was Vice-President and John F. Esson Secretary-Treasurer of Esson Motors Limited.

By-law 4(*b*) of Esson Motors Limited read:

The president shall preside at meetings of the board. He shall act as chairman of the shareholders' meetings if present.....

Paragraph (*c*) of Section 102 of the *Companies Act* of New Brunswick, R.S.N.B. 1952, Chapter 33, under which Esson Motors Limited was incorporated, provides:

> "In the absence of other provisions in that behalf in the letters patent or by-laws of the company,
>
> * * *
>
> (*c*) all questions proposed for the consideration of the shareholders at such meetings shall be determined by the majority of votes, and the chairman presiding at such meetings shall have the casting vote in the case of an equality of the votes.

Thurlow J. disposed of the casting vote argument as he had done in *Allied Business Supervisions Limited v. Minister of National Revenue*[1]. He was right in so doing.

In the appeal respecting Aaron's Ladies Apparel Limited, a company incorporated under the Saskatchewan *Companies Act* (ibid), the following question had been propounded:

1. Within the meaning of the *Income Tax Act*, R.S.C. 1952, Chapter 148, as amended:

(c) during the period commencing on February 1, 1960, and ending on July 14, 1961, did Isidore Aaron and Alexander Aaron together control Aaron's Ladies Apparel Limited?

(d) during the period commencing on July 14, 1961, and ending on December 31, 1962, did Aaron's (Prince Albert) Limited control Aaron's Ladies Apparel Limited?

The shareholding of the Respondent, Aaron's Ladies Apparel Limited was as follows:

1 February 1960—14 July 1961		
Isidore Aaron	349	
Alexander Aaron	349	
Margaret Pratt	310	
Total	1,008	
14 July 1961—31 December 1961		
Aaron's (Prince Albert) Limited ..		698
Margaret Pratt		310
Total		1,008

This case differs from the others in that there could be no argument that but for Article 6 of the Articles of Association Isidore Aaron and Alexander Aaron controlled the respondent company by reason of holding 698 out of 1,008 shares in their own names prior to July 14, 1961, and thereafter in the name of Aaron's (Prince Albert) Limited which they also controlled. Subsections (1) and (2) of s. 18 of *The Companies Act* read:

18. (1) There may be registered with the memorandum articles of association prescribing regulations for the company, and such articles may adopt all or any of the regulations contained in table A in the first schedule.

(2) If the articles are not registered or, if articles are registered, in so far as the articles do not exclude or modify the regulations in that table, those regulations shall, so far as applicable, be the regulations of

[1] [1966] C.T.C. 330, 66 D.T.C. 5244.

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the company in the same manner and to the same extent as if they were contained in duly registered articles.

The Articles of Association of the respondent's company provided in part as follows:

1. The provisions contained in Table A in the First Schedule of the *Companies Act* as hereinafter modified shall apply to this company.

4. A poll may be demanded by one member and para. 44 of the said Table A shall be amended accordingly.

6. That all motions put before any meeting of shareholders or directors of the company shall require the unanimous consent of all its members, and paras. 46, 47 and 82 of the said Table A shall be amended accordingly.

Paragraphs 46, 47 and 82 read:

46. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

47. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

82. A committee may meet and adjourn as it thinks proper. Questions arising at a meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

Paragraph 44 reads:

At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least two members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

The appellant contends that Article 6 above is illegal and *ultra vires* as being (*a*) contrary to the provisions of *The Companies Act*; (*b*) it constitutes an unreasonable restriction on the rights of a member to have a reasonable opportunity of bringing before the meeting any proposal or matter within the scope of the business of the meeting; and (*c*) it is contrary to the fiduciary relationship which the directors at a directors' meeting have towards the company which require them to give their entire ability to the best interests of the company and its shareholders.

All three points may be dealt with together as they extent to which they bind the shareholders of a company.

That a majority may bind the minority in a company is beyond question.

Section 14(*b*) of the *Interpretation Act* of the Province of Saskatchewan, R.S.S. 1953, c. 1, provides:

> 14. In an Act words making a number of persons a corporation shall:
> (*b*) vest in a majority of the members of the corporation the power to bind the others by their acts.

Similar wording is also to be found in the *Interpretation Act* of Canada, R.S.C. 1952, c. 158, s. 30.

The nature and effect of Articles of Association were stated by Duff J. (as he then was) in *Theatre Amusement Co. v. Stone*[1] as follows:

> The articles of association are binding upon the company, the directors and the shareholders, until changed in accordance with the law. So long as they remain in force, any shareholder is entitled, unless he is estopped from taking that position by some conduct of his own, to insist upon the articles being observed by the company, and the directors of the company. This right he cannot be deprived of by the action of any majority. In truth, the articles of association constitute a contract between the company and the shareholders which every shareholder is entitled to insist upon being carried out.

A situation similar to the one here was dealt with by this Court in *Ringuet et al v. Bergeron*[2]. In that case certain shareholders, Bergeron, Pagé and Ringuet, had contracted amongst themselves to vote unanimously at all meetings of the company and to vote for each other as directors. The contract provided for a penalty for breach of the contract in the following terms:

> 11. Dans toutes assemblées de ladite Compagnie, les parties aux présentes s'engagent et s'obligent à voter unanimement sur tout objet qui nécessite un vote. Aucune des parties aux présentes ne pourra différer d'opinion avec ses co-parties contractantes en ce qui concerne le vote. Le vote prépondérant du Président devra toujours être en faveur des deux parties contractantes.
>
> 12. Si l'une des parties ne se conforme à la présente convention, ses actions seront cédées et transportées aux deux autres parties contractantes en parts égales, et ce gratuitement.
>
> Telle est la sanction de la non exécution d'aucune des clauses de la présente convention par l'une des parties contractantes.

For a period the contracting parties observed the terms of the contract, but later two of the parties began to take

[1] (1914), 50 S.C.R. 32 at 36, 16 D.L.R. 855, 6 W.W.R. 1438.
[2] [1960] S.C.R. 672, 24 D.L.R. (2d) 449.

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steps to oust Bergeron from the management of the company. A shareholders' meeting was called whereat Ringuet and Pagé voted themselves in as a new board of directors. Bergeron was thus completely excluded from the management of the company. He brought action alleging that Ringuet and Pagé, in failing *inter alia* to vote for his election to the board of directors, had violated the contract. The trial court rejected the action, but in the Court of Queen's Bench the Chief Justice and Owen J. found for Bergeron, Pratte J. dissenting.

In this Court, upholding the Court of Queen's Bench, Judson J. for the majority said:

> The Chief Justice found nothing illegal in the agreement and decided that it should be given its full effect. The ratio of the dissenting opinion is to be found in the distinction drawn between the rights of a shareholder and the obligations assumed on becoming a director. While majority shareholders may agree to vote their shares for certain purposes, they cannot by this agreement tie the hands of directors and compel them to exercise the power of management of the company in a particular way. This appears in the following extract from the reasons of Pratte J.:
>
> > «Mais la situation des directeurs est bien différente de celle des actionnaires. Le directeur est désigné par les actionnaires, mais il n'est pas à proprement parler leur mandataire; il est un administrateur chargé par la loi de gérer un patrimoine qui n'est ni le sien, ni celui de ses co-directeurs, ni celui des actionnaires, mais celui de la compagnie, une personne juridique absolument distincte à la fois de ceux qui la dirigent et de ceux qui en possèdent le capital actions. En cette qualité, le directeur doit agir en bonne conscience, dans le seul intérêt du patrimoine confié à sa gestion. Cela suppose qu'il a la liberté de choisir, au moment d'une décision à prendre, celle qui lui paraît la plus conforme aux intérêts sur lesquels la loi lui impose le devoir de veiller.»
>
> There can be no objection to the general principle stated in this passage, but, in my view, it was not offended by this agreement. However, the conclusion of Pratte J. was that a director who has bound himself as this contract bound the parties has rendered himself incapable of doing what the law requires of him and that clause 11 requiring unanimity at all meetings had that effect. He also held that clause 11 was not severable and that therefore the agreement was invalidated in its entirety.
>
> Owen J. agreed that the undertaking of unanimity at directors' meetings which he considered was required by clause 11 might be contrary to public order but that it was not necessary to decide this since the clause was severable from the other provisions of the agreement to which he gave full effect. The defendants had failed to comply with other clauses in the contract—the voting of Bergeron's salary, the election of Bergeron as a director of the company and his appointment as secretary-treasurer and assistant general manager.
>
> The point of the appeal is therefore whether an agreement among a group of shareholders providing for the direction and control of a com-

pany in the circumstances of this case is contrary to public order, and whether it is open to the parties to establish whatever sanction they choose for a breach of such agreement.

Did the parties of this agreement tie their hands in their capacity as directors of the company so as to contravene the requirements of the *Quebec Companies Act,* which provides (s. 80) that "the affairs of the company shall be managed by a board of not less than three directors"? I agree with the reasons of the learned Chief Justice that this agreement does not contravene this or any other section of the *Quebec Companies Act*. It is no more than an agreement among shareholders owning or proposing to own the majority of the issued shares of a company to unite upon a course of policy or action and upon the officers whom they will elect. There is nothing illegal or contrary to public order in an agreement for achieving these purposes. Shareholders have the right to combine their interests and voting powers to secure such control of a company and to ensure that the company will be managed by certain persons in a certain manner. This is a well-known, normal and legal contract and one which is frequently encountered in current practice and it makes no difference whether the objects sought are to be achieved by means of an agreement such as this or a voting trust. Such an arrangement is not prohibited either by law, by good morals or public order.

It is important to distinguish the present action, which is between contracting parties to an agreement for the voting of shares, from one brought by a minority shareholder demanding a certain standard of conduct from directors and majority shareholders. Nothing that can arise from this litigation and nothing that can be said about it can touch on that problem. The fact that this agreement may potentially involve detriment to the minority does not render it illegal and contrary to public order. If there is such injury, there is a remedy available to the minority shareholder who alleges a departure from the standards required of the majority shareholders and the directors. The possibility of such injurious effect on the minority is not a ground for illegality.

I think that this litigation can be decided on the simple ground that clause 11 has no reference to directors' meetings. Clause 11 refers to meetings of the company, that is, shareholders' meetings, and not to meetings of the board of directors. On this point I agree with the Chief Justice, who stated his opinion in the following terms:

> «Au surplus, y a-t-il quelque chose qui répugne à la loi, à l'ordre public et aux bonnes mœurs qu'un groupe d'actionnaires s'entendent pour contrôler et diriger une compagnie, pour devenir ses administrateurs, ses principaux officiers? Il n'était sûrement pas besoin d'un contrat écrit pour pareille entente qui intervient chaque jour dans le monde des compagnies, étant notoire qu'un grand nombre d'entre elles sont contrôlées par un groupe d'actionnaires qui souvent même ne représentent pas la majorité des actions.
>
> L'engagement des co-contractants à voter unanimement leurs actions dans les assemblées de la compagnie ne saurait lui-même, à mon avis, être invalide; après tout, chacun des comparants n'a pas renoncé à la délibération, à la discussion, au droit de faire triompher son opinion avant de se ranger à l'avis de la majorité qui en principe doit gouverner.»

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I have the greatest difficulty in seeing how any question of public order can arise in a private arrangement of this kind. The possibility of injury to a minority interest cannot raise it. If this were not so, every arrangement of this kind would involve judicial enquiry. Minority rights have the protection of the law without the necessity of invoking public order. This litigation is between shareholders of a closely held company. The agreement which the plaintiff seeks to enforce damages nobody except the unsuccessful party to the agreement. No public interest or illegality is involved.

I am of opinion that the same reasoning applies here. Control of a company within *Buckerfield* rests with the shareholders as such and not as directors. A contract between shareholders to vote in a given or agreed way is not illegal. The Articles of Association are in effect an agreement between the shareholders and binding upon all shareholders. Article 6 in question here was neither illegal nor *ultra vires*.

The appeal in respect of Aaron's Ladies Apparel Limited will accordingly also be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent, Dworkin Furs (Pembroke) Ltd.: Soloway, Wright & Company, Ottawa.

Solicitors for the respondents, Allied Business Supervisions Ltd. and Aaron's Ladies Apparel Ltd.: Pitblado, Hoskin & Company, Winnipeg.

Solicitors for the respondent, Alpine Drywall & Decorating Ltd.: MacLeod, Dixon & Company, Calgary.

Solicitors for the respondent, M. F. Esson & Sons Ltd.: Friel & Cooper, Moncton.

ROBERT A. KRAMER, HILLSIDE SHOPPING CENTRE LIMITED and McCALLUM HILL & CO. LIMITED (*Claimants*) ..... APPELLANTS;

AND

WASCANA CENTRE AUTHORITY (*Respondent*) ..... RESPONDENT.

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*Nov. 24, 25, 28, 29
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Jan. 24

McCALLUM HILL & CO. LIMITED (*Claimant*) ..... APPELLANT;

AND

WASCANA CENTRE AUTHORITY (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Expropriation—Compensation—Public authority given power to expropriate—Municipal by-law limiting use of lands taken to "public service use"—Determination of valuation.

The appellants held varying interests in certain lands in the City of Regina. The said lands, situated in the vicinity of the provincial Legislative Building and constituting an area described as one of unique attractiveness for development, were governed by a general subdivision by-law, No. 2356, which provided for use thereof for single detached dwellings. Subsequent amending by-laws permitted a limited amount of local business use. A proposed development plan for the area, involving high density residential, commercial and other development, was submitted to the municipal authorities by the appellants, McCallum Hill & Co. Ltd. Although this proposed subdivision was approved in principle, no amending by-laws were enacted to carry it into effect. Rather, by-law No. 3506 was enacted, adopting a community planning scheme which called for the use of the lands for "parks and public open spaces". This was followed by a by-law, No. 3618, which repealed the previous zoning by-law 2356 and provided that the lands would be designated for "public service".

Under *The Wascana Centre Act, 1962,* (Sask.), c. 46, the respondent was given power to expropriate lands, and on September 18, 1962, notice was given to the appellants of expropriation of the lands in question. Following hearings on the question of compensation for the expropriation, the arbitrator fixed such compensation upon the basis of use for

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*PRESENT: Cartwright, Abbott, Martland, Ritchie and Spence JJ.

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"parks and public open spaces" at $506,500. On appeal by the appellants to the Court of Appeal, it was unanimously determined that the award should be increased to $669,840.

The majority in the Court of Appeal affirmed the opinion of the arbitrator that the value must be determined on "public service use", *i.e.*, the use permitted by by-law 3618 which was in effect at the time of the expropriation, but they were of the opinion that the arbitrator had fixed the value for such "public service" use at too low an amount. Brownridge J.A. agreed with the majority, although for different reasons, that the award should be increased to $699,840. He accepted the contention of the appellants that for the purpose of finding the value of the lands expropriated, by-laws 3506 and 3618 and *The Wascana Centre Act* should all be considered not to have been enacted, and that, therefore, the valuation should be fixed on the basis of the use permitted by the repealed by-law, No. 2356, as amended by subsequent by-laws permitting local business use, with whatever added value the possibility of development in accordance with the proposed plan of subdivision of the area would have given the lands.

On appeal to this Court, the appellants sought to have the award further increased.

Held: The appeal should be dismissed.

Per Cartwright, Abbott, Martland and Ritchie JJ.: On the basis of the views expressed by the majority in the Court below, the appeal should be dismissed. The arbitrator held on the evidence that by-law 3618 was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings—although passed with knowledge of the Wascana Centre scheme. He held therefore that this by-law, in limiting the use of the land expropriated to "public service use", was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority in the Court of Appeal, and on the present appeal the appellants failed to establish that they were wrong.

Per Spence J.: Brownridge J.A., in his calculations, arrived at his award by the consideration of the proper and well-recognized principle. He took the proper starting point—what a prudent man would pay rather than be evicted. He considered the permitted land use under the general subdivision by-law, excluding the latter by-laws which were, as he found, part of the expropriation proceedings, and he calculated the present value of the potentiality for development discounted by the appellants' opportunity to carry out the proposed but never authorized scheme of subdivision of the area. *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712; *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, allowing, in part, an appeal from an arbitrator's award of compensation for lands expropriated. Appeal dismissed.

W. Z. Estey, Q.C., and *A. Enplander*, for the appellants.

E. J. Moss and *C. R. Wimmer*, for the respondent.

The judgment of Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

ABBOTT J.:—The relevant facts and the legal principles which are applicable in this appeal are clearly set forth in the reasons of my brother Spence which I have had the advantage of considering. I agree with him that the appeal should be dismissed but, with respect, I prefer to do so upon the basis of the views expressed by Wood and Maguire JJ.A., in the Court below.

The learned arbitrator found that the Community Planning Scheme adopted by by-law 3506, passed by the City Council of Regina on December 5, 1961, represented the state of mind of the city authorities at that time. That Planning Scheme was crystallized in the zoning by-law 3618 adopted on December 28, 1962, of which public notice had been given some months before, and which affected the whole City of Regina. The arbitrator held on the evidence that this by-law was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings—although passed of course with knowledge of the Wascana Centre Scheme. He held therefore that the bylaw 3618, in limiting the use of the land expropriated to "public service use", was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority in the Court of Appeal. The Appellants failed to satisfy me that they are wrong and I would therefore dispose of the appeal as proposed by my brother Spence.

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan delivered on May 19, 1965. By that judgment the Court of Appeal for Saskatchewan allowed, in part, an appeal from an award made by His Honour Judge J. E. Friesen, sitting as an arbitrator, who had fixed the compensation at $506,500. The Court of Appeal increased that award to $669,840 and added interest at 5 per cent from September 19, 1962, until the date of payment. The appellants seek to have the award as so amended further increased.

The arbitration is to fix the compensation for the expropriation by the respondent of lands totalling 86.15 acres in the City of Regina composed of Blocks H, J, K and L on a

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plan known as the Hillsdale Commercial registered as No. 60R13698. The appellants Robert A. Kramer, Hillsdale Shopping Centre Limited, and McCallum Hill & Company Limited, all of the City of Regina, hold varying interests in the said lands and, under an agreement between the parties, the compensation for the expropriation should be fixed in two amounts—one to cover parcels H, J and L, and a second to cover parcel K, as the latter alone has improvements thereon. The total amount so fixed is then subject to an application before the Saskatchewan Court of Queen's Bench for distribution between the appellants.

The lands in question which are depicted on ex. C, a copy of the said registered subdivision plan for the area, No. 60R13698, are grouped in an area immediately to the east of the Legislative Building grounds in the City of Regina and the south of but bordering upon Wascana Lake. The Regina campus of the University of Saskatchewan is to the immediate south-east. It was said to be one and one-third miles from the lands in question to the centre of the business district of Regina. Immediately to the south of the lands in question, the present appellants, and others, have developed and sold large residential subdivisions. The lands in question, therefore, were described as an area of unique attractiveness for development and, in fact, the sole undeveloped close-in area in Regina.

The lands were governed by a general subdivision by-law of the City of Regina, No. 2356, which provided for use thereof for single detached dwellings. That by-law had been amended by subsequent by-laws which permitted a limited amount of local business use. The appellants McCallum Hill & Company Limited, hereinafter referred to as McCallum Hill, were engaged in a series of plans to develop the area and were in continuous negotiation with municipal authorities for that purpose. A series of proposals similar in the main but with individual differences were submitted. On November 5, 1959, a Proposed Development Plan for North Hillsdale which had been submitted to the City Commissioner, was made the subject of a report to the city council, and on that date the city council having before it the report of the city commissioner and the report of the Community Planning Commission under date October 25, 1959, resolved to endorse the proposals of the development plan as set out on the said plan, sheet No. 2, and approved

in principle the proposed shopping mall. The said sheet No. 2 was produced at trial and marked as ex. 30. That proposed plan of subdivision called for the use of Block L, 18.90 acres, for high density residential development; 5.9 acres along New Broad Street for business (small office) buildings development; the use of Block J, 37.87 acres, for office and institutional development; and the use of Block M (not subject to the expropriation here in question), 26.41 acres, for a shopping centre. It will be seen that such a proposal extended very considerably the use permitted by the old subdivision by-law 2356 and its amending by-laws.

Although the proposed subdivision was approved in principle, no amending by-laws were enacted to carry it into effect. Rather, under circumstances to which reference will be made hereafter, by-law 3506 was enacted on December 5, 1961, adopting the Community Planning Scheme prepared by the Community Planning Association. This scheme called for the use of the lands with which this expropriation is concerned for "parks and public open spaces". That by-law was followed by by-law 3618 enacted on December 28, 1962. It was a zoning by-law which repealed the previous zoning by-law, No. 2356, and provided that the subject lands would be designated for "public service".

The Wascana Centre Authority had been created by the *Wascana Centre Act* which had been enacted by the Legislature of the Province of Saskatchewan, receiving Royal Assent on April 14, 1962. By the provisions of s. 72 thereof, the Act was deemed to have come into force on April 1, 1962. That statute gave to the Wascana Centre Authority the power to expropriate lands, and on September 18, 1962, notice of expropriation of Blocks H, J and L was given to the appellants Kramer and McCallum Hill, and of Block K to McCallum Hill.

The learned County Court Judge, as arbitrator, considered the question of compensation for the expropriation at hearings which extended for many days and, in lengthy and carefully drafted reasons for judgment, fixed such compensation upon the basis of use for "parks and public open spaces" at $506,500. Both appellants appealed to the Court of Appeal of Saskatchewan and the Court unanimously determined that the award should be increased to $669,840.

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Maguire J.A., with whom Woods J.A. concurred, affirmed the opinion of the learned County Court Judge that the value must be determined on "public service use", *i.e.*, the use permitted by by-law 3618 which was in effect at the time of the expropriation, but he was of the opinion that the learned County Court Judge, as arbitrator, had fixed the value for such "public service" use at too low an amount. Maguire J.A., considering the possibilities of the lands for such public service use, arrived at a total valuation of $669,840.

Brownridge J.A., considering the value based on other possibilities to which I shall refer immediately, arrived at a computation, nevertheless, of almost exactly the same amount, so that the members of the Court of Appeal of Saskatchewan were, for different reasons, agreed that the award should be increased to $669,840. Brownridge J.A., accepted the contention of the appellants that for the purpose of finding the value of the lands expropriated, by-laws 3506 and 3618 and the *Wascana Centre Act* should all be considered not to have been enacted, and that, therefore, the valuation should be fixed on the basis of the use permitted by the repealed by-law, No. 2356, as amended by subsequent by-laws permitting local business use, with whatever added value the possibility of development in accordance with the proposed plan of subdivision of Hillsdale North (ex. 30) would have given the lands.

With respect, I have come to the conclusion that the view of Brownridge J.A., is to be preferred to that of Maguire J.A., with whom Woods J.A. concurred. The standard of valuation in such cases is firmly fixed. It might perhaps be best stated in the words of Rand J. in *Diggon-Hibben Ltd. v. The King*[1]:

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

A prudent man would pay for the property rather than be ejected from it, the present value of the possibilities for the eventual development of the property for its highest and best use. There is no doubt that the highest and best use of the subject property was that shown on the proposed plan of subdivision of North Hillsdale (ex. 30) which had

[1] [1949] S.C.R. 712 at 715.

been drafted by the combined efforts of McCallum Hill and other very able and experienced developers retained by it for such purpose.

The submission of the appellants to the Court of Appeal of Saskatchewan and to this Court was that in considering the possibilities for the highest and best use of the lands the tribunal should exclude any limitations on the development of the lands which were in fact mere steps in the expropriating machinery. The appellants cited *Re Gibson and City of Toronto*[1] and particularly Hodgins J.A., who said at p. 28:

> If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. I see difficulties in the way of holding that by-law No. 5545 should be treated as part of the expropriation proceedings. But in this case it makes little difference in the result.
>
> It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation.

In considering whether the doctrine outlined by Hodgins J.A., applies to the circumstances of this case, one must keep in mind that in order to be found to be part of the expropriating machinery one does not need to determine that the limiting by-laws were in any sense the result of a fraudulent conspiracy to deprive the owner of an award to which he was entitled. It should be noted that the appellants, in their factum to this Court, submit:

> 7. The Appellants do not allege any bad faith on the part of the council of the City of Regina in passing the community planning scheme by-law and preparing the zoning map for proposed zoning by-law 3618 in contemplation of the passage of the Wascana Centre Act. The Appellants need go no higher than to state that the evidence is sufficient to demonstrate that the City did cooperate with the Government of Saskatchewan in laying the groundwork for the Wascana Centre development.

It would appear that, on the other hand, the concept of the Wascana Centre scheme was in every way a commendable proposal in the development of a very attractive area to surround the Legislative Buildings, one of which the citizens of Regina and indeed of Saskatchewan could well be

[1] (1913), 28 O.L.R. 20.

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proud. The creation of that concept and its execution, however, should not result in depriving an owner of the valuation of his lands expropriated for the purpose of carrying out the concept, based on the potential development of those lands prior to the creation of the scheme. In the light of this principle, the series of events should be considered.

I have already cited the zoning applicable to the appellants' lands up to and including November 5, 1961, and the expression by the municipal council, on that day, of approval in principle of a substantial alteration of that zoning to the advantage of the appellants.

On December 22, 1959, a copy of the outlined plan, *i.e.*, ex. 30, was endorsed with the city's approval under signature of its duly authorized officers and that plan was then registered as No. 60R13698. In the spring of 1960, Mr. Whittlesey, the town planner retained by McCallum Hill, was in Regina and then was informed that the city planning commission was preparing a comprehensive study of the entire city, together with community plans which were integral to that comprehensive study. He was later issued a copy of that comprehensive plan which plan showed the property in question had been zoned for park land. Mr. Whittlesey realized that the use of the area in question proposed by McCallum Hill was illogical in the light of the "coming, if not already there, Wascana Authority", and that as a result the possibility of proceeding with the development which McCallum Hill had envisaged was "withdrawn".

Mr. Frederick W. Hill gave evidence on behalf of McCallum Hill that he conferred with Mr. Yamasaki in the summer of 1961 and that he recalls particularly in the fall of 1961 that Mr. Yamasaki, who was the architect and planner retained by the Wascana Centre Authority, showed him a plan of the indicated area that

> they wanted to take in within the Wascana Centre Authority which included these lands which are the subject of this arbitration and these lands were shown on the plan as mandatory to be taken into the authority. They wanted to advise us that this was what they planned to do and asked for our co-operation in any proceeding with any development of these lands, which we agreed to do. From that point on we certainly did not feel that we, either in the public interests or in any way, shape or form, were in a position to undertake any development of the lands or proceed with the plans that we had been developing from these years. As you know, the legislation wasn't finally enacted until the following spring.

Mr. Gilmour, the executive director and secretary of the Wascana Centre Authority, swore that he met Mr. Hill on many occasions, several of which were prior to the time that the Wascana Centre Authority became a legal entity, and that he suggested to Mr. Hill that Mr. Yamasaki in his master plan was recommending that the areas in question be "for government use". Mr. Gilmour swore that this would have occurred in the late fall of 1961 or in the early spring of 1962. During this period, by virtue of special legislation, which need not be considered in detail, the City of Regina had enacted a series of holding by-laws. These by-laws permitted application to a special board for exemption from the provisions thereof limiting developments. No such application was made on behalf of the appellants and Mr. Frederick W. Hill explained that the appellants' co-operation having been requested and granted, there was no purpose in making application to permit a development which obviously could not proceed.

By-law 3506 was enacted on December 5, 1961, and approving the general zoning map for the whole city includes a recital which is, in my view, very significant. This recital was quoted by Brownridge J.A., in his reasons for judgment and is as follows:

> At present these two major areas of public buildings are included in an overall study for the development of Wascana Centre. This study embraces the Provincial Government grounds, the various institutions south of College Avenue, the Douglas Park Sports area, the future University site and other lands around Wascana Lake. Participants in this study are the Provincial Government, the University of Saskatchewan, and the City of Regina. The concept of the Wascana Centre development is a magnificent example of foresight and should provide a stimulus and example to other agencies when programming for public buildings and institutions.

Proceeding with the Wascana Centre scheme, the municipality enacted by-law 3618 about a year later, on December 28, 1962. That was a general zoning by-law for the City of Regina and included the lands in question and all other lands in the municipality. By-law 3506 had limited the use of the lands in question to "parks and public open spaces". By-law 3618 zoned the lands in question for "public service", a designation somewhat more advantageous to the owner than that which had appeared in by-law 3506. It was this permission for more advantageous use which caused the majority in the Court of Appeal to increase the award to the appellants.

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Although both by-law 3506 and by-law 3618 required the consent of the Minister of Municipal Affairs, neither by-law received such approval until January 29, 1963. It is significant that by-law 3618 was enacted and both by-laws were approved after the *Wascana Centre Act* had been enacted. Under that statute, the Wascana Centre Authority was created with three participating parties—the Province of Saskatchewan, the City of Regina, and the University of Saskatchewan. It will be realized that the latter two, although independent legal entities, were in practical fact very much under the control and guidance of the former. Any municipality possesses any power whatsoever only by virtue of the enactments of the provincial legislature and the University of Saskatchewan is, of course, an institution of higher education largely supported by provincial grants. The *Wascana Centre Act* set up a master plan for the Wascana Centre and a detailed scheme for land uses in the area composing the Wascana Centre. As I have said, powers of expropriation were granted and there were special references to expropriation of the very lands in issue on this appeal.

Section 43(1) of the statute as found in R.S.S. 1965, c. 401, provided that upon the acquisition by the Authority of these lands which were designated in Schedule B thereto, the provincial government should pay to the Authority out of the Consolidated Revenue Fund, the total cost to the Authority of such acquisition. Elsewhere, on further expropriations not dealt with in specific sections, the cost of the acquisition was divided 55 per cent to the government of the Province, 30 per cent to the City of Regina, and 15 per cent to the University of Saskatchewan.

I am of the opinion that in view of the circumstances to which I have referred above, one can only come to the conclusion that the enactment of by-laws 3506 and 3618 was simply a step, in so far as these lands are concerned, in the setting up of the Wascana Centre and the acquisition by the Wascana Centre Authority of the lands in question. Counsel for the respondent points out that the two by-laws deal not only with the lands in question but with all lands within the City of Regina and that, therefore, there can be no implication that the enactment of the by-laws was part of a "scheme". To that submission, there are two answers: Firstly, as I have pointed out, no "scheme" in any nefari-

ous connotation need be proved, and secondly, whatever the impact and purpose of the by-laws were as to other lands, the impact and purpose as to the lands in question were very plainly to prevent such a development as had been envisaged by the appellants and instead included them in the limiting, although commendable, design of the Wascana Centre Authority.

I am, therefore, of the opinion that it is the duty of the tribunal fixing the award to consider the situation without regard for the enactment of the limiting use in those two by-laws. That situation apart from those two by-laws is, therefore, that to which we must turn in fixing compensation. It was a zoning for single family residences with some limited business permitted in certain small areas, *i.e.*, the situation under by-law 2356 and amending by-laws. The valuation, therefore, is the valuation for those uses plus the present value of any potential increase in value due to a rezoning. No such rezoning ever occurred until the more limiting zoning of by-laws 3506 and 3618. What were the possibilities of development for the use outlined in the proposed plan of redevelopment of Hillsdale North as shown in ex. 30? It is true that that scheme had been approved in principle on November 5, 1959, but by the time the expropriation occurred the whole Wascana scheme had been developed and even if the by-laws which carried it out had never been enacted, the possibility of the appellants' obtaining, by the time expropriation occurred, the enactment of by-laws to incorporate the scheme in ex. 30 would have been very small.

Brownridge J.A. pointed out that Mr. Robison, giving evidence for the appellants, had put the valuation upon the potentiality of the development under ex. 30 at $1,500,000, but it is clear that such valuation did not discount the fact that development under such scheme was not possible until the zoning by-laws were amended to permit land use in accordance with that scheme and that event was of only slight possibility. Brownridge J.A. noted Mr. Robison's evidence, which he quotes as follows:

> My experience indicates that institutions of a non-profit character have to meet the test of competition in the market.

Brownridge J.A. accepted that statement and, therefore, concluded that the difference in value of the subject lands

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between a modified version of the appellants' proposed subdivision (ex. 30) which envisaged some commercial and high density residential use along with public service on the one hand, and the public service alone, was not as great as it had at first appeared. Brownridge J.A. concluded that the award made by the learned arbitrator was "clearly too small" and that it should be increased. He found that his calculations for increase came very close to the amount found by Maguire J.A., namely, $669,840, and therefore concurred in the increase of the award to that amount.

In my view, it is not the duty of this Court to engage in calculations or to exercise judgment as to land valuation in the Province of Saskatchewan. It is the duty of this Court to consider whether those calculations and assessment of land valuations were made in accordance with the proper and well-recognized principle. I am of the opinion that Brownridge J.A., in his calculations, did arrive at his award by the consideration of the proper and well-recognized principle. He took the proper starting place—what a prudent man would pay rather than be evicted. He considered the permitted land use under the general subdivision by-law, excluding the latter by-laws which were, as he found, part of the expropriation proceedings, and he calculated the present value of the potentiality for development discounted by the appellants' opportunity to carry out its proposed but never authorized scheme, ex. 30.

I would, therefore, dismiss the appeal and affirm the judgment of the Court of Appeal of Saskatchewan. The respondent is entitled to its costs in this Court.

Appeal dismissed with costs.

Solicitors for the appellants: Embury, Molisky, Gritzfeld & Embury, Regina.

Solicitors for the respondent: Moss & Wimmer, Regina.

KING EDWARD PROPERTIES LIMITED (*Applicant*) ..... APPELLANT;

AND

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG (*Respondent*) ..... RESPONDENT.

1966
*Nov. 29
1967
Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Compensation—Part of a parcel of land taken—Application of "before" and "after" method of valuation.

The appellant was the owner of a rectangular parcel of land, part of which was expropriated by the respondent municipality for a roadway. The expropriated land cut diagonally across the appellant's property from the south-east corner to the north-west corner, thus leaving the appellant with two triangular parcels separated by the road. The highest and best use of these lands was for light industrial use. The appellant's purpose in purchasing the property was to realize a profit by carrying out a plan of subdivision thereon.

The parties being unable to agree on the amount of compensation to which the appellant was entitled by virtue of the expropriation, the matter proceeded to arbitration. An award totalling $90,000 was made by the arbitrator. The Court of Appeal, by a majority judgment, reduced this compensation to $34,000. Schultz J.A. would have awarded $56,000.

Each appraiser retained by the parties used the "before" and "after" method of valuation. The respective valuations given by the appraiser for the claimant were $570,000 and $480,000; those given by the appraiser for the municipality were $492,000 and $517,000. The arbitrator was dissatisfied with the evidence of both appraisers and although the total amount awarded by him equated that advanced by the claimant's appraiser, it was arrived at by a different method. He awarded $59,000 for the land and $31,000 for severance. In the Court of Appeal, both the majority and Schultz J.A. preferred to use the method of "before" and "after" valuations. The majority accepted the values of the municipality's appraiser. They allowed $59,000 for the land taken and having recognized that the remaining land had increased in value by $25,000, made their award of $34,000. Schultz J.A. reduced the "before" valuation of the claimant's appraiser to $539,000 and after deducting $483,000 as the "after" valuation, arrived at the sum of $56,000. From the judgment of the Court of Appeal an appeal was brought to this Court.

Held (Abbott and Judson JJ. dissenting): The appeal should be allowed and the award increased to $56,000.

Per Martland, Ritchie and Spence JJ.: In cases such as this the "before" and "after" method of valuation would seem to be the one which attained the most accurate results. Schultz J.A. considered the matter

*PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

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upon proper and well-recognized principles in both the "before" and "after" valuation and his conclusion, rather than that of the majority of the Court of Appeal, should be adopted.

As to the "before" valuation, the view of Schultz J.A. took into account the potentialities of the subject lands at their highest and best use and yet made deduction for the fact that such valuations were only possibilities, and for the costs to which the owner would be put in attaining such valuations. The "before" valuation as made by the municipality's appraiser at the same square-foot rate throughout was unacceptable in that it failed to take into account the fact that the lands in the eastern portion were at a greater distance from an access street than were the lands in the western portion.

As to the "after" valuation, Schultz J.A., in adopting the approximate figure reached by the claimant's appraiser, recognized that the easterly portion having been turned into a wedge or pie-shaped parcel would, as a result, be more difficult to develop. The municipality's appraiser had made no allowance for this difficulty in development and had, in fact, increased the valuation of this area.

Per Abbott and Judson JJ., *dissenting*: The majority judgment of the Court of Appeal should be affirmed. The municipality's "before" valuation, which recognized a generous appreciation in value of $70,000 in the period of seven months from the time the appellant purchased the property, was more realistic than the "before" valuation of the owner's appraiser. The attributed appreciation in value from $419,000 to $570,000 during this period was based on a fanciful plan of subdivision which involved the extension of a street across a railway on the south side of the lot.

The real difference between the two valuators in the "after" valuation was as to the valuation of the easterly triangle. According to the owner's appraiser there had been a serious depreciation in value here; according to the municipality's appraiser there had been none. The majority in the Court of Appeal refused to accept this depreciation in value. The expropriation and the fully paved road which resulted therefrom was an improvement for the entire parcel.

[*Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1966] S.C.R. 336, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], reducing the amount of compensation awarded by an arbitrator for land expropriated. Appeal allowed, Abbott and Judson JJ. dissenting.

A. Sweatman, Q.C., and *T. Mathers*, for the appellant.

D. C. Lennox and *F. N. Steele*, for the respondent.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—In June 1962 the appellant, King Edward Properties Limited, contracted to buy a rec-

[1] (1966), 54 D.L.R. (2d) 165.

tangular parcel of land on the east side of King Edward Street in the City of St. James in Metropolitan Winnipeg. The purchase was completed in December of 1962. On January 31, 1963, the Metropolitan Corporation of Greater Winnipeg expropriated part of the land for the extension of Madison Street.

The parcel was one of 28.139 acres containing 1,225,726 square feet. It had a frontage of 1615.9 feet on King Edward Street with an average depth of slightly under 800 feet. It was purchased for $419,000 with a cash payment of $70,000 and the balance secured by a five-year mortgage bearing interest at 5½ per cent. The purchase price works out to 34.4 cents per square foot.

The land expropriated for the highway comprised 146,690 square feet (3.368 acres) and it cuts diagonally across the appellant's property from the south-east corner to the north-west corner, thus leaving the appellant with two triangular parcels separated by the road. The triangular parcel to the west comprised 533,543 square feet (12.248 acres) and the one to the east comprised 545,493 square feet (12.523 acres).

The arbitrator awarded $59,000 for the land and $31,000 for severance, a total of $90,000. The Court of Appeal, by a majority judgment, reduced this compensation to $34,000. Schultz J.A. would have awarded $56,000. My opinion is that the majority judgment of the Court of Appeal should be affirmed.

Each appraiser retained by the parties used the "before" and "after" method of evaluation. Here are the valuations:

Before value

Farstad (for the owner)	Whyte (for the municipality)
$570,000	$492,000
After value	
$480,000	$517,000

The Court of Appeal had first to deal with a wide difference between the two valuations prior to taking. They recognized that the parcel was an attractive industrial site, easy of access to the centre of Winnipeg and suitable for subdivision into large lots for warehousing and distributing plants. But an attributed appreciation in value from $419,000 to $570,000 in a period of seven months was just too much for any Court to swallow. It was based upon a

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fanciful plan of subdivision which involved a proposed extension of Bradford Street across the CPR tracks on the south side of the lot. The criticism of the majority in the Court of Appeal and their reasons for their preference of the municipality's valuation are contained in the two following paragraphs, and to me the reasoning is unassailable:

> This is where, in my opinion, he went astray. He had to evaluate undeveloped and vacant land in view of its highest and best use, namely, industrial purposes for which the land was already zoned. He assumed that a road was available to develop this substantial parcel into smaller parcels where none was in existence. Mr. Farstad further assumed that the cost of this road development, after necessary permits had been obtained, would be charged to the prospective purchasers. He failed to take into consideration the area of land required for the proposed extension of Bradford Street, the obtaining of the necessary permits and plans of survey, and he made no allowance for the costs of opening the proposed street nor for the cost of installation of services,—costs which initially would have to be borne by the applicant. By virtue of the expropriation an adequate fully-serviced road was to be constructed, and in fact was constructed, at the cost of the general Metro taxpayers, with no direct cost to the owners of the adjoining property. Further, the suggested increase in value between June 1st, 1962, and February 4th, 1963, of more than 11c. per square foot is not realistic at all in view of the evidence of sales made during that particular period and previous periods.
>
> On the other hand, Mr. Whyte's approach is by far the better; it is more realistic and absolutely proper. His evaluation of the land before the taking at 40c. per square foot recognizes a substantial enough appreciation in land value between June 1962, and February 1963, and amply allows for all increases in land values in the immediate area during that period.

The Court of Appeal, therefore, started with Whyte's valuation of $492,000, which recognized a generous appreciation in value of $73,000 in seven months. Whyte's valuation works out to 40c. per square foot as contrasted with the purchase price of 34.4c. per square foot.

The "after" valuation was broken down by both valuators in the same way. Each recognized that the westerly triangle was the more valuable because of the facilities of access. Each also recognized that the northerly tip of the triangle was more valuable than the rest. These are their valuations of the westerly triangle:

WESTERLY TRIANGLE

	Farstad
Northerly tip	
63,000 sq. ft. @ 90¢ sq. ft.	$ 56,700
Rest of Triangle	
470,543 sq. ft. @ 50¢ sq. ft.	235,271
	$291,971

Whyte

64,669 sq. ft. @ $1.00 sq. ft. ..... $ 64,669
468,874 sq. ft. @ 50¢ sq. ft. 234,437

$299,106

The difference of opinion here is slight and it is attributable to this: Whyte thought that the northerly tip was more extensive than Farstad. He gave it an area of 64,669 square feet instead of 63,000, and he thought that it was worth $1 per square foot as contrasted with 90c. per square foot by Farstad.

The real difference between the two shows up in the "after" valuation of the easterly triangle:

WHOLE OF EASTERLY TRIANGLE

Farstad

545,493 sq. ft. @ 35¢ sq. ft. $190,922

Whyte

545,493 sq. ft. @ 40¢ sq. ft. $218,197

Farstad values this easterly triangle at 35c. per square foot, Whyte at 40c. per square foot. According to Farstad's figures, there had been a serious depreciation in value here; according to Whyte, there had been none.

The majority in the Court of Appeal refused to accept this depreciation in value. They point out that Farstad's average valuation per square foot for the whole parcel was 46½c. and they could find no rational explanation for the reduction. They did not accept his reason that the approaches were no longer as good. They said:

> The expropriation and the fully improved paved road which results therefrom is an improvement for the entire parcel. Access to both parcels is a first-class road, comparable to any of similar type in Manitoba or possibly elsewhere. Further, it forms part of an overall development to give free and easy access from Portage Avenue to Provincial Trunk Highways 6, 7 and 8 into a very progressive industrial area and will most probably generate business through the volume of traffic in the area.

The majority reasons allowed $59,000 for the land taken—146,690 square feet at 40c. per square foot. They recognized that the remaining land had increased in value by $25,000 and therefore their award of compensation was $34,000.

I agree with their reasons and conclusions and I would dismiss the appeal with costs.

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The judgment of Martland, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[1] which, by a majority (Chief Justice and Monnin J.A.), reduced the award of the arbitrator, His Honour Judge A. R. Macdonnell, from $90,000 plus 6 per cent interest to $34,000 plus 5 per cent interest. Schultz J.A. dissented and would have allowed an award of $56,000 with interest at the same 5 per cent rate.

The appellant had purchased the lands from Bridge & Tank (Western) Limited in June of 1962. The lands held originally by the latter company included the whole block from Saskatchewan Avenue on the south to Dublin Avenue on the north, but Bridge & Tank (Western) Limited sold 400 feet southerly from Dublin Avenue across the whole width of the property to the Pepsi-Cola Company Limited in 1961. The sale price was 23 cents per square foot or $10,000 per acre. Therefore, the lands purchased by King Edward Properties Limited contained 28.139 acres with a frontage on King Edward Street along its west limit and along Saskatchewan Avenue or, more properly, the CPR spur line running along the north side of Saskatchewan Avenue on the south limit but with access to no street on the east. The lands were rectangular in shape having a length from north to south of about 1,600 feet and from east to west of about 795 feet. The lands had been purchased by Bridge & Tank (Western) Limited in 1957 at the price of only 4.6 cents per square foot or $2,000 per acre.

The appellant purchased the lands from Bridge & Tank (Western) Limited for $419,000, which is at the rate of 34.4 cents per square foot or $15,000 per acre. The rapid increase in value of the lands in such a short period was typical of the situation in this new and expanding industrial area of Greater Winnipeg. The appellant purchased the lands which were zoned as M-2 for light industrial use to "move this land as soon as possible" and in order to do so drafted a plan of subdivision, produced before the learned County Court Judge as ex. 6. This plan of subdivision called for the extension northerly across Saskatchewan Avenue of a street known as Bradford Street, which extension is shown on the said plan as "proposed Bradford Street

[1] (1966), 54 D.L.R. (2d) 165.

extension". That proposed Bradford Street extension, as sketched on the said plan, ran northerly to the southerly limit of the lands owned by the Pepsi-Cola Company and then turned westerly to continue to King Edward Street. Lots of varying widths lettered from A to G were sketched on the easterly side of the proposed Bradford Street extension. These lands ran from the said extension easterly for about 80 feet to the easterly limit of the lands owned by the appellant which, as I have said, did not abut on any street. Lots, also of varying widths, lettered from I to O inclusive, were sketched on the westerly side of the proposed Bradford Street extension, and lots P to V inclusive were sketched on the east side of King Edward Street, *i.e.*, the westerly edge of the appellant's lands.

To have carried out that subdivision would have required, of course, negotiations with the municipal corporation to extend Bradford Street north and would also have required negotiations with the Department of Transport to permit a new level crossing over the CPR spur line which ran along the northerly limit of Saskatchewan Avenue, *i.e.*, the southerly limit of the appellant's lands.

Evidence before the learned County Court Judge upon the arbitration was given by expert appraisers on behalf of the claimant, the present appellant, and on behalf of the municipal corporation.

The appraiser for the claimant, Mr. Farstad, made his valuation on the basis of the proposed extension of Bradford Street which I have described and divided his valuations into three different pieces of property—firstly, the lands along the east side of the Bradford Street extension, totalling 361,000 square feet, which he valued at 45 cents per square foot for a total of $162,450; secondly, the lands along the west side of Bradford Street extension, totalling 347,500 square feet, which he valued at 50 cents per square foot for a total of $173,750; and, thirdly, the lands along the King Edward Street frontage, 357,000 square feet, which he valued at 65 cents per square foot for a total of $232,050. This came to a total valuation of $568,250 which he rounded out into $570,000.

The appraiser giving evidence for the municipal corporation, on the other hand, Mr. Whyte, simply valued the whole of the lands, before the expropriation, at 40 cents per square foot, rounding out the valuation at $492,000.

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The appraisers then turned to the valuation of the lands after the expropriation. This "before" and "after" method of arriving at the amount which should be awarded to a claimant upon an arbitration has been used frequently and was approved, *inter alia,* by this Court in an arbitration dealing with a nearby property: *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[1].

The expropriation consisted in cutting through the property, in a diagonal line from the south-east corner to the north-west corner, of an 80 foot roadway which would be a one-way street northbound. In addition to the actual width of the proposed roadway, the narrow triangle of lands which would have been left at the north-west corner between the new road and King Edward Street was expropriated southerly from the northerly limit of the lands southerly for 460 feet. King Edward Street was to become a one-way street southbound. The result of the expropriation was that the lands now consisted of two roughly triangular parcels—the one to the west side of the new highway running southerly from its juncture with King Edward Street for 1,160 feet, with a width at its northerly limit of only 132 feet and at its southerly limit of 800 feet, the other on the east side of the new street, also triangular in shape, having a north limit of about 680 feet with a depth of about 750 feet, to a sharp point. Both appraisers divided their valuations after expropriation into three parts.

Mr. Farstad, for the claimant, valued the north-west corner of the lands consisting of 63,000 square feet at 90 cents per square foot, totalling $56,700. The balance of the west parcel fronting on King Edward Street he valued at 50 cents per square foot for a total of $235,271. The whole of the east triangle he valued at 35 cents per square foot for $190,922. He rounded out the total valuation to $480,000, *i.e.*, $90,000 less than his valuation before expropriation.

Mr. Whyte, for the municipality, on the other hand, valued the first two parcels at substantially the same amount as did Mr. Farstad, but he valued the large easterly triangle at 40 cents per square foot for $218,197, giving a total valuation of $517,000, as against his valuation prior to expropriation of $492,000, so that he showed an increase in

[1] [1966] S.C.R. 336, 55 D.L.R. (2d) 600.

value of $25,000. He valued the actual lands taken for the new street, 146,680 square feet, at the same 40 cents per square foot for a rounded figure of $59,000, so, therefore, he would have assessed the compensation for the taking at the difference—$34,000.

The learned County Court Judge, expressing himself as utterly dissatisfied with the evidence of both appraisers, took a figure of $59,000, the offer made by the respondent to the appellant for the lands actually taken, and added to it a $31,000 damage item for severance claimed by the appellant from the respondent during the negotiations, to reach a total award of $90,000. It will be seen that although this sum equated that advanced by Mr. Farstad for the appellant, it was arrived at by an altogether different method, and a method which surely could not be supported.

In the Court of Appeal, both Monnin and Schultz JJ.A., pointed out that the learned County Court Judge's assessment was made on the basis that there would not be any entry permitted to the new public street, while both parties agreed now that adequate access to that public street would be provided, and both Monnin J.A., giving judgment for the majority, and Schultz J.A., preferred to use the well-recognized and firmly established method of "before" and "after" valuations which had been used by both appraisers and which, it would seem in cases such as this, always reach the most accurate result.

As the Chief Justice of Manitoba said in *Winnipeg Supply and Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg, supra,* when the appeal in that matter was before the Court of Appeal for Manitoba, "this places this Court in a position where it must make its own valuation on a proper and recognized basis". I conceive it the duty of this Court to determine whether the result in the Court of Appeal for Manitoba was reached on a proper and recognized basis.

As I have already said, the "before" and "after" method of valuation would seem to be the one which attained the most accurate results. The majority judgment in the Court of Appeal for Manitoba has accepted the valuation made by Mr. Whyte of the property before expropriation, *i.e.,* 40 cents per square foot for the total of 1,225,726 square feet. It must be remembered that the lands were purchased by

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the appellant for the purpose of realizing a profit from the subdivision thereon. The lands were zoned M-2 for light industrial use and all the evidence is that the highest and best use of those lands was for such light industrial use. The proper development of the potential value of the lands, therefore, could only be attained if they were properly subdivided. The appellant had proceeded toward that end when it drafted the plan (ex. 6) and commenced negotiations for the extension of the street and other matters involved in the subdivision of the property in accordance with that plan.

The valuation of the lands before expropriation as made by Mr. Whyte at the same square-foot rate throughout failed to take into account that the lands on the west side then faced on King Edward Street which was, at that time, a street used for traffic travelling in both directions, while the easterly portion of the land ran 795 feet east of that King Edward Street and had access to no street but the said King Edward Street. There could be no acceptable valuation of these lands at the common square foot rate throughout under such circumstances.

I am of the opinion that Mr. Farstad's valuation for the claimant based on a subdivision such as ex. 6 and which showed valuation at three different rates, *i.e.*, 65 cents per square foot for the lands facing King Edward Street, 50 cents per square foot for the lands facing the Bradford Street extension on its west side, and 45 cents per square foot for the lands facing the Bradford Street extension on its east side, was a more realistic evaluation of the value of the property, taking into account its possibilities for a fuller and better use. Of course, the division of the lands by the cutting out thereof of the proposed Bradford Street extension would lessen the actual acreage available for sale by the acreage used in the new street, which Mr. Farstad calculated at 160,100 square feet. Mr. Farstad, therefore, made no claim for any evaluation of that latter acreage but, as Schultz J.A. pointed out in his reasons in the Court of Appeal, Mr. Farstad failed to take into consideration the costs entailed in the creation of the Bradford Street extension, and that it was highly doubtful whether such costs could be recoverable from purchasers of the individual sites, after the extension had been completed. It is, of course, sound that in allowing for the potential value of the

lands which are to be improved one must deduct the costs to the claimant of making such improvements. Schultz J.A., in his reasons for judgment, did reduce Mr. Farstad's valuation "before" expropriation from $570,000 to $539,000 by this $31,000 item, attempting to make the deduction for such costs of the improvements as would have to be borne by the appellant. It must also be recognized that the subdivision as envisaged by the appellant was only a possibility. As Monnin J.A. said:

> Mr. Farstad makes reference not only to unimproved land, as it was, but to value for development and on the assumption that a road existed to service this property, which road in fact did not exist.

With respect, the error in Mr. Farstad's valuation was not in taking into account the road which did not exist but was in failing to take into account the costs to the appellant entailed in creating that road and some discount due to the fact that the creation of that road was by no means assured. There is no proof that the City of Winnipeg would have agreed to an extension of Bradford Street in the fashion envisaged, although it was admitted that such an extension was contemplated by the municipality before the diagonal street was determined upon. There might well be difficulty encountered in the application to the Board of Transport Commissioners to permit a level crossing on the spur line, although the new diagonal roadway does have such a crossing some few hundred feet to the east of that which was envisaged in the proposal for the Bradford Street extension.

In Schultz J.A.'s reasons, there is no calculation to show how the deduction of $31,000 was arrived at, but I do not think it is the duty of this Court to attempt such calculation; rather, it is to determine whether the valuation as made in the Court of Appeal was in accordance with proper and recognized principles. In my opinion, with respect, the view adopted by Schultz J.A. rather than that adopted by the majority of the Court of Appeal, does reach a valuation in accordance with proper and recognized principles in that it takes into account the potentialities of the subject lands at their highest and best use and yet makes deduction for the fact that such valuations are only possibilities, and for the costs to which the owner would be put in attaining such valuations. The actual calculations would not appear to be the concern of this Court.

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KING EDWARD PROPERTIES LTD. v. METROPOLITAN CORPORATION OF GREATER WINNIPEG

Spence J.

Turning next to the evaluation after expropriation, the majority of the Court of Appeal have again accepted the evidence of Mr. Whyte given on behalf of the municipal corporation. In so far as two of the said parcels were referred to by each of the appraisers, *i.e.*, the north-west corner of the lands in the westerly triangle, and the balance of the lands in the westerly triangle, there is very little difference between the opinions of the two appraisers. In so far as the easterly triangle is concerned, Mr. Whyte valued the whole triangle containing 545,493 square feet at 40 cents per square foot, while Mr. Farstad, giving evidence on behalf of the claimant, valued the same triangle at 35 cents per square foot. In the case of Mr. Whyte, this was ascribing the same square foot value to the lands in the easterly triangle after the expropriation as he had ascribed to all the lands in the whole rectangular area before expropriation.

These lands in the easterly triangle were, in fact, those which, prior to the expropriation, had been farthest distant from any access, *i.e.*, from King Edward Street. If the 40 cents per square foot was an average for the whole 28.139 acres, then it is inevitable that the lands in the northeast quadrant would have been of a value of much less than 40 cents to average out over the whole rectangle at that rate. Therefore, in fact, Mr. Whyte has increased the value which he put on the lands in the easterly triangle after the expropriation. Mr. Farstad, on the other hand, valued the lands to the east of the proposed Bradford Street extension, prior to the expropriation, at 45 cents per square foot, and has now valued the easterly triangle at 35 cents per square foot. One cannot say that that represents a decrease of 10 cents per square foot in the valuation of lands similarly placed before and after expropriation, as Mr. Farstad's valuation before expropriation, as I have pointed out above, was based on the proposed Bradford Street extension, which would have made the lands to the east of the said extension accessible to a two-way street and have resulted in a series of rectangular lots A to G in numbering, of varying widths but of a common depth.

The result after expropriation is that there is a triangle which is 680 feet wide at its upper or northern end and which narrows down to a sharp point at the southerly end. Mr. Whyte, in his evidence, admitted that such an irregularly shaped parcel does lead to difficulties and that the

turning of a rectangular parcel into a wedge or pie-shaped parcel, which is a good graphic description of the result, would make it more difficult to develop. Yet, as I have pointed out, Mr. Whyte's valuation at 40 cents per square foot amounts to an increase over his valuation "before" expropriation. This difficulty in development was recognized by Schultz J.A., when he said:

> It would appear that the larger triangular Area No. 2 is more difficult of development and is definitely less valuable. In effect, there is considerable agreement in the evidence of the two appraisers on this point, but Mr. Whyte admittedly made no allowance whatever for this fact....
>
> Having regard to the facts I have stated, I am of the opinion that Mr. Farstad's valuation of $483,000 is the approximately correct one and I would adopt it. Deducting this amount from the $539,000 I have approved as the "before taking" valuation would leave the sum of $56,000 as the amount of compensation payable to the applicant.

I am of the opinion, therefore, that Schultz J.A., has considered the matter upon proper and well-recognized principles in both the "before" and "after" valuation and, therefore, I am of the opinion that the conclusion which he reached should be adopted.

In the result, I would allow the appeal and increase the amount of the award to $56,000. Since the appellant, in Part IV of his factum, has stated that it desired that the Court of Appeal judgment be varied only to the extent of fixing the compensation at $56,000, the appellant should have its costs in this Court. The appellant, by the order of the Court of Appeal, was allowed the costs of the arbitration. In the net result, the judgment of the learned County Court Judge has been reduced from $90,000 to $56,000. The order of the Court of Appeal as to the costs of the appeal to that Court should not be disturbed.

Appeal allowed with costs, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: Pitblado, Hoskin & Co., Winnipeg.

Solicitor for the respondent: D. C. Lennox, Winnipeg.

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*Dec. 1
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Jan. 24

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada, (*Plaintiff*) ..... APPELLANT;

AND

HILBOURNE LESLIE MURRAY and BURTON CONSTRUCTION COMPANY LIMITED (*Defendants*).... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Rights and powers—Member of the armed forces injured in motor vehicle accident—Action for loss of services—Whether Crown in right of Canada bound by provincial legislation restricting recovery —The Highway Traffic Act, R.S.M. 1954, c. 112, s. 99(1)—The Tortfeasors and Contributory Negligence Act, R.S.M. 1954, c. 266, s. 5.

B, a member of the Canadian armed forces, sustained personal injuries in a highway traffic accident in Manitoba, while being transported, as a guest without payment, in a motor vehicle owned by R. That vehicle was in collision with another motor vehicle owned by the respondent company and operated by its servant, the respondent M. The appellant instituted proceedings in the Exchequer Court against the respondents claiming damages to the full amount of the loss sustained by Her Majesty as a result of being deprived of B's services. The parties agreed that the collision resulted from the negligence of both R and M, and that the former was responsible for it to the extent of 75 per cent.

Section 99(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, limits the liability of an owner or operator of a motor vehicle to a gratuitous passenger to cases of gross negligence or wilful and wanton misconduct on the part of the owner or operator. Section 5 of *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1954, c. 266, provides that where no cause of action exists against the owner or operator of a motor vehicle by reason of the aforementioned enactment no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator; s. 9(2) of the same Act provides that the said Act applies to actions by and against the Crown, and that Her Majesty is bound thereby and has the benefit thereof.

There was no suggestion of gross negligence or of wilful or wanton misconduct on the part of R.

The question in issue was as to whether s. 5 of the latter Act is effective so as to limit the appellant's claim to 25 per cent of the damages sustained by Her Majesty because of the loss of B's services, or whether, notwithstanding that provision, there can be recovery of the total loss. The position taken by the appellant was that the Crown in the right of Canada cannot be bound by this provincial legislation because it was never intended to be made applicable to the appellant,

*PRESENT: Taschereau C.J. and Fauteux, Martland, Judson and Spence JJ.

and that, if it had been so intended, it would have been *ultra vires* of the Legislature of Manitoba. The President of the Exchequer Court decided the issue in favour of the respondents and from that decision the Crown appealed to this Court.

Held: The appeal should be dismissed.

The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that no other prerogative right may be extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. In the present case the Manitoba Legislature was the legislative body which had the necessary jurisdiction to declare such limit.

This was not a case in which a provincial legislature had sought to "bind" the federal Crown, in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights. The situation was that as a result of s. 50 of the *Exchequer Court Act*, Parliament enabled the Crown, in the event of an injury to a member of the armed services, to enforce such rights as would be available to a master seeking compensation for loss of the services of his injured servant. What those rights may be can only be determined by the law in force at the time and the place when and where the injury to the servant occurred.

Gartland Steamship Co. and LaBlanc v. The Queen, [1960] S.C.R. 315, applied; *Gauthier v. The King* (1918), 56 S.C.R. 176, distinguished; *The King v. Richardson*, [1948] S.C.R. 57; *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331; *Attorney General of Canada v. Jackson*, [1946] S.C.R. 489; *The Queen v. Sylvain*, [1965] S.C.R. 164; *Toronto Transportation Commission v. The King*, [1949] S.C.R. 510, referred to.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an action for damages for loss of services of a Crown servant.

C. R. O. Munro, Q.C., for the plaintiff, appellant.

V. Simonsen, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant instituted proceedings in the Exchequer Court against the respondents claiming damages to the full amount of the loss sustained by Her Majesty as a result of being deprived of the services of one Robert James Briggs, a member of the Canadian armed forces. He sustained personal injuries in a highway traffic accident in the Province of Manitoba, while being transported, as a guest without payment, in a motor vehicle owned by one Reykdal. That vehicle was in collision with

[1] [1965] 2 Ex. C.R. 663.

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another motor vehicle owned by the respondent company and operated by its servant, the respondent Murray. It is agreed that the collision resulted from the negligence of both Reykdal and Murray, and that the former was responsible for it to the extent of 75 per cent.

Section 99(1) of *The Highway Traffic Act* of Manitoba, R.S.M. 1954, c. 112, provides that:

> 99. (1) No person transported by the owner or operator of a motor vehicle as his guest without payment for the transportation shall have a cause of action for damages against the owner or operator for injury, death, or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death, or loss for which the action is brought.

Sections 5 and 9(2) of *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1954, c. 266, provide:

> 5. Where no cause of action exists against the owner or operator of a motor vehicle by reason of section 99 of The Highway Traffic Act no damages or contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of such owner or operator and the portion of the loss or damage so caused by the negligence of such owner or operator shall be determined although such owner or operator is not a party to the action.
>
> 9. (2) This Act applies to actions by and against the Crown, and Her Majesty is bound thereby and has the benefit thereof.

There is no suggestion of gross negligence or of wilful or wanton misconduct on the part of Reykdal.

The question in issue is as to whether s. 5 of the latter Act is effective so as to limit the appellant's claim to 25 per cent of the damages sustained by Her Majesty because of the loss of Briggs' services, or whether, notwithstanding that provision, there can be recovery of the total loss.

The position taken by the appellant is that the Crown in the right of Canada cannot be bound by this provincial legislation because it was never intended to be made applicable to the appellant, and that, if it had been so intended, it would have been *ultra vires* of the Legislature of Manitoba.

The learned President decided the issue in favour of the respondents and from that decision the present appeal is brought. His position is stated in his reasons for judgment as follows:

> It follows that, as long as the Sovereign relies upon Her common law status as a person to take advantage of a cause of action available to

persons generally in the province, and not upon some special right conferred on Her by Parliament, She must take the cause of action as She finds it when Her claim arises and, if the legislature of the province has changed the general rules applicable as between common subjects, the Sovereign must accept the cause of action as so changed whether the change favours Her claim or is adverse to it.

To put the matter in other terms, I have reached the conclusion that this case should be decided against the view put forward by the Attorney General, and in favour of that put forward by the defendant, because I am of opinion that, under our constitution, when the Sovereign in right of Canada relies upon a right in tort against a common person, She must, in the absence of some special prerogative or statutory right to the contrary, base Herself upon the general law in the province where the claim arises governing similar rights between common persons.

In *The King v. Richardson*[1], this Court decided that the relationship of master and servant between the Crown and a member of the armed forces was settled by the provision which is now s. 50 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which provides that:

> 50. For the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

The constitutional validity of this section was challenged in *Nykorak v. Attorney General of Canada*[2], and the provision was declared by this Court to be valid.

These cases do not go further than to hold that Parliament has properly declared the existence of a certain legal relationship between the Crown and members of the armed forces for the purpose of determining liability in an action by or against Her Majesty. Section 50 does not purport to establish what shall be the consequences of the relationship in any such action.

In *Attorney General of Canada v. Jackson*[3], it was held, in a case where a member of the armed services had been injured while travelling as a guest passenger in a motor vehicle, that the Crown could not recover damages from the driver of that vehicle because a provision of the *Motor Vehicle Act* of New Brunswick declared that the owner or driver of a motor vehicle not operated in the business of carrying passengers for hire or gain should not be liable for loss or damage sustained by a person being carried in such

[1] [1948] S.C.R. 57, [1948] 2 D.L.R. 305.
[2] [1962] S.C.R. 331, 33 D.L.R. (2d) 373.
[3] [1946] S.C.R. 489, [1946] 2 D.L.R. 481.

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vehicle. This Court held that the Crown, as master, could not claim damages for injury to the servant where the latter had no right of action himself. The servant had no cause of action because of the effect of the provincial statute.

It was decided, in *The Queen v. Sylvain*[1], that, the common law action *per quod servitium amisit* not existing in the civil law, the Crown could not succeed in a claim under art. 1053 of the *Civil Code* for injuries sustained by members of the armed forces in a collision, in the Province of Quebec, between a military vehicle and that of the respondent, driven by his son.

In each of these cases the liability of a defendant to the Crown, in its capacity of master, was determined on the basis of the law of the province in which the injuries were sustained.

The applicability of provincial legislation to the federal Crown in a damage claim based upon negligence was also considered by this Court in *Toronto Transportation Commission v. The King*[2]. As a result of a collision between a street car and a Royal Canadian Air Force truck, an aircraft, loaded on the truck, was damaged. The trial judge found both drivers to be negligent and apportioned the responsibility equally between them. It was held by this Court that while, if the common law alone were applicable, the Crown's claim would fail, because it failed to prove that the negligence of the street car driver alone caused the damage, the Crown could take advantage of the Ontario *Negligence Act,* R.S.O. 1937, c. 115, and could, pursuant to that statute, recover one-half of its damages.

Kerwin J. (as he then was), delivering the judgment of the majority of the Court, said, at p. 515:

> The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown. ....Here, if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the Commission's servants caused the damage.....
>
> The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages.

This was, of course, a case in which the Crown took advantage of a statutory provision which was in its favour.

[1] [1965] S.C.R. 164, 52 D.L.R. (2d) 607.
[2] [1949] S.C.R. 510.

The right of a defendant, in an action by the Crown, to take advantage of a statute limiting the extent of liability was, however, considered by this Court in *Gartland Steamship Co. and LaBlanc v. The Queen*[1], in which the Crown claimed in respect of damage caused to its bridge by negligence in the operation of the appellant's vessel. One of the issues involved was as to whether the appellant could limit its liability to pay damages in accordance with ss. 649 and 651 of the *Canada Shipping Act*, 1934 (Can.), c. 44. The respondent contended that these sections could not be relied upon as against Her Majesty because the statute did not specifically apply to the Crown.

Locke J., who, while he dissented on the apportionment of responsibility, delivered the unanimous opinion of the Court on this issue, said, at p. 345:

> The effect of the sections of the *Canada Shipping Act*, however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law.

In my opinion this proposition of law is applicable to the circumstances of the present case, and the fact that, in the *Gartland* case, the statute in question was a federal enactment, while in the present case it is provincial, does not affect the position. The words "limit of the liability effectively declared by law" at the end of the statement must mean, in a federal state, effectively declared by that legislative body which has jurisdiction to declare such limit.

The Manitoba Legislature has created, in favour of the owner and the driver of a motor vehicle in that province, the right, in the event that injury is caused by that motor vehicle to a gratuitous passenger in another vehicle, the driver of which is not legally responsible to such passenger because of s. 99(1) of *The Highway Traffic Act*, to have their legal responsibility to pay damages limited to that portion of the loss or damage caused by the negligence of the driver of that motor vehicle. That right is a civil right

[1] [1960] S.C.R. 315.

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created by statute enacted by the legislative body which had the necessary jurisdiction. This legislation did not affect any previously existing right of the Crown in the right of Canada created by competent federal legislation. Nor did it affect any prerogative right of the Crown. The appellant would have had no right of recovery at all had it not been for s. 50 of the *Exchequer Court Act*. But, as has already been noted, that section did not create a right of recovery. It merely established a relationship from which certain results might flow.

To put the matter in another way, this is not a case in which a provincial legislature has sought to "bind" the federal Crown, in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights. The situation is that as a result of s. 50 of the *Exchequer Court Act*, Parliament enabled the Crown, in the event of an injury to a member of the armed services, to enforce such rights as would be available to a master seeking compensation for loss of the services of his injured servant. What those rights may be can only be determined by the law in force at the time and the place when and where the injury to the servant occurred.

The appellant placed reliance upon the decision of this Court in *Gauthier v. The King*[1], which was given careful consideration by the learned President. In that case, the federal government agreed to purchase from the appellant certain fishing rights, the price to be settled by arbitration. Each party selected an arbitrator, and those two chose a third, but, before proceedings were taken, the government revoked the submission and declared its intention to abandon the purchase. Section 5 of the Ontario *Arbitration Act*, R.S.O. 1914, c. 65, made a submission to arbitration irrevocable except by leave of the Court. Section 3 provided that the Act should apply to an arbitration to which His Majesty was a party. The question in issue was as to whether the government could revoke the submission and pay damages for breach of the agreement to arbitrate or whether the Crown was bound by the arbitration award, which had been made, after the withdrawal of the government appointed arbitrator, by other arbitrators. It was held in this Court that s. 5 did not apply to a submission by the Crown in the right of Canada.

[1] (1918), 56 S.C.R. 176.

In my opinion that case is not analogous to the present one. The *Gauthier* case was one in which it was sought to impose a contractual liability upon the federal Crown by virtue of a provincial statute which had changed the common law with respect to the revocation of a submission to arbitration. Anglin J., who delivered the reasons accepted by the majority of the Court, drew a distinction between cases falling within s. 19 (now 17) of the *Exchequer Court Act* and those falling within s. 20 (now 18) of that Act. Section 19 gave to the Exchequer Court jurisdiction to deal with liabilities (*in posse*) of the Crown already existing. With regard to those, he said, there was no ground for holding that the Crown had renounced prerogative privileges theretofore enjoyed and submitted its rights to be disposed of according to the law in like cases applicable as between subject and subject.

The claim in issue, being one of contract, was within s. 19, and the law to be applied, the cause of action having arisen in Ontario, was the common law, except as modified by a statute binding upon the federal Crown. He regarded the common law right to revoke the authority of an arbitrator as being a privilege of the Crown, which could not be taken away or abridged by provincial legislation.

On the other hand, he recognized that s. 20 of the Act had created and imposed new liabilities on the Crown, and that the authorities had decided that in cases falling within that section the Crown's liability would be determined according to the existing general law applicable as between subject and subject. The reason for this was that "No other law than that applicable between subject and subject was indicated in the 'Exchequer Court Act' as that by which these newly created liabilities should be determined." (See p. 191.)

It may be noted that it was s. 20 which imposed a liability upon the Crown in respect of injury caused by the negligence of a servant of the Crown.

The present case deals with a claim in negligence by the Crown against a subject. It could arise only because of the master and servant relationship deemed to exist between the Crown and members of the armed services by virtue of s. 50 of the *Exchequer Court Act*. In my view that section likewise did not indicate that the legal consequences

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ensuing from that legislation would be determined by any law other than the provincial law applicable between subject and subject.

For that reason, even if the decision reached on the facts of the *Gauthier* case be accepted (as to which, as the learned President points out, some question is raised by the later decision of the Privy Council in *Dominion Building Corporation v. The King*[1], respecting the application of a provincial statute to a contract made by the federal Crown), it does not assist the appellant in this case.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: E. A. Driedger, Ottawa.

Solicitors for the defendants, respondents: Scarth, Honeyman, Scarth & Simonsen, Winnipeg.

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*Feb. 10
Feb. 10

NICKEL RIM MINES LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE ATTORNEY GENERAL FOR ONTARIO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Mining tax—Provincial tax on net profits of sold and unsold ore—Whether direct taxation—Mining Tax Act, R.S.O. 1950, c. 237, s. 4.

The plaintiff company commenced this action for a declaration that a tax imposed on it under the authority of the *Mining Tax Act, R.S.O.* 1950, c. 237, was *ultra vires* in that it was an indirect tax. Section 4 of the Act imposes a tax on the net profits of the sales of ore and also upon estimated net profits on unsold ore based upon actual market value. The trial judge ruled that the statute was *intra vires* in so far as it imposed a tax on the output sold during the mine's calendar year; that this aspect of the tax was severable; and that in so far as the statute imposed a tax on output not sold during the calendar year but treated or in the course of treatment, the statute was *ultra vires*. The Court of Appeal held that the tax imposed by the *Mining Tax Act* was *intra vires in toto* as being a direct tax. The plaintiff company appealed to this Court where the constitutional question raised was

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

[1] [1933] A.C. 533 at pp. 548-49.

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stated as follows: "Whether section 4 and related sections of the *Mining Tax Act*, being chapter 237 of the Revised Statutes of Ontario 1950 as amended by ... is *ultra vires* the Legislature of the province of Ontario in so far as the tax purported to be imposed by that section and the related sections is an indirect tax."

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Wells J. Appeal dismissed.

R. F. Reid, Q.C., and *J. W. Morden*, for the plaintiff, appellant.

F. W. Callaghan, Q.C., and *A. E. Charlton*, for the defendant, respondent.

Gérald LeDain, Q.C., for the intervenant, the Attorney General for Quebec.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

CARTWRIGHT J. (*orally for the Court*):—Mr. Callaghan and Mr. LeDain, we need not call upon you. We are all of opinion that the appeal fails. We are in substantial agreement with the reasons of the Court of Appeal delivered by the Chief Justice of Ontario. The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Day, Wilson, Campbell & Martin, Toronto.

Solicitor for the defendant, respondent: F. W. Callaghan, Toronto.

HOLY ROSARY PARISH (THOROLD) CREDIT UNION LIMITED ..... APPELLANT;

AND

DANNY BYE ..... RESPONDENT.

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*Feb. 13, 14
Feb. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Assignment of wages to secure loan—Subsequent assignment in bankruptcy by debtor—Assignee failing to prove in bankruptcy—Unconditional discharge of bankrupt—Whether assignment

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

[1] [1966] 1 O.R. 345, 53 D.L.R. (2d) 290.

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thereafter void and unenforceable—Bankruptcy Act, R.S.C. 1952, c. 14, s. 135(2)—The Wages Act, R.S.O. 1960, c. 421, s. 7(6) [rep. & subs. 1960-61, c. 103, s. 1].

In May 1961 the respondent obtained a loan from the appellant credit union and at the same time assigned 30 per cent of his wages to the union. On October 3, 1961, the respondent made an assignment in bankruptcy and on January 11, 1962, an order was made for his unconditional discharge. The credit union did not prove its claim in the bankruptcy. On April 26, 1965, the credit union filed the assignment with the respondent's employer and requested the latter to act upon it. The respondent then sought a declaration that he was released from all debts and liabilities incurred by him on or before October 3, 1961, and that the assignment of wages was void and unenforceable. He relied on s. 135(2) of the *Bankruptcy Act*, R.S.C. 1952, c. 14, which provides that "An order of discharge releases the bankrupt from all other claims provable in bankruptcy". The judge of first instance and the Court of Appeal held in favour of the respondent. With leave, the credit union appealed to this Court.

Held: The appeal should be dismissed.

The borrowing by the respondent from the credit union created a debt provable in bankruptcy. The debt was not proved in bankruptcy, and it was now gone by operation of law. The assignment was given as a means of collection of the debt. The statutory release of the debtor under the *Bankruptcy Act* rendered the assignment ineffective as a means of collection.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal by the appellant credit union from an order of Moorhouse J. Appeal dismissed.

N. R. H. Young and *R. Atamanuk*, for the appellant.

R. H. Frayne, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—In *Holy Rosary Parish (Thorold) Credit Union Ltd. v. Premier Trust Company*[2], the Premier Trust Company, as trustee in bankruptcy of one Robitaille, a wage-earner, sought a declaration that an assignment of wages given by Robitaille to the credit union was void and unenforceable against it. This application was eventually dismissed in this Court but, at the same time, the Court said that the effect of the discharge of the bankrupt upon the credit union's right to obtain a portion of the wages earned by the bankrupt after his discharge was not in issue in the appeal and that the Court expressed no opinion thereon. This problem is now before the Court.

[1] (1966), 54 D.L.R. (2d) 590.

[2] [1965] S.C.R. 503, 51 D.L.R. (2d) 591, 7 C.B.R. (N.S.) 169.

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Judson J.

On May 30, 1961, Bye obtained a loan from Holy Rosary Parish (Thorold) Credit Union Limited and at the same time assigned 30 per cent of his wages. The assignment reads:

ASSIGNMENT OF WAGES

For value received, I hereby transfer, assign and set over unto the Holy Rosary Parish (Thorold) Credit Union Limited, (hereinafter referred to as the assignee), 30 per cent of all wages, salary, commission and other monies owing to me, or hereafter to become owing to me or earned by me in the employ of Overland Transport Co. or any other person, firm or corporation by whom I may be hereafter employed.

AND I HEREBY AUTHORIZE AND DIRECT my said employer or any future employer to pay the said 30 per cent of all wages, salary, commissions and other monies to the assignee, and I hereby constitute the assignee my attorney irrevocable to take all proceedings which may be proper and necessary for the recovery of any amount or amounts above assigned and to give receipts for same, or any part thereof, in my name, and I hereby release and discharge my said employers and each of them from all liability to me for or on account of any or all monies paid in accordance with the terms hereof.

This is the same form of assignment that was under consideration in the *Premier Trust* case and appears to be authorized by s. 7(6) of *The Wages Act,* R.S.O. 1960, c. 421, as amended by 9-10 Elizabeth II, c. 103. This subsection reads:

(6) Any contract hereafter made may provide for the assignment by the debtor to the creditor of a portion of the debtor's wages up to but not exceeding the portion thereof that is liable to attachment or seizure under this section, and any provision of any contract hereafter made that provides for the assignment by the debtor to the creditor of a greater portion of the debtor's wages than is permissible under this subsection is invalid.

On October 3, 1961, Bye made an assignment in bankruptcy. On January 11, 1962, an order was made for his unconditional discharge from bankruptcy. On April 26, 1965, the credit union filed the assignment with Overland Express Limited and requested them to act upon it. Bye then brought a motion for an order declaring

(*a*) that he was released from all debts and liabilities incurred by him on or before the 3rd of October 1961; and

(*b*) that the assignment of wages was now void and unenforceable.

Bye relies upon the *Bankruptcy Act,* R.S.C. 1952, c. 14, s. 135(2), which reads:

135.(2) An order of discharge releases the bankrupt from all other claims provable in bankruptcy.

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Judson J.

There is no doubt that the borrowing by Bye from the credit union did create a debt provable in bankruptcy. The credit union did not prove in bankruptcy. The debt has now gone by operation of law. The assignment was given as a means of collection of the debt. The statutory release of the debtor under the *Bankruptcy Act* renders the assignment ineffective as a means of collection. Both the judge of first instance and the Court of Appeal[1] have so held and in my opinion correctly.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Young & McNamara, Thorold.

Solicitors for the respondent: Freeman & Frayne, St. Catharines.

1966

*Nov. 29

1967

Feb. 7

PATRICK HARRISON & COMPANY LIMITED (*Respondent*) ..... APPELLANT;

AND

THE ATTORNEY-GENERAL FOR MANITOBA (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mines and mining—Statute applying to "Mining, quarrying and other works for the extraction of minerals from the earth"—Contractor contracting to prepare shafts and drifts for mines—Whether contractor's operations fell within provisions of statute—The Employment Standards Act, 1957 (Man.), c. 20, s. 25(d).

The appellant contracted with a certain company to prepare shafts and drifts for mines to be used by that company for the extraction of minerals at two locations in Manitoba. The appellant and the Minister of Labour for Manitoba agreed that the appellant should deposit a sum of money in the Employees' Wages Trust Account, an account in the control of the Minister of Labour. The amount of that sum of money should be determined by the decision as to whether the appellant's operations were governed under the provisions of *The Employment Standards Act* or *The Construction Industry Act*, and such determination would be made by the Court of Queen's Bench upon application on behalf of the Minister of Labour. Thereafter an application was made by the respondent Attorney-General. The trial

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*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Spence JJ.

[1] (1966), 54 D.L.R. (2d) 590.

court judge found that the appellant's operations were within *The Employment Standards Act* and an appeal from his judgment was dismissed by the Court of Appeal. A further appeal was then brought to this Court.

The issue was to determine whether or not the appellant's operations fell within s. 25(*d*) of *The Employment Standards Act*, 1957 (Man.), c. 20. Section 25(*d*) in defining "plant" refers to Schedule A, item 1 of which reads: "Mining, quarrying and other works for the extraction of minerals from the earth."

Held: The appeal should be dismissed.

The word "mining" itself was sufficient to cover the appellant's operations. *Davvell v. Roper* (1855), 24 L.J. Ch. 779; *Re Morgan, Vachell v. Morgan*, [1914] 1 Ch. 910, applied.

If the phrase "other works for the extraction of minerals from the earth" were to be taken as modifying or limiting the word "mining", the appellant's operations would still be covered. The purpose to be attained by the performance of the appellant's contract was the extraction from the earth of valuable minerals and therefore the construction was for that purpose. The driving into the earth of the shafts, and the driving therefrom of horizontal drifts, was mining.

APPEAL from a judgment of the Court of Appeal for Manitoba, dismissing an appeal from a judgment of Wilson J. Appeal dismissed.

Alan Sweatman, Q.C., and *T. G. Mathers*, for the appellant.

A. Kerr Twaddle, for the respondent.

The judgment of Taschereau C.J. and Martland, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba which dismissed an appeal from the judgment of Wilson J.

The matter came before the learned trial judge on an agreed statement of facts which is quite brief and which I quote:

AGREED STATEMENT OF FACTS

Patrick Harrison & Company Limited (hereinafter called "the Company") is a corporation incorporated under the laws of Canada and is under contract with International Nickel Company of Canada, Limited (hereinafter called "International") a company with which it has no connection other than under such contracts to prepare shafts and drifts for mines to be used by International for the extraction of minerals at two locations in Manitoba, namely, Thompson and Birchtree. Each undertaking is the subject of a separate contract. A true copy of the contract with respect to the Birchtree undertaking is attached hereto marked Exhibit A.

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Spence J.

The contract with respect to the undertaking at Thompson is in the same terms except for the specifications as to the work to be performed. The location of each of the undertakings is within one of the areas set out in Schedule B of The Employment Standards Act.

At each location, the Company's heavy equipment consists of compressors, hoists, clams used for sinking shafts which hang from mine timbers, drills, Euclid Trucks and bulldozers.

An outline of the work done by the Company is as follows:

The area where the shaft is to be sunk is prepared for excavation and the shaft collar is then made down to bed rock in which the bearing timbers are inserted and cemented in. Over this the head frame is built with a bind for the disposal of waste rock. The head frame holds the sheave wheels over which the bucket cables are operated to remove waste rock.

After the collar and the head frame are constructed, benching is commenced, that is, the sides of the shafts are excavated alternatively so that the workmen always have a shelf from which to work. This is continued until the shaft is excavated to the contract depth.

As work in the shaft progresses stations are built at designated levels. These stations are starting points for the drifts.

When the shaft is completed, drifts are then driven from the stations in a direction requested by International to the main ore bodies. From the drifts, raises are driven from one level to the other. In the process of driving the drifts track and pipes for water, air and electricity are installed. Once the shaft, drifts and raises are completed the Company is through with its work and International moves in to commence the extraction of ore.

The company may on occasions encounter small ore bodies in the process of driving drifts and raises and this ore is put to one side for International. The Company is in no way responsible for the actual extraction of ore.

Occasionally after the shaft is sunk and the stations constructed, the Company is not called upon to drive the drifts as the station is close enough to the main ore body for International to commence mining from the stations. Not all shafts that are sunk turn out to be mines as International, depending on geological tests, etc., may decide to move elsewhere. The Company sinks a shaft under a separate contract and the driving of drifts in each shaft sunk is a separate contract to the sinking of the shaft. The two shafts in question with drifts from them are however now operating mines.

International treated the payments to the Company under both contracts as capital costs of the mine and not as expenses of operating the mine.

On its payroll the Company has designated certain employees as "miners", "timbermen", "hoistmen" and "trackmen".

Attached hereto is a specimen of the Company's stationery.

The appellant and the Minister of Labour for the Province of Manitoba agreed that the appellant should deposit a sum of money in the Employees' Wages Trust Account, an account in the control of the Minister of Labour. The amount of that sum of money should be determined by the decision as to whether the appellant's opera-

tions were governed under the provisions of *The Employment Standards Act*, 1957 (Man.), c. 20, or *The Construction Industry Wages Act*, 1964 (Man.), c. 9, and such determination would be made by the Court of Queen's Bench upon application on behalf of the Minister of Labour. Thereafter, an application was made by the respondent Attorney-General to the Court of Queen's Bench under the provisions of Rule 536 of that Court which Rule is in the following terms:

> 536. Where the rights of any person depend on the construction of any statute, by-law, deed, will, or other instrument, he may apply by way of originating notice, on notice to all parties concerned, to have his rights declared and determined.

It will be seen that the whole issue is to determine whether or not the appellant's operations fall within s. 25(*d*) of the said *Employment Standards Act*. That section is, in fact, a definition section, and cl. (*d*) defines "plant" as follows:

> (*d*) "plant" means any establishment, works, or undertaking, in or about any industry set out in Schedule A, but does not include any municipal or other public body.

Schedule A referred to in the definition has as item 1:

> 1. Mining, quarrying and other works for the extraction of minerals from the earth.

The learned trial court judge was of the opinion that the words "for the extraction of minerals from the earth" related to the immediately antecedent words "other works", and that they therefore could not be taken to define the word "mining". The learned judge examined the contract between the appellant and the mine owner, the International Nickel Company of Canada Limited, in detail, to determine whether the subject of that contract was "mining" as that word had been construed in a series of cases to which he referred.

Considering the words mining and quarrying alone, with respect, I am in full agreement with the conclusions of the learned trial judge, that the operations of the appellant company would certainly come within the word "mining". I need cite only two authorities which I adopt in coming to that conclusion.

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Spence J.

In *Davvell v. Roper*[1], Kindersley, V.C., said at p. 780:

> Mining is when you begin on the surface, and, by sinking shafts, you work underground in a horizontal direction, making a tunnel as you proceed, and leaving a roof overhead.

And in *Re Morgan, Vachell v. Morgan*[2], Sargant J. said at p. 918:

> The sinking of the shaft is obviously a process for the performance of working the mines and forms part of the working of the mines, although no single piece of coal should in fact be hewn.

The words of the Schedule, however, were not simply mining and quarrying but "mining, quarrying and other works for the extraction of minerals from the earth". As I have said, the learned trial judge took the words "for the extraction of minerals from the earth" as relating only to the immediately antecedent words "other works". That interpretation would result in three categories being dealt with in the Schedule:

(*a*) mining,
(*b*) quarrying, and
(*c*) other works for the extraction of minerals from the earth.

It is difficult to understand why mining should be separated from other works for the extraction of minerals from the earth by the insertion between those two categories of quarrying. It would have appeared more logical to have had the Schedule read:

(*a*) mining,
(*b*) other works for the extraction of minerals from the earth, and
(*c*) quarrying.

For the purpose of the present case, however, it is not necessary to consider whether the Schedule applies to the operation of quarrying without the removal of minerals from the earth. The Schedule certainly does apply to mining and to other works for the extraction of minerals from the earth. As I have said, the word "mining" itself is sufficient to cover the appellant's operations. If the phrase "other works for the extraction of minerals from the earth" were to be taken as modifying or limiting the word "mining", the appellant's operations would still be covered.

[1] (1855), 24 L.J. Ch. 779. [2] [1914] 1 Ch. 910.

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Spence J.

The services performed by the appellant under its contract with the International Nickel Company were "mining . . . for the extraction of minerals from the earth". The word "for" is an ordinary English word and should be so interpreted. The fourth meaning assigned to that word in the Shorter Oxford Dictionary and that which I believe is the applicable meaning in the phrase under consideration is "with the object or purpose of". The only object or purpose to be attained by the performance of the contract between the appellant and the International Nickel Company was the extraction from the earth of valuable minerals and therefore the construction was for that purpose. Certainly the driving into the earth of those shafts, and the driving therefrom of horizontal drifts, was mining.

It should be remembered that what is brought within the provisions of the statute is "any works or undertaking in or about any industry" set out in the Schedule. Certainly a work such as that constructed by the appellant under the contract was a work in or about the industry of mining for the extraction of minerals from the earth. Indeed, the minerals could not be extracted without the construction of the work by the International Nickel Company of Canada Limited or, as in the present case, by a contractor.

The appeal should be dismissed with costs.

JUDSON J.:—I agree with Spence J. subject to this. I agree with the learned trial judge and the Court of Appeal that the words in question mean:

(*a*) mining;

(*b*) quarrying, and

(*c*) other works for the extraction of minerals from the earth,

and that "mining" and "quarrying" are not modified by the words "for the extraction of minerals from the earth".

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Pitblado, Hoskin & Co., Winnipeg.

Solicitors for the respondent: Johnson, Jessiman, Gardner, Twaddle & Johnson, Winnipeg.

1966
*Dec. 8
1967
Feb. 13

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

HARRY GRAVES CURLETT ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Second mortgage loan—Money lending business—Sale of entire portfolio of second mortgages—Whether sale of inventory—Whether profit taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 85E(1), 139(1)(e), (w).

The respondent was the controlling shareholder of a company which made first mortgage loans on real estate. In order to provide the borrowers with additional funds, the respondent advanced them his own money at a discount, on second mortgages. The profits from these transactions were held to be a part of the respondent's income. In 1961, the respondent sold his entire portfolio of second mortgages to the company of which he was the controlling shareholder. The purchase price paid to him exceeded the amount owing to him on the mortgages by the sum of $28,896.71. The Minister taxed this profit as income. The Exchequer Court held that immediately before and at the time of the sale in question the respondent patently was in the money lending business, and that the profit realized from the sale was a capital profit and not subject to tax. The Minister appealed to this Court.

Held: The Minister's appeal should be allowed.

As the profits which were derived from the second mortgages were taxable, it appears that their cost or value was relevant in computing the taxpayer's income from his loan business, and that they therefore constituted inventory within the meaning of s. 139(1) of the *Income Tax Act*. Section 85E(1) of the Act was therefore applicable and the sale was deemed to have been made in the course of carrying on the money lending business. The profit was therefore taxable.

Revenu—Impôt sur le revenu—Prêt sur seconde hypothèque—Entreprise de bailleur de fonds—Vente du portefeuille de secondes hypothèques—Vente d'inventaire—Profit sujet à la taxe—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 85E(1), 139(1)(e), (w).

Le contribuable était l'actionnaire ayant le contrôle d'une compagnie qui prêtait sur hypothèque. Dans le but de fournir aux emprunteurs des fonds additionnels, le contribuable avancait de son propre argent, avec escompte, sur des secondes hypothèques. Il a été jugé que les profits provenant de ces transactions faisaient partie des revenus du contribuable. En 1961, le contribuable a vendu tout son portefeuille de secondes hypothèques à la compagnie dont il avait le contrôle. Le prix d'achat excédait par la somme de $28,896.71 le montant qui lui était dû sur les hypothèques. Le Ministre a cotisé ce profit comme

*PRESENT: Fauteux, Abbott, Martland, Ritchie and Spence JJ.

étant un revenu. La Cour de l'Échiquier a jugé qu'immédiatement avant et au temps même de la vente, le contribuable exploitait une entreprise de bailleur de fonds, et que le profit réalisé par la vente était un profit de capital et non sujet à la taxe. Le Ministre en appela devant cette Cour.

Arrêt: L'appel du Ministre doit être maintenu.

Comme les profits provenant des secondes hypothèques étaient sujets à la taxe, il semble que leur coût ou valeur avait une pertinence dans la computation des revenus du contribuable provenant de son entreprise de prêteur, et qu'en conséquence ils constituaient un inventaire dans le sens de l'art. 139(1) de la *Loi de l'Impôt sur le Revenu*. L'article 85E(1) de la loi était donc applicable et la vente était censée avoir été faite dans le cours de l'exploitation de l'entreprise de bailleur de fonds. Le profit était donc sujet à la taxe.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel maintenu.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

G. W. Ainslie, for the appellant.

Arnold F. Moir, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from the judgment of Gibson J. of the Exchequer Court of Canada[1] allowing an appeal from the respondent's income tax assessment for the year 1962 and holding that the profit which the respondent realized from the sale in 1961 of all the second mortgages which he then held to Associated Investors of Canada Ltd. (hereinafter called "Associated"), a company of which he was for all practical purposes the sole shareholder, was a capital profit and therefore not subject to tax under the provisions of the *Income Tax Act*, R.S.C. 1952, c. 148.

The learned trial judge has found that immediately before and at the time when the sale in question was concluded the respondent "patently was in the money lending business" and that the bonuses received from second mortgages held by him were taxable as income. The ques-

[1] [1966] Ex. C.R. 955, [1966] C.T.C. 243, 66 D.T.C. 5200.

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Ritchie J.

tion raised by this appeal, however, is whether the profit which he realized on the sale of all the second mortgages which were then in his investment portfolio was a profit from the sale of his second mortgage business as a going concern, or whether it was simply a profit from the sale in bulk of his then existing inventory of second mortgages.

In conducting his mortgage loan business between 1949 and 1952, it was the respondent's usual practice to advance to the borrowers 85 per cent of the face value of the mortgages and to then assign and sell the mortgages at their face value to Associated. The profits from these transactions were held to be a part of the respondent's income in the case of *Curlett v. Minister of National Revenue*[1].

Before concluding the transaction which gave rise to the profit, the character of which is now in dispute, the respondent had changed his method of doing business so that the security given by the borrower was a first mortgage in the name of Associated and a second mortgage in the respondent's own name, it being understood that the discount to be received by the respondent was to be calculated on the basis of the amount advanced by both Associated and himself, although Associated was not entitled to any part of the discount. All the mortgages that were sold to Associated in 1961 were of this latter type and the net result of the sale was that the purchase price paid to the respondent exceeded the amount owing to him on the mortgages by the sum of $28,896.71, and it is this profit which was not received by the respondent until 1962 which the Minister of National Revenue claims to be taxable as income.

At the outset it appears to me to be convenient to reproduce the following relevant sections of the *Income Tax Act:*

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

[1] [1961] Ex. C.R. 427, [1961] C.T.C. 339, 61 D.T.C. 1210; [1962] S.C.R. VII.

85E.(1) Where, upon or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by him

(*a*) during the last taxation year in which he carried on the business or the part of the business, and

(*b*) in the course of carrying on the business.

139. (1) In this Act, . . .

(*w*) "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year; . . .

I agree with the finding of the learned trial judge to which I have referred that at the time when the sale of these second mortgages was concluded the respondent "patently was in the money lending business" and as the profits which he derived from his second mortgages were taxable it appears to me that their "cost or value" was relevant in computing the taxpayer's income from his loan business, and that they therefore constituted "inventory" within the meaning of s. 139(1) of the *Income Tax Act*.

It is noted by Martland J. in *Frankel Corporation Limited v. Minister of National Revenue*[1] that s. 85E of the Act had no application to that case because it only became effective in respect of sales made after April 5, 1955. That section, however, undoubtedly, applies to the present case and I am unable to escape the conclusion that in making the sale to Associated Mr. Curlett was disposing of at least a part of his money lending business and that the sale which he made was a sale of property which was included in the inventory of that business. I am, therefore, of the opinion that it was a sale made "in the course of carrying on the business" and was income from that business within the meaning of s. 3 of the *Income Tax Act*.

In holding that the profit made by Mr. Curlett on his sale to Associated was not to be related to the sale of the mortgages but was rather to be treated as the amount paid for his "substantial money lending business as a going concern", the learned trial judge said:

On the facts of this case, I am of opinion that the said sum of $28,896.71 was not a receipt by the appellant of any part of the discounts or bonuses incorporated in the principal sums payable under these said

[1] [1959] S.C.R. 713 at 723, [1959] C.T.C. 244, 59 D.T.C. 1161, 19 D.L.R. (2d) 497.

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Ritchie J.

second mortgages. Instead, it was part of the purchase monies received by him in a bona fide realization sale to Associated Investors of Canada Limited of all the assets of his substantial money-lending business as a going concern.

With the greatest respect, I am unable to attach any reality to the conception of "going concern" value as an element in a transaction whereby Mr. Curlett sold his inventory of second mortgages to the company which already held all the first mortgages and of which he was, for all practical purposes, the only shareholder.

For these reasons, I would allow this appeal and restore the assessment made by the Minister of National Revenue in respect of the profit of $28,896.71 realized by the respondent in the year 1962 from the sale of his second mortgages to Associated. The appellant will have his costs in this Court and in the Exchequer Court of Canada.

No appeal has been asserted in relation to the other questions which were determined by the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Wood, Moir, Hyde & Ross, Edmonton.

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*Mar. 21, 22
Mar. 22

RAYMOND GEORGE SAUNDERS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Motor vehicle—Care or control while impaired—Car in a ditch and unable to move under own power—Whether car a "motor vehicle"—Criminal Code, 1953-54 (Can.), c. 51, ss. 2(25), 222, 223.

The appellant was acquitted by a magistrate on an impaired driving charge on the ground that the automobile was not a motor vehicle within the meaning of s. 223 of the *Criminal Code*. At the time of his apprehension, the appellant was in an impaired condition behind the steering wheel of his car with the key in the ignition. The car was in a ditch and could not move under its own power until it was extricated by a tow. The Crown appealed by way of a stated case. The appeal was allowed and the case remitted to the magistrate. A further appeal

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

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to the Court of Appeal was dismissed without written reasons. The appellant was granted leave to appeal to this Court on the following point of law: "Is an automobile, which cannot be set in motion by its own power, by reason of conditions existing at the time of the alleged offence, a 'motor vehicle' within the meaning of those words where they appear in the phrase 'care and control of a motor vehicle' in section 223 of the *Criminal Code*?"

Held: The appeal should be dismissed.

The true object of the provisions of ss. 222 and 223 of the Code is to cope with and protect the person and the property from the danger which is inherent in the driving, care or control of a motor vehicle by anyone who is intoxicated or under the influence of a drug or whose ability to drive is impaired by alcohol or a drug. The definition of motor vehicle in s. 2(25) of the Code refers to the type, the nature and not the actual operability or effective functioning of the particular vehicle. It is therefore immaterial if a motor vehicle, at the time of the alleged offence, cannot be set in motion by its own power by reason of internal or external conditions.

Droit criminel—Véhicule à moteur—Garde ou contrôle alors que la capacité de conduire est affaiblie—Véhicule dans un fossé et incapable de se mouvoir de son propre pouvoir—L'automobile est-elle un «véhicule à moteur»—Code criminel, 1953-54 (Can.), c. 51, arts. 2(25), 222, 223.

L'appelant a été acquitté, par un magistrat, de l'offense d'avoir conduit une automobile alors que sa capacité était affaiblie, pour le motif que l'automobile n'était pas un véhicule à moteur dans le sens de l'art. 223 du *Code criminel*. Lors de son arrestation, les capacités de conduire de l'appelant étaient affaiblies et il était assis au volant de son automobile. La clef d'allumage était en place. L'automobile était dans un fossé et ne pouvait pas se mouvoir de son propre pouvoir jusqu'à ce qu'elle fut dégagée au moyen d'une remorque. La Couronne en appela par voie d'un dossier imprimé. L'appel fut maintenu et le dossier renvoyé au magistrat. Un appel subséquent fut rejeté sans motifs écrits par la Cour d'Appel. L'appelant a obtenu permission d'en appeler devant cette Cour sur la question de droit suivante: «Est-ce qu'une automobile, qui ne peut pas être mise en mouvement de son propre pouvoir, en raison de conditions existantes au temps de l'offense, est un «véhicule à moteur» dans le sens de ces mots dans la phrase «garde et contrôle d'un véhicule à moteur» dans l'article 223 du *Code criminel*?»

Arrêt: L'appel doit être rejeté.

Le véritable but des dispositions des arts. 222 et 223 du Code est de conjurer le danger et de protéger les personnes et la propriété contre le danger qui est inhérent à la conduite, à la garde ou au contrôle d'un véhicule à moteur par toute personne en état d'ivresse ou sous l'influence d'un narcotique ou dont la capacité de conduire est affaiblie par l'effet de l'alcool ou d'une drogue. La définition de véhicule à moteur dans l'art. 2(25) du Code réfère au type, à la nature et non pas à la capacité actuelle de manœuvrer ou au fonctionnement effectif

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du véhicule en question. Le fait qu'un véhicule à moteur, lors de l'offense, ne puisse se mouvoir de son propre pouvoir en raison de conditions internes ou externes, est sans importance.

APPEL d'un jugement de la Cour d'Appel de la province de Saskatchewan, confirmant une décision du Juge Balfour. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, affirming a decision of Balfour J. Appeal dismissed.

Robert Carleton, for the appellant.

Serge Kujawa, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellant was charged with having, on the 6th day of October A.D. 1963, at Herbert District, in the province of Saskatchewan, the care or control of a motor vehicle while his ability to drive a motor vehicle was impaired, committing thereby the offence described in s. 223 of the Criminal Code. To this charge, he pleaded not guilty and was ultimately acquitted by Police Magistrate C. W. Vause.

Dissatisfied with this determination of the case, as being erroneous in point of law, the Attorney General for the province appealed to the Court of Queen's Bench[1], by way of a stated case. The relevant facts and grounds, as well as the question submitted for the consideration of the Court, are set forth in the following terms by the Magistrate:

> In the early morning, 1.20 a.m., on the 6th day of October, 1963, the accused was found in an automobile in the ditch on the west side of the highway and off the travelled portion thereof. He was asleep seated behind the steering wheel, the key was in the ignition switch, and the ignition was turned off. The motor was not running but was capable of running, as Constable Burch of the R.C.M. Police had attempted to drive the automobile out of the ditch without success and later, after it had been extricated by a tow, drove the automobile back to Swift Current, Saskatchewan. The automobile was at right angles to the highway with the rear wheels in the ditch, while the two front wheels were on the shoulder of the gravel road. The left rear wheel of the automobile was completely clear and would spin freely. The position of the vehicle in the ditch, plus that fact that it was, what is commonly known as 'high centered',

[1] [1965] 3 C.C.C. 326, 44 C.R. 322, 50 W.W.R. 610.

prevented movement of the automobile under its own power, and it was absolutely necessary for it to be extricated from its position in the ditch by means of a winch on a tow truck.

The evidence clearly indicated that the accused was in an impaired condition at the time of apprehension.

There is no evidence to establish that the accused did not enter or mount the automobile for the purpose of setting it in motion.

Part of a case of beer was found in the rear seat of the automobile.

No evidence was adduced to prove the condition of the accused when his automobile left the highway. There was no positive or reliable proof as to the length of time the automobile of the accused had been in the ditch before the arrival of the police constables or when or where he had consumed intoxicating liquor.

I found as a fact that the accused was in an impaired condition at the time of apprehension by the R.C.M. Police.

I found as a fact that the accused had care or control of the vehicle at the time of his apprehension.

I found as a fact that it was absolutely necessary to have the vehicle extricated from its position in the ditch by means of a winch on a tow truck.

I found as a fact that the vehicle in its position in the ditch was not a danger to the public or property as contemplated by Section 223 of the Criminal Code.

* * *

CASE:

(1) The proceeding was questioned on one ground, namely:

That I erred in my finding of law, namely: that the automobile was not a motor vehicle within the meaning of Section 223 of the Criminal Code.

With respect to ground (1), in view of the fact that I found the vehicle was not a danger to the public or property as contemplated by Section 223 of the Criminal Code, due to its position in the ditch and my finding of fact that it was absolutely necessary to have the automobile extricated from the position in the ditch by means of a winch on a tow truck, I was of the opinion that the vehicle was not a motor vehicle. I came to the said conclusion based on the test of whether a vehicle is a motor vehicle within the meaning of Section 223, as decided by Rex v. Thornton, 96 C.C.C. The test as stated in the said case was simply whether or not it did constitute a danger such as was contemplated by Section 223.

The appeal was heard by Mr. Justice Balfour of the Court of Queen's Bench. In his reasons for judgment, the learned judge referred particularly to and quoted extensively from the reasons of MacDonald J.A., who delivered the judgment of the Court of Appeal for Alberta, in *R. v. Rye*[1], and from the reasons given by Ilsley C.J., and concurred in by the majority, in the decision of the Court of Appeal for Nova Scotia, in *R. v. Wolfe*[2]. On the authority of the

[1] (1958), 119 C.C.C. 370, 27 C.R. 153, 24 W.W.R. 49.
[2] (1961), 130 C.C.C. 269, 45 M.P.R. 355.

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decisions of these two Courts of Appeal, Mr. Justice Balfour decided that the Magistrate, in the case at bar, did err in his finding of law that the automobile was not a motor vehicle within the meaning of s. 223 of the *Criminal Code* and hence remitted the case to the Magistrate for determination in the light of this finding.

An appeal was then entered from this decision to the Court of Appeal of the province of Saskatchewan. The Court, constituted of Culliton C.J.A., Hall and Maguire JJ.A., dismissed this appeal, but did not deliver any written reasons.

Appellant finally sought and obtained leave to appeal to this Court on the following point of law:

> Is an automobile, which cannot be set in motion by its own power, by reason of conditions existing at the time of the alleged offence, a 'motor vehicle' within the meaning of those words where they appear in the phrase 'care and control of a motor vehicle' in section 223 of the Criminal Code?

Having heard counsel for the appellant and retired to further consider the matter, the Court then informed counsel for respondent that it was not necessary to hear him and, indicating that reasons for judgment would be later delivered, the Court dismissed the appeal.

In the consideration of the question, it is appropriate to note that conditions, preventing an automobile to be set in motion on its own power, are, according to their nature, conveniently differentiated as being either *internal*, such as, for example, a lack of gasoline, a mechanical breakdown or the like, or *external*, such as, for instance, a loss of traction attributable to the miring of the automobile in snow or mud. The above question, in the scope of which both *internal* and *external* conditions are contemplated, has given rise to conflicting judicial opinions in cases decided under the former *Criminal Code*, R.S.C. 1947, c. 36, as well as, though to a much lesser and decreasing degree, in those decided under the new *Criminal Code*. Most of the cases are reviewed in an article mentioned by Mr. Justice Balfour and written by L. K. Graburn,—cf. vol. 1 (1958-59) of *The Criminal Law Quarterly*,—and little would be gained by discussing them here. Sufficient it is, I think, to quote the provisions of s. 2(25) and the relevant parts of ss. 222 and

223 of the *Criminal Code* and then indicate and consider the nature and basis of the conflict.

2. In this Act,

(25) *"motor vehicle"* means a vehicle that is drawn, propelled or driven by any means other than by muscular power, but does not include a vehicle of a railway that operates on rails;

* * *

222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of...

223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable...

It should be noted that there was no definition of *motor vehicle*, in the former Code, and that the present definition was introduced with and at the time of the coming into force of the new Code, to wit, on the 1st of April 1955.

Obviously, every one agrees that the true object of the provisions of ss. 222 and 223 is to cope with and protect the person and the property from the danger which is inherent in the *driving, care or control* of a motor vehicle by anyone who is intoxicated or under the influence of a drug or whose ability to drive is impaired by alcohol or a drug. At this point, however, the unanimity ends and the conflict arises.

In one category of cases, it is held that since protection against the above danger is the true and sole object of the legislation, it follows that, if, when the involved automobile cannot be set in motion by its own power by reason of conditions existing at the time of the alleged offence, there is actually or potentially no such danger, then the automobile cannot be said to be a *motor vehicle* within the meaning which ought to be given to these words in the context of ss. 222 and 223 and, in such circumstances, these sections have no application. This interpretation is held to be unaffected by reason of s. 2(25) for, defining as it does, *motor vehicle as a vehicle that is drawn, propelled or driven by any means other than by muscular power,* this definition, it is said, contemplates a motor vehicle actually free of internal or external conditions preventing it to move by its own power.

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In the other category of cases, it is held that the fact that a motor vehicle is not free of such conditions at the time of the alleged offence, is entirely immaterial. That this is so, since at least the introduction in the legislation of the statutory definition of *motor vehicle,* is uncontrovertible for, it is said, the definition refers to the type, the nature and not the actual operability or effective functioning of this particular vehicle.

In my respectful opinion, the holding in the latter category of cases is the correct one, and *R. v. Rye, supra,* and *R. v. Wolfe, supra,* were rightly decided, as also were, amongst others, the cases of *R. v. Weaver*[1] and *R. v. Simpson*[2], where the lack of danger alleged and pleaded in defense, was related, in the first case, to an *internal* condition, and in the second case, to an *external* condition. The definition of a *motor vehicle* is in plain and ordinary language. It contemplates a *kind* of vehicle, not its actual operability or functioning. Its application is not confined to a portion of the Code, it extends uniformly throughout. The definitions of the offences mentioned in ss. 222 and 223 are also couched in a language that is plain and simple and in which nothing, either expressed or implied, indicates an intent of Parliament to exact, in every case, as being one of the ingredients of the offences, the proof of the presence of some element of actual or potential danger or to accept, as a valid defense, the absence of any. On the contrary, these and the other related provisions of the Code manifest the determination of Parliament to strike at the very root of the evil, to wit: the combination of alcohol and automobile, that normally breeds this element of danger which this preventive legislation is meant to anticipate.

We are unanimously of the opinion that the question, upon which leave to appeal was granted, must receive an affirmative answer and, for that reason, the appeal, as above indicated, was dismissed.

Appeal dismissed.

Solicitor for the appellant: D. C. Wilkinson, Swift Current.

Solicitor for the respondent: The Attorney General, Regina.

[1] (1958), 28 C.R. 37, 121 C.C.C. 77.
[2] (1958), 28 C.R. 202, 41 M.P.R. 133, 121 C.C.C. 295.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CLARE LECKIE, Executrix of the Estate of Adam Newton Leckie .. RESPONDENT.

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*Feb. 15
Feb. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Provincial tax credit—Situs of shares—Register of transfers or place of transfer—Estate Tax Act, 1958 (Can.), c. 29, ss. 9(1)(a), 9(8)(d).

At the time of his death, the deceased was domiciled in Ontario. Included in his estate were shares of a company incorporated in Newfoundland and all the issued shares of a company incorporated in Manitoba. The Newfoundland company maintained several registers for the transfer of shares, including one in Ontario. The Manitoba company maintained only one such register and that was at its head office in Winnipeg. The estate claimed that it was entitled, in computing the estate tax payable, to a provincial tax credit in respect of these shares because their situs was in Ontario, a prescribed province. The Exchequer Court held that the shares of both companies were situated in Ontario. The Minister appealed to this Court.

Held: The Minister's appeal as to the shares in the Manitoba company should be allowed; the Minister's appeal as to the shares in the Newfoundland company should be dismissed.

As was held by the Tax Appeal Board and by the Exchequer Court, the situs of the shares of the Newfoundland company was in Ontario.

As to the shares in the Manitoba company, the condition prescribed in s. 9(8)(*d*)(i) of the *Estate Tax Act* was not fulfilled. Consequently for the purposes of the Act, the situs of these shares was governed by s. 9(8)(*d*)(ii). The wording of s. 9(8)(*d*) is mandatory and appears to be clear and free from any ambiguity. Under its terms, the shares in the Manitoba company were deemed to be situated in Manitoba.

Revenu—Impôt successoral—Crédit pour taxes provinciales—Situs des actions d'une compagnie—Registre de transferts ou lieu de transfert—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 29, arts. 9(1)(a), 9(8)(d).

Lors de son décès, le *de cujus* était domicilié en Ontario. Parmi les biens de sa succession se trouvaient des actions d'une compagnie ayant été incorporée à Terre-Neuve et toutes les actions d'une compagnie ayant été incorporée au Manitoba. La compagnie de Terre-Neuve tenait plusieurs registres de transferts d'actions, dont l'un en Ontario. La compagnie du Manitoba tenait un seul de ces registres qui était à son bureau-chef à Winnipeg. La succession prétend avoir droit, dans le calcul de son impôt successoral, à un crédit pour taxes provinciales

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

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concernant ces actions parce que leur situs était en Ontario, une province prescrite. La Cour de l'Échiquier a jugé que les actions des deux compagnies étaient situées en Ontario. Le Ministre en appela devant cette Cour.

Arrêt: L'appel du Ministre concernant les actions de la compagnie du Manitoba doit être maintenu; l'appel du Ministre concernant les actions de la compagnie de Terre-Neuve doit être rejeté.

Tel que l'ont décidé la Commission d'Appel de l'Impôt et la Cour de l'Échiquier, le situs des actions de la compagnie de Terre-Neuve était en Ontario.

Quant aux actions de la compagnie du Manitoba, la condition prescrite par l'art. 9(8)(*d*)(i) de la *Loi de l'Impôt sur les biens transmis par décès* n'a pas été remplie. Conséquemment pour les fins du statut, le situs de ces actions était déterminé par l'art. 9(8)(*d*)(ii). Le langage de l'art. 9(8)(*d*) est obligatoire et semble être clair et libre de toute ambiguïté. En vertu de ses termes, les actions de la compagnie du Manitoba sont réputées situées dans le Manitoba.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt successoral. Appel maintenu en partie.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an estate tax matter. Appeal allowed in part.

D. G. H. Bowman and *G. V. Anderson,* for the appellant.

Donald A. Keith, Q.C., and *Frank K. Roberts,* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Gibson J. allowing an appeal by the respondent and dismissing a cross-appeal by the appellant from a decision of the Tax Appeal Board and declaring that under the provisions of the *Estate Tax Act,* Statutes of Canada 1958, 7 Elizabeth II, c. 29, certain shares owned by the deceased Adam Newton Leckie were property situate in the Province of Ontario, which is a prescribed province.

There is no dispute as to the facts.

The questions which arise are as to the situs for the purpose of section 9 of the *Estate Tax Act* of (i) 30,003

[1] [1966] C.T.C. 310, 66 D.T.C. 5237.

common shares and 165 preferred shares of the capital stock of Leckie Enterprises Limited and (ii) 300 shares of the capital stock of Anglo-Newfoundland Development Company Limited.

As to the shares in Anglo-Newfoundland Development Company Limited, the Court at the conclusion of the argument of counsel for the appellant stated that it was not necessary to call upon counsel for the respondent as on this point we were all in agreement with the reasons and conclusion of the Tax Appeal Board which were concurred in by Gibson J.

It remains to consider the question as to the shares in Leckie Enterprises Limited, hereinafter called "The Company".

The relevant provision of the *Estate Tax Act* is s. 9(8)(*d*) which reads as follows:

> 9. (8) A reference in this section to the situs of any property passing on the death of a person shall be construed as a reference to the situs of that property at the time of the death of that person, and, for the purposes of this section except sub-section (3), the situs of any property so passing, including any right or interest therein of any kind whatever, shall, where that property comes within any of the classes of property mentioned in paragraphs (*a*) to (*d*) of this section, be determined in accordance with the following rules:
>
> * * *
>
> (*d*) shares, stocks and debenture stocks of a corporation and rights to subscribe for or purchase shares or stocks of a corporation (including any such property held by a nominee, whether the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situated
>
> (i) in the province where the deceased was domiciled at the time of his death, if any register of transfers or place of transfer is maintained by the corporation in that province for the transfer thereof, and
>
> (ii) otherwise, in the place where the register of transfers or place of transfer nearest to the place where the deceased was ordinarily resident at the time of his death is maintained by the corporation for the transfer thereof;

At the time of his death Adam Newton Leckie, hereinafter referred to as "the deceased", was domiciled and ordinarily resident at Oakville in the County of Halton in the Province of Ontario. He was the beneficial owner of the 30,003 common shares which were all the issued common shares of the Company and the registered owner of all of these except two used to qualify directors who were his nominees and acted entirely on his instructions. The

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preferred shares had no voting rights and it is not questioned that the deceased was at all times in complete control of the company.

The Company was incorporated pursuant to the provisions of the *Manitoba Companies Act* on October 2, 1957. Its head office was at all times in the City of Winnipeg. It maintained only one register for the transfer of shares and that register was at its head office in Winnipeg.

Section 346(1) of the *Manitoba Companies Act* provides as follows:

> 346. (1) The register of transfers of every corporation with capital stock shall be kept at the head office of the corporation, and one or more branch registers of transfers, at which transfers may be validly registered, may be kept at such office or offices of the corporation or other place or places within or without the province as the directors, from time to time, appoint. Both registrars and transfer agents may issue and deliver share certificates in such manner as the directors of the company from time to time authorize.

The directors did not authorize a branch register to be kept at any office of the Company in Ontario or at any other place in Ontario.

On this state of facts it seems plain that the condition prescribed in clause (i) of paragraph (*d*) of subsection 8 of section 9 of the *Estate Tax Act,* quoted above, was not fulfilled and for the purposes of that Act the situs of these shares is governed by clause (ii) of that paragraph and accordingly they shall be deemed to be situated in the place where the register of transfers or place of transfer nearest to the place where the deceased was ordinarily resident at the time of death was maintained by the company for the transfer thereof.

The wording of this provision is mandatory and appears to me to be clear and free from any ambiguity. On the admitted facts it has the inevitable result of declaring that the shares in question shall be deemed to be situated in Manitoba.

For the reasons stated by Mr. W. O. Davis, who gave the decision of the Tax Appeal Board, and those briefly set out above, I would allow the appeal as to the shares in Leckie Enterprises Limited, dismiss the appeal as to the shares in Anglo-Newfoundland Development Company Limited and

direct that the assessment be referred back to the appellant for re-consideration and re-assessment in accordance with these reasons.

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While the value of the shares in respect of which the appellant has succeeded is much greater than that of those in respect of which he has failed, success has been divided throughout and in all the circumstances of the case I would direct that there be no order as to costs in the Exchequer Court or in this Court.

Appeal allowed as to the shares of the Manitoba Company; appeal dismissed as to the shares of the Newfoundland Company; no order as to costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Keith, Ganong, Mahoney & Keith, Toronto.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

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*Jan. 31
Mar. 2

AND

FOREIGN POWER SECURITIES CORPORATION LIMITED .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Public investment company—Shares acquired at costs—Profit on sale of same—Whether capital gain or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The respondent, a public investment company, had acquired from its parent private investment company a large number of shares in Trans-Canada Pipe Lines Ltd. and Quebec Natural Gas Corporation, at costs. In 1957 and 1958, the respondent sold some of these shares at a considerable profit. The Exchequer Court held that this profit was the realization of an investment and non-taxable. The Minister appealed to this Court.

Held: The Minister's appeal should be dismissed.

The trial judge gave full consideration to all the circumstances relied upon by the Minister and rightly concluded that the shares were acquired by the respondent as investments to be held as a source of income in

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland and Spence JJ.

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the ordinary course of its business as an investment company, and that the reason it decided to realize these investments after a comparatively short period of time was that, in the opinion of its responsible officers, the shares had reached a price which was unrealistically high.

Revenu—Impôt sur le revenu—Compagnie publique de placements—Actions acquises au prix coûtant—Profit lors de la revente—Est-ce un gain de capital ou un revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

L'intimée, une compagnie publique de placements, a acquis au prix coûtant d'une compagnie privée de placements par qui elle était contrôlée un grand nombre d'actions de la compagnie Trans-Canada Pipe Lines Ltd. et de Quebec Natural Gas Corporation. En 1957 et 1958, l'intimée a vendu un nombre de ces actions avec un profit considérable. La Cour de l'Échiquier a jugé que ce profit était la réalisation d'un placement et non sujet à la taxe. Le Ministre en appela devant cette Cour.

Arrêt: L'appel du Ministre doit être rejeté.

Le juge de première instance a pleinement considéré toutes les circonstances sur lesquelles le Ministre s'était appuyé et a correctement conclu que les actions avaient été acquises par l'intimée comme un placement pour être conservé comme source de revenus dans le cours ordinaire de son entreprise de compagnie de placements, et que la raison pour laquelle elle a décidé de réaliser ces placements après une période de temps comparativement courte est que, dans l'opinion de ses officiers responsables, les actions avaient atteint un prix tellement élevé qu'il dépassait toute réalité.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

G. W. Ainslie and *P. Cumyn*, for the appellant.

R. de Wolfe MacKay, Q.C., and *Keith E. Eaton*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J:—This is an appeal from a judgment[1] of Noël J. allowing the respondent's appeal from the assessments of income tax made for its 1957 and 1958 taxation years.

[1] [1936] Ex. C.R. 358, [1936] C.T.C. 23, 66 D.T.C. 5012.

The question for decision is whether profits of $703,636 realized in 1957 and $63,932 realized in 1958 on the acquisition and sale by the respondent of shares in Trans-Canada Pipe Lines Limited and Quebec Natural Gas Corporation were income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, as is contended by the appellant, or were realization of an enhancement in the value of investments held by the appellant, as found by the learned trial judge.

It is not questioned that the primary activities of the respondent are those of a bona fide investment company but counsel for the appellant argues that the particular transactions, out of which the profit sought to be taxed arose, were speculations constituting adventures in the nature of a trade.

The question is essentially one of fact depending on the intention with which the respondent acquired the shares.

The learned trial judge has set out the relevant facts in detail and has made reference to several passages in the evidence. I do not find it necessary to repeat these. I am satisfied that the learned trial judge gave full consideration to all the circumstances relied upon by the appellant and having done so he reached the conclusion that the shares in question were acquired by the respondent as investments to be held as a source of income in the ordinary course of its business as an investment company and that the reason it decided to realize these investments after a comparatively short period of time was that, in the opinion of its responsible officers, the shares had reached a price which was unrealistically high.

If this finding of fact is accepted, no question of law arises. A perusal of the record in the light of the full and able arguments addressed to us satisfies me that this finding was right.

For the reasons given by Noël J. and those briefly stated above, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston, Montreal.

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*Feb. 21, 22
Mar. 2

ARNOLD GLENN SHINGOOSE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal Law—Charge of non-capital murder against a juvenile—Application to have trial held in ordinary courts—Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 9.

The appellant, a 15 year old juvenile, was charged under the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, with non-capital murder. The Crown applied under s. 9 of the *Juvenile Delinquents Act* to have the juvenile proceeded against by indictment in the ordinary courts. The Juvenile Court judge made the order asked after hearing evidence of a psychiatrist and from the probation officer, some of which was unsworn. The appellant then applied for a writ of *habeas corpus* with *certiorari* in aid. This application was dismissed. The Court of Appeal upheld the dismissal. The appellant applied to this Court for leave to appeal. Such leave in respect of *habeas corpus* was not required by virtue of s. 691(3) of the *Criminal Code*, but it was granted in so far as it related to the request for *certiorari* in aid.

Held: The appeal should be dismissed.

On the merits of this case, and without deciding the question of the jurisdiction of this Court, the order made by the Juvenile Court judge should not be disturbed. It was a discretionary order which he had jurisdiction to make. There is no rule of law, nor any authority, to compel a magistrate or a Juvenile Court judge when making an order under s. 9(1) of the *Juvenile Delinquents Act* to base his opinion solely on sworn testimony.

Droit criminel—Accusation de meurtre non qualifié contre un enfant —Requête pour avoir le procès devant les cours ordinaires—Loi sur les Jeunes Délinquants, S.R.C. 1952, c. 160, s. 9.

L'appelant, un enfant de 15 ans, a été accusé sous le régime de la *Loi sur les Jeunes Délinquants*, S.R.C. 1952, c. 160, d'un meurtre non qualifié. La Couronne a présenté une requête en vertu de l'art. 9 de la *Loi sur les Jeunes Délinquants* pour qu'il soit ordonné que l'enfant soit poursuivi par voie de mise en accusation dans les cours ordinaires. Le juge de la Cour pour jeunes délinquants a accordé cette demande après avoir entendu les témoignages d'un psychiatre et d'un agent de surveillance. Une partie de ces témoignages n'a pas été prise sous serment. L'appelant a alors présenté une requête pour obtenir un bref d'*habeas corpus* avec *certiorari* à l'appui. La Cour d'Appel a confirmé le jugement rejetant cette requête. L'appelant a présenté une requête devant cette Cour pour permission d'appeler. Quant au bref d'*habeas*

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie and Hall JJ.

corpus, cette permission n'était pas requise en vertu de l'art. 691(3) du *Code Criminel*, mais permission a été accordée en autant que la requête se rapportait au bref de *certiorari*.

Arrêt: L'appel doit être rejeté.

Sur les mérites de la cause, et sans décider la question de la juridiction de cette Cour, il n'y a pas lieu de changer l'ordonnance du juge de la Cour pour jeunes délinquants. Cette ordonnance était discrétionnaire et relevait de sa compétence. Il n'y a aucune règle de droit, ni aucune autorité, contraignant un magistrat ou un juge de la Cour pour les jeunes délinquants de baser son opinion seulement sur des témoignages assermentés lorsqu'il rend une ordonnance sous l'art. 9(1) de la *Loi sur les Jeunes Délinquants*.

APPEL d'un jugement de la Cour d'Appel du Manitoba concernant une ordonnance en vertu de l'art. 9 de la *Loi sur les Jeunes Délinquants*. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Manitoba with respect to an order made under s. 9 of the *Juvenile Delinquents Act*. Appeal dismissed.

Murray Tapper, for the appellant.

A. A. Sarchuk, for the respondent.

The judgment of the Court was delivered by

HALL J.:—The appellant, Arnold Glenn Shingoose, a juvenile 15 years of age at the time of commission of the alleged offence, was charged under an information dated April 10, 1966, in Juvenile Court under the *Juvenile Delinquents Act* as follows:

...that Arnold Glenn Shingoose a child did on or about the 9th day of April, 1966, at the Lizard Point Indian Reserve in the said Province, commit a delinquency in that he did unlawfully murder George Clearsky and thereby committed non-capital murder contrary to the form of the statute in such case made and provided Section 206 (2) C.C. & J.D. Act.

Upon being apprehended, he was brought before His Honour F. W. Coward, a judge under the *Juvenile Delinquents Act*. On May 2, 1966, an application was made to the Juvenile Court judge under s. 9 of the *Juvenile Delinquents Act* to order that the child be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf. Section 9 reads as follows:

9.(1) Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the Court may, in

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Hall J.

its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf; but such course shall in no case be followed unless the Court is of the opinion that the good of the child and the interest of the community demand it.

(2) The Court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.

On the hearing of this application, the Juvenile Court judge received sworn testimony as to the age of the juvenile which established that he was born January 5, 1951, and he was, accordingly, over the age of 14 years. He also heard representations from Crown counsel in which he was referred to a number of decisions relating to s. 9 aforesaid. Following that, he asked for a psychiatric report and a psychological report. He then proceeded to hear representations from the Probation Officer, Mr. Korzeniowski, who was cross-examined by counsel for the juvenile. Mr. Korzeniowski was not sworn. The Juvenile Court judge then adjourned the proceedings until Tuesday, May 24, 1966, at which time the psychiatric and psychological reports were received. Counsel for the juvenile objected that these were not given under oath. The Juvenile Court judge then made the Order complained of.

The appellant applied for a writ of *habeas corpus* with certiorari in aid. The application was heard by Bastin J. and dismissed by him. The appellant appealed to the Court of Appeal of Manitoba and that Court, after a full hearing on the merits, upheld the judgment of Bastin J. The appellant thereupon applied to this Court for leave to appeal from the judgment of the Court of Appeal of Manitoba. Leave to appeal in respect of *habeas corpus* was not required by virtue of s. 691(3) of the *Criminal Code*. Leave to appeal insofar as the application related to the request for certiorari in aid was granted.

On the hearing in this Court, the jurisdiction of the Court to interfere with the order made by the learned Juvenile Court judge in *habeas corpus* proceedings was questioned, and upon consideration the Court stated:

Mr. Tapper and Mr. Sarchuk:—We think the best course is to hear the argument on the merits reserving the question whether the proceedings taken by the appellant are such that we can deal with the merits. It goes without saying, Mr. Sarchuk, that you will be entitled to argue as fully as you please that in view of the form of the proceedings we cannot deal with the merits.

Apart altogether from the procedural difficulties and without passing upon them, I am of the view that on the merits the order made by the learned Juvenile Court judge should not be disturbed. It was a discretionary order which he had jurisdiction to make. The appellant's contention is that on the hearing preceding the making of the order in question the Juvenile Court judge heard representations of counsel for the Crown as well as reports from the Probation officer and from a psychologist and a psychiatrist which were not given under oath.

In the Court of Appeal, Monnin J.A., speaking for the Court, said:

> The issue before Bastin J., involved the question whether the juvenile had been properly dealt with by Coward J.C.J. Reviewing the record in this matter it is apparent that Coward J.C.J. entered into an extensive enquiry for the purpose of determining whether or not to grant the Crown's application for transfer. It is plain that he addressed his mind both to the facts and to the governing law. He gave specific consideration to the requirements of sec. 9(1) of *The Juvenile Delinquents Act, supra,* requiring that no order of transfer to the adult Court be made "unless the Court is of the opinion that the good of the child and the interest of the community demand it".

Monnin J.A., without referring to the case by name, was following the decision of the Court of Appeal of Manitoba in *Regina v. Pagee*[1], in which he had participated. In that case, Miller C.J.M., speaking for the Court, said:

> In my opinion if Crown counsel outlines to the Juvenile Court Judge reasons which indicate that it is for the good of the child and in the interest of the community that the transfer be made, then the Juvenile Court Judge, after considering any representation on behalf of the juvenile, can, in his discretion, act upon such information and material as is before him. I do not say that sworn evidence could not be given if desired either by the Crown or the defence or by both in support of or in opposition to the transfer, but what I want to make clear is that there is no rule of law, nor any authority, to compel the Magistrate when making an order under s. 9(1) of the *Juvenile Delinquents Act,* to base his opinion solely on sworn testimony.

With this I agree.

The appeal should, accordingly, be dismissed.

Appeal dismissed.

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

Solicitor for the respondent: G. E. Pilkey, Winnipeg.

[1] [1964] 1 C.C.C. 173, 39 C.R. 329.

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G. W. GOLDEN CONSTRUCTION LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Real estate transactions—Construction company—Sale of land allegedly acquired for investment purposes—Secondary intention—Admissibility of evidence of subsequent transaction—Capital gain or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company was engaged in the business of purchasing land for the purpose of building houses thereon for sale, but also with a view to constructing apartment blocks for renting. In 1953, it had assembled a number of lots on which it built a number of houses which were later sold. However, some of these lots were required by the city of Edmonton for a school and in 1955, the appellant company received 3 other parcels of land in exchange. The company's declared intention was to erect apartments for renting on these new lots it received from the city. In 1958, the appellant subdivided one of these parcels into 3 lots, one of which it sold for a cash payment and another lot. The latter was immediately sold. The Minister assessed the profit realized from the 2 sales as part of the appellant's income. The appellant argued that these sales should be regarded as an unsolicited realization of an investment. The appellant also objected to the presentation of evidence by the Minister that it had sold the balance of the property in 1959 to a shopping centre company. The Exchequer Court upheld the Minister's assessment. The company appealed to this Court.

Held: The appeal should be dismissed.

The evidence concerning the sale in 1959 of the balance of the property which the appellant had received from the city was admissible. That evidence was relevant to show a course of conduct on the part of the appellant. Notwithstanding the fact that the appellant company may originally have intended to build apartments on this land, the evidence disclosed that it had the secondary intention of selling the lands at a profit if it were unable to carry out its primary objective. The property received from the city should be regarded as having been acquired by the appellant as part of the inventory of its business and as having been so held by it when the profit in question was realized. Consequently, the profit was a profit from the appellant's business within the meaning of ss. 3 and 4 of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Transactions immobilières—Compagnie de construction—Vente de terrain censé avoir été acquis pour des fins de

*PRESENT: Taschereau C.J. and Fauteux, Martland, Ritchie and Spence JJ.

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placement—Intention secondaire—Admissibilité d'une preuve de transaction subséquente—Gain en capital ou revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

La compagnie appelante s'occupait d'acheter des terrains dans le but d'y construire des maisons qu'elle vendait, mais aussi dans le but d'y construire des maisons de rapport. En 1953, la compagnie avait réuni un grand nombre de lots sur lesquels elle a bâti plusieurs maisons qu'elle a subséquemment vendues. Cependant, quelques-uns de ces lots ont été requis par la cité d'Edmonton pour y construire une école, et en 1955, la compagnie a reçu de la cité, en échange, 3 parcelles de terrain. L'intention de la compagnie à ce moment-là était d'ériger des maisons de rapport sur ces nouveaux lots qu'elle avait reçus de la cité. En 1958, la compagnie a subdivisé un de ces terrains en 3 lots dont l'un a été vendu pour du comptant et en échange d'un autre lot. Cet autre lot a été vendu immédiatement. Le Ministre a cotisé le profit réalisé lors de ces 2 ventes comme faisant partie du revenu de l'appelante. L'appelante a soutenu que ces ventes devaient être considérées comme étant une réalisation non sollicitée d'un placement. L'appelante s'est aussi objectée à ce que le Ministre présente une preuve à l'effet que la compagnie aurait vendu en 1959 la balance du terrain qu'elle avait reçu de la cité à une compagnie opérant un centre d'achats. La Cour de l'Échiquier a maintenu la cotisation du Ministre. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La preuve concernant la vente en 1959 de la balance de la propriété que l'appelante avait reçue de la cité était admissible. Cette preuve était pertinente pour montrer une ligne de conduite de la part de l'appelante. Malgré le fait que la compagnie appelante pouvait avoir eu originairement l'intention de construire des maisons de rapport sur ce terrain, la preuve a démontré qu'elle avait l'intention secondaire de vendre ces terrains à un profit si elle était incapable de mettre à exécution son premier objectif. La propriété reçue de la cité doit être considérée comme ayant été acquise par l'appelante comme une partie de l'inventaire de son entreprise et d'avoir fait partie de son inventaire lorsque le profit en question a été réalisé. En conséquence, le profit était un profit provenant de l'entreprise de l'appelante dans le sens des arts. 3 et 4 de la *Loi de l'Impôt sur le Revenu.*

APPEL d'un jugement du Juge Kearney de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Kearney J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

J. M. Hope, for the appellant.

G. W. Ainslie and *L. R. Olson,* for the respondent.

[1] [1966] Ex. C.R. 198, [1965] C.T.C. 409, 65 D.C.T. 5221.

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The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Kearney of the Exchequer Court of Canada[1] directing that an order of the Tax Appeal Board be set aside and restoring the assessment of the Minister of National Revenue for the appellant's taxation year 1958, whereby income tax was levied on a net gain of $23,384 realized by the appellant in a series of real estate transactions which are hereinafter described.

The appellant is and always has been engaged in the business of general contracting, and the objects expressed in its Memorandum of Association read, in part, as follows:

> 3. The objects for which the Company is established are:—
> (*a*) To purchase, take on lease or in exchange, or otherwise acquire any lands and buildings, and any estate or interest in, and any rights connected with, any such lands and buildings.
> (*b*) To develop and turn to account any land acquired by the Company or in which the Company is interested, . . .

Nothing turns on the language of this Memorandum of Association standing alone but it is apparent to me from the evidence that in conformity with these objects the appellant in fact engaged in the business of purchasing land in the Province of Alberta and elsewhere primarily for the purpose of building houses thereon for sale, but also with a view to constructing apartment blocks for renting. The appellant's course of conduct indicates to me that the lands alone were also available for resale if "somebody came along" who was prepared to offer a sufficiently high price.

In the course of its business in the year 1953, the appellant purchased a number of parcels of land in the west end of the City of Edmonton which it later assembled into a block with the approval of the city. This land came to be known as the "Parkview Subdivision" and the company there built approximately 300 houses which were later sold. It was one of the conditions of the city's approval of this scheme that the appellant should provide the necessary land for public services including schools, and when the city decided to construct a large high school in this subdivision the appellant was required to transfer to it about 100 small lots in exchange for which in the month of April 1955 the city transferred to the appellant a number of city lots

[1] [1966] Ex. C.R. 198, [1965] C.T.C. 409, 65 D.C.T. 5221.

which the appellant itself selected and which included a property of about 2.85 acres at the corner of 86th Avenue and 83rd Street, then described as lot 42 and sometimes referred to as the "Bonnie Doon" property. A further property of approximately 9 acres which was transferred to the appellant was located on the west side of 85th Street. There was also included in the exchange a lot of a little more than 2 acres which was in another area and which is hereinafter referred to as property "x".

The profit of $23,384 which the Minister of National Revenue has assessed as part of the appellant's income for the year 1958 arose as the result of a replotting of lot 42, hereinbefore referred to. The effect of this replotting was that lot 42 was subdivided into lots 43, 44 and 46, and the appellant transferred the new lot 44 to the Imperial Oil Company Limited in exchange for which Imperial Oil transferred lot 48 to the appellant and paid the sum of $20,000. The appellant then transferred the newly acquired lot 48 to the Lutheran Church for $18,000. It is agreed that this series of transactions gave rise to the profit now sought to be taxed.

The contention advanced on behalf of the appellant, which found favour with the Tax Appeal Board, was that at the time when the city lots were transferred to it in exchange for the Parkview School property the appellant had already determined that, apart from property "x", all the lands were to be used for the construction of apartment buildings which would be held as capital assets so as to provide a permanent source of income for the appellant's controlling shareholder and his family. On this assumption, it was argued that when the properties were sold without any apartment buildings having been built the sales were sales of capital assets and that any profit realized by the appellant as a result thereof was a capital gain and not income.

In the course of delivering the reasons for judgment of the Tax Appeal Board, the learned Assistant Chairman observed that apartment buildings built by the appellant had always been retained by it for the rental income to be had and he went on to say:

> The plan was that any apartment building put up should be treated as for investment purposes only. On this account, the appellant has never disposed of or parted with any apartment building erected by it. Having

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been through a heavy housebuilding programme over a period of years and achieved a position of financial independence, the appellant's controlling shareholder, Mr. G. W. Golden, became more interested in creating and enlarging a permanent source of income for himself and family than in money-making through further building operations.

Although plans and a model of an apartment building to be erected on lots 43, 44 and 46 were prepared for the appellant, none was ever constructed on any part of the property acquired from the city. This was chiefly due to the fact that a very large shopping centre was constructed on adjacent property which, it was felt, would interfere with the value of the appellant's lands as an attractive site for the apartment building, and negotiations were conducted with the builder of the proposed shopping centre with a view to erecting a large screen to block the view of the back of the shopping centre from the proposed apartments but nothing came of this and the project was abandoned.

The evidence of Mr. G. W. Golden, the president and controlling shareholder of the appellant, was clearly to the effect that when it acquired these lands from the city its primary purpose and intention was to use them for the construction of apartment buildings, and steps were undoubtedly taken to this end, but when it became apparent that the sites were not as desirable for this purpose as they had originally appeared to be, the appellant was willing and ready to turn them to account if a sufficiently profitable sale offered itself.

In this latter regard, I am of the opinion, for the reasons stated by Mr. Justice Kearney, that the evidence which was tendered as to the sale in 1959 of the balance of the property which the appellant had acquired from the city is admissible. See *Osler, Hammond & Nanton Limited v. M.N.R.*[1], per Judson J. When questioned about this sale, Mr. Golden said:

> I couldn't afford to build apartments on land that I could get $20,000.00 an acre for. I thought it was a windfall myself. So that the sale was something over $200,000.00.
>
> Q. Let us put it that way, Mr. Golden, you finally reach a point, you may intend to build an apartment or houses on property, and that may be your intention all along. A. I didn't go looking for it. It was not for sale.

[1] [1963] S.C.R. 432 at 434, [1963] C.T.C. 164, 63 D.T.C. 1119, 38 D.L.R. (2d) 178.

Q. If you were offered enough money or it is a good deal and you are willing to sell, you are willing to sell? A. Well, it was not economical for me to build if somebody came along like this.

Q. In other words with a price like that it didn't pay you to keep it for apartments no matter what your original intention had been? A. No.

I think this evidence is relevant to show a course of conduct on the part of the appellant, and when it is remembered that all of the property which the city transferred to it in exchange for the Parkview School site, amounting in all to about 12 acres, was sold off within four years after the appellant had acquired it, I think it is only reasonable to infer that, at least after the abandonment of the apartment project, these lands were being held for resale as a part of the appellant's inventory. It is of some significance to note in this connection that the lands were entered in the books of the company in an account under the heading "Land for Resale".

Notwithstanding the fact that the appellant may originally have intended to build apartments on this land, I think the evidence disclosed that it had the secondary intention of selling the lands at a profit if it were unable to carry out its primary objective.

In this regard, I find it difficult to distinguish this case in principle from the situation which was considered by Judson J. in *Regal Heights Ltd. v. M.N.R.*[1], although that was a case in which the profit to the promoters arose out of a single transaction for the carrying out of which Regal Heights Ltd. had been expressly incorporated, whereas in the present case the taxpayer is an experienced real estate operator of long standing.

An even closer analogy to the situation here in question is, in my opinion, to be found in the case of *Fraser v. M.N.R.*[2], where the appellant and his associate were found to be experienced operators in the field of real estate and where Judson J., giving the unanimous decision of this Court, reviewed the situation in the following passage at pp. 660-1:

Cameron J., accepted the evidence of the appellant that when the two associates acquired the property, they did intend to attempt to develop the

[1] [1960] S.C.R. 902 at 907, [1960] C.T.C. 384, 60 D.T.C. 1270, 26 D.L.R. (2d) 51.

[2] [1964] S.C.R. 657, [1964] C.T.C. 372, 64 D.T.C. 5224, 47 D.L.R. (2d) 98.

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property for rental purposes. He calls this their dominant intention and he says that he is far from satisfied that it was their sole intention at any time. He also finds that they intended to sell at least part of the property if they were unsuccessful in developing it as they planned. His conclusion is contained in the following extract from his reasons:

> In my view, the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments, a profitable sale would be made as soon as it could be arranged.

In spite of the Judge's emphasis on primary and secondary intention, when applied to the facts of this case it amounts to no more than this. He was saying that two active and skilled real estate promoters made a profit in the ordinary course of their business, and this they obviously did. They were carrying on a business; they intended to make a profit, and if they could not make it one way, then they made it another way.

This language appears to me to have direct application to the present case.

I regard the property originally described as lot 42 as having been acquired by the appellant as part of the inventory of its business and as being so held by it when the profit which is here in question was realized. I therefore agree with Mr. Justice Kearney that the profit was a profit from the appellant's business within the meaning of ss. 3 and 4 of the *Income Tax Act*.

For these reasons, as well as for those contained in the reasons of Mr. Justice Kearney, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & MacDonnell, Edmonton.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

IN THE MATTER OF A REFERENCE RE:

STEVEN MURRAY TRUSCOTT

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*Jan. 25, 26, 27, 30
May 4

Criminal law—Murder—Youth of 14½ years convicted of murder—Circumstantial evidence—Whether proper trial—Reference to Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

In 1959, the accused, a boy of 14½ years, was found guilty by a jury of the murder of a girl of 12 years and 9 months. Most of the evidence was circumstantial and the accused did not give evidence at his trial. The conviction was unanimously affirmed by the Court of Appeal. An application for leave to appeal to this Court was refused in February 1960.

Pursuant to s. 55 of the *Supreme Court Act,* R.S.C. 1952, c. 259, the governor general in council, in April 1966, referred to this Court for hearing and consideration the following question: "Had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by Section 597A of the *Criminal Code* of Canada, what disposition would the Court have made of such an appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?"

At this hearing, the Court received a large body of evidence, much of it relating to the medical aspects of the case and also heard the oral evidence of the accused who had not given evidence at the trial.

Held: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ. would have dismissed such an appeal; Hall J. would have allowed the appeal, quashed the conviction and directed a new trial.

Joint opinion of the Chief Justice, Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.: The verdict of the jury, read in the light of the charge of the trial judge, makes it clear that they were satisfied beyond a reasonable doubt that the facts, which they found to be established by the evidence which they accepted, were not only consistent with the guilt of the accused but were inconsistent with any rational conclusion other than that he was the guilty person. On a review of all the evidence given at the trial, the verdict could not be set aside on the ground that it was unreasonable or could not be supported by the evidence. The verdict was in accordance with the evidence. Furthermore, the judgment at trial could not have been set aside on the ground of any wrong decision on a question of law or on the ground that there was a miscarriage of justice. It follows that the judgment of the Court of Appeal dismissing the appeal made to it was right. The effect of the additional evidence which was heard by this Court, considered in its entirety, strengthens the view that the verdict of the jury ought not to be disturbed.

Per Hall J., *dissenting:* The trial was not conducted according to law. There were grave errors in the trial. Nothing that transpired on the hearing in this Court or any evidence tendered before this Court can be used to give validity to what was an invalid trial.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

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RE: TRUSCOTT

Droit criminel—Meurtre—Garçon de 14½ ans trouvé coupable de meurtre—Preuve circonstancielle—Le procès a-t-il été instruit correctement—Question déférée à la Cour Suprême du Canada—Loi sur la Cour Suprême, S.R.C. 1952, c. 259, art. 55.

En 1959, l'accusé, un garçon de 14½ ans, a été trouvé coupable par un jury du meurtre d'une fillette de 12 ans et 9 mois. La majorité de la preuve était circonstancielle et l'accusé n'a pas témoigné à son procès. Le verdict de culpabilité fut confirmé unanimement par la Cour d'Appel. Une requête pour permission d'appeler devant cette Cour a été refusée en février 1960.

Conformément aux dispositions de l'art. 55 de la *Loi sur la Cour Suprême*, S.R.C. 1952, c. 259, le gouverneur général en conseil, en avril 1966, a déféré à cette Cour la question suivante pour audition et considération: «Si un appel avait été présenté par Steven Murray Truscott à la Cour Suprême du Canada, tel que cela est maintenant permis par l'article 597A du *Code Criminel* du Canada, comment la Cour aurait-elle disposé de cet appel après avoir considéré le dossier existant ainsi que toute preuve additionnelle que la Cour peut, à sa discrétion, entendre et considérer?»

Lors de cette audition, un grand nombre de témoignages et de documents ont été présentés, dont une grande quantité se rapportait aux aspects médicaux de la cause, et la Cour a aussi entendu le témoignage de l'accusé qui n'avait pas témoigné lors de son procès.

Arrêt: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie et Spence auraient rejeté un tel appel; le Juge Hall aurait maintenu l'appel, annulé le verdict de culpabilité et ordonné un nouveau procès.

L'opinion collective du Juge en Chef et des Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie et Spence: Le verdict du jury, considéré à la lumière de l'exposé du juge au procès, démontre qu'ils étaient satisfaits hors de tout doute raisonnable que les faits, qu'ils ont trouvé avoir été établis par la preuve qu'ils ont acceptée, étaient non seulement compatibles avec la culpabilité de l'accusé mais étaient incompatibles avec toute autre conclusion rationnelle que celle qu'il était la personne coupable. Sur un examen de toute la preuve qui a été présentée au procès, le verdict ne peut pas être mis de côté pour le motif qu'il était déraisonnable ou ne pouvait pas s'appuyer sur la preuve. Le verdict était d'accord avec la preuve. Bien plus, le jugement de première instance ne peut pas être mis de côté pour le motif qu'il y avait eu erreur sur une question de droit ou pour le motif qu'il y avait eu une erreur judiciaire. Il s'ensuit que le jugement de la Cour d'Appel rejetant l'appel qui lui avait été présenté n'était pas erroné. L'effet de la preuve additionnelle qui a été entendue par cette Cour, considérée en entier, renforce l'opinion que le verdict du jury ne devrait pas être changé.

Le Juge Hall, *dissident:* Le procès n'a pas été instruit selon la loi. Il y a eu de graves erreurs dans le procès. Pour rendre valide ce qui était un procès invalide, on ne peut pas se servir de ce qui s'est passé lors de l'audition devant cette Cour ou de la preuve qui a été présentée à la Cour.

Son Excellence le gouverneur général en conseil (C.P. 760, en date du 26 avril 1966) a déféré à la Cour Suprême du Canada dans l'exercice des pouvoirs conférés par l'article 55 de la *Loi sur la Cour Suprême,* S.R.C. 1952, c. 259, la question telle qu'énoncée plus haut.

Reference by His Excellency the governor general in Council (P.C. 760, dated April 26, 1966) to the Supreme Court of Canada in exercise of the powers conferred by section 55 of the *Supreme Court Act,* R.S.C. 1952, c. 259, of the question stated above.

G. A. Martin, Q.C., E. B. Jolliffe, Q.C., and *R. J. Carter,* for Steven Murray Truscott.

W. C. Bowman, Q.C., and *D. H. Scott, Q.C.,* for the Attorney General for Ontario.

D. H. Christie, Q.C., for the Attorney General for Canada.

Joint opinion of THE CHIEF JUSTICE, CARTWRIGHT, FAUTEUX, ABBOTT, MARTLAND, JUDSON, RITCHIE and SPENCE JJ.:—On September 16, 1959, Steven Murray Truscott, a boy of 14½ years, went on trial for the murder of Lynne Harper, a girl of 12 years and 9 months. The trial lasted until September 30, 1959, when the jury returned a verdict of guilty with a recommendation for mercy. An appeal to the Court of Appeal for Ontario[1] against the conviction was dismissed on January 21, 1960. On the same date the sentence of death was commuted to a term of life imprisonment. An application for leave to appeal to this Court from the judgment of the Court of Appeal was refused on February 24, 1960. At that time this Court had jurisdiction to entertain an appeal only in two cases: (a) where there was dissent by a judge of the Court of Appeal on any question of law (there was no such dissent in this case), or (b) on any question of law with leave of this Court.

By Order-in-Council P.C. 1966/760, dated April 26, 1966, pursuant to s. 55 of the *Supreme Court Act,* His Excellency

[1] (1960), 32 C.R. 150, 126 C.C.C. 109.

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the Governor General referred to this Court for hearing and consideration the following question:

> Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the Criminal Code of Canada, what disposition would the Court have made of such an Appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?

Section 597A of the *Criminal Code* of Canada was enacted by 1960-61, c. 44, s. 11, in the following terms:

> 597A. Notwithstanding any other provision of this Act, a person
>
> (*a*) who has been sentenced to death and whose conviction is affirmed by the court of appeal, or
>
> (*b*) who is acquitted of an offence punishable by death and whose acquittal is set aside by the court of appeal,
>
> may appeal to the Supreme Court of Canada on any ground of law or fact or mixed law and fact.

It came into force on July 13, 1961. On this Reference, therefore, we have power to review law or fact or mixed law and fact.

The Court also received a large body of evidence, much of it relating to the medical aspects of the case. It also heard the oral evidence of the accused. He had not given evidence at the trial.

The case against Steven Truscott was that he met Lynne Harper in the school grounds on the Clinton R.C.A.F. Station at about 7.10 on the evening of June 9, 1959; that he travelled north with her on the cross-bar of his bicycle on the county road; that he turned into Lawson's bush, which is about half way between the school grounds and Highway No. 8; and that he murdered the girl there. His defence was that the girl had asked him to take her to the intersection of Highway No. 8 and the county road; that he took her to this intersection and left her there, and when he was part way on his return journey, he saw a car stop at the intersection and pick her up, and that he never saw her again.

For an understanding of the evidence, it is necessary to describe the neighbourhood, a sketch plan of which is attached to these reasons. The R.C.A.F. Station is at the southerly end of a county road which goes north to King's Highway No. 8. This highway runs east and west. On leaving the Station, immediately on the right is the Robert Lawson farm property. Close to the road there are the usual buildings, including a barn. On the left is the O'Brien

farm property. At the northerly limit of the Lawson property there are 20 odd acres of bush, mostly second growth ash, elm, maple and basswood. The wire fencing between the bush and the road is not in very good condition. There is an entrance to the bush along the northerly limit. It is referred to throughout the evidence as the "tractor trail". From the southerly end of the county road to the tractor trail is 3,366 feet. 1,568 feet farther north the Canadian National Railway crosses the road at right angles. Then, 491 feet farther north there is a bridge over the Bayfield River. This bridge is referred to frequently in the evidence. Then, 1,300 feet farther north is the intersection of the county road with King's Highway No. 8. East from the bridge over the Bayfield River and visible from the bridge there is a swimming hole about 640 feet away.

We will first describe the movements of Lynne Harper in the late afternoon and early evening of June 9. She arrived home from school between 5.15 and 5.30 p.m. and she had finished her supper by 5.45 p.m. After supper she left the house for a short time to apply for a permit for the swimming pool for that evening. She could not get the permit because it was necessary for an infant to be accompanied by a grown-up person. Her parents were unable to go with her that evening. About 6.35 she went to the schoolhouse to assist a Mrs. Nickerson, who was conducting a meeting of Junior Girl Guides. Mrs. Nickerson confirms the time of her arrival. Mrs. Nickerson said that Truscott came along shortly before 7 p.m. and that Lynne Harper went over to speak to him and that after a few minutes they left together on foot in a northerly direction, Truscott pushing his bicycle. She puts the time between 7.00 and 7.10 p.m.

An estimate of the time was also made by a Mrs. Bohonus, an officer of the Brownie Pack, who came to assist Mrs. Nickerson. Mrs. Bohonus said that shortly after she arrived, she looked at her watch and it was ten minutes to seven. According to her, not more than five or ten or, at most, fifteen minutes later, Steven Truscott appeared and talked to Lynne Harper. Mrs. Bohonus does not say how long they talked or at what time they left.

Three boys, Hatherall, Westey and McKay, were at the football field adjoining the school and the county road. They saw Truscott and Lynne Harper come from the

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school area to the county road. Lynne Harper got on the cross-bar of Truscott's bicycle and the two went north on the county road.

We will now deal with Steven Truscott's movements during the early evening of June 9th before he met Lynne Harper. We begin with the evidence of Jocelyne Goddette. She, Lynne Harper and Steven Truscott were all in the same class, Grade VIII, at school. Jocelyne Goddette's story was that Steven Truscott had made an arrangement to meet her at Lawson's wood to show her a new calf. He told her to keep the arrangement quiet because Mr. Lawson did not like people trespassing on his property. She says that he called at her house about 5.50 p.m. and that she told him that she could not come out at the moment because of domestic duties and that she would meet him later if possible. Truscott denies that he made such an arrangement and the call at the house. Jocelyne Goddette's father said that there was a call such as his daughter described but that he did not know who the caller was.

Truscott arrived home for supper between 5.15 and 5.30 p.m. His mother sent him to the store at the end of the street to get some coffee. She fixes the time as close to six o'clock because there was need to hurry in order to get there before closing time. He obtained the coffee and returned home. After supper he went out. His mother had told him that he had to be back by 8.30 p.m. because she and her husband were going out and he was needed for baby sitting.

Paul Desjardine, a fourteen year old boy, rode north on his bicycle to go fishing at the bridge over the Bayfield River at about 6.10 p.m. He met Steven Truscott a short distance south of Lawson's bush. Steven was alone and was riding his bicycle around in a circle on the road. There was no conversation. Truscott denies that there was such a meeting.

Mrs. Beatrice Geiger left her house in the married quarters on the Base riding one of her sons' bicycles to go to the bridge. This was about ten minutes past six. On the way to the bridge Steven Truscott passed her in the bush area riding his bicycle. They were both going north. Steven went as far as the bridge, stopped a second or two, took a look

around and headed south again. She met him the second time at about the railroad tracks. This would be around twenty-five minutes past six or half past six. Truscott said that he did not remember seeing Mrs. Geiger.

Kenneth Geiger, the twelve year old son of Mrs. Geiger, left his home about a quarter or twenty minutes after six to go swimming. He walked to the school and met Robb Harrington and the two boys rode double on one bicycle down to the river. On the way down from the school area to the bridge he saw Steven Truscott. He was sitting on his bicycle in the middle of the road almost opposite the "tractor trail", which is on the northerly limit of Lawson's bush. He was facing towards the station. They passed Steven at about 6.25 or 6.27 p.m. Steven said to Kenneth Geiger that Mrs. Geiger was at the bridge and Kenneth Geiger said that he knew that. Robb Harrington estimates the time as being a quarter to seven. Truscott denies that he ever saw or spoke to Kenneth Geiger.

Ronald Demaray saw Steven on the bridge just before he went home. He believes that he got home between 6:30 and 7 p.m. and that it would take him ten minutes to get home from the bridge. As far as he could see, Steven was alone and just seemed to be looking around.

Richard Gellatly, a boy of twelve years, was at the river on the evening of June 9. He had to return home to get his swimming trunks. He met Steven riding Lynne Harper towards the bridge on the county road about one-quarter of the way from O'Brien's farm. Gellatly was riding south on his bicycle and Steven Truscott and Lynne Harper were riding north. He met them on the station side of Lawson's bush, that is, on the south side. He gives the time as 7:25 p.m. He says that he could be a few minutes out. He put on his trunks at home and returned to the river. It was about ten minutes after he passed Steven and Lynne that he went back to the river. He did not see Steven again. He was familiar with Steven's bicycle. He did not see the bicycle. He said that if it had been lying alongside the road by Lawson's bush or anywhere alongside the road, he would have seen it.

Mrs. Donna Dunkin drove to the river on the county road from the married quarters on the evening of June 9. She

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travelled from the married quarters at the station and pulled off the road just north of the railroad tracks. She saw Richard Gellatly riding his bicycle towards the station just as she pulled off the road to park. She also saw Philip Burns, who was walking behind Richard Gellatly. At the time she saw them, they were between the railway tracks and the bridge over the river. Philip Burns would be no more than ten feet behind Richard Gellatly. She placed the time between 7:05 and 7:15 p.m.

Philip Burns, a boy of eleven years, who was unsworn, started to go south to the Air Force Station from the bridge on foot. He was behind Richard Gellatly. Gellatly started from the bridge on a bicycle. Burns left at approximately 7 o'clock. He fixes the time because he asked Mrs. Geiger what time it was. She did not have a watch. Sergeant McCafferty was close and he said it was around five to seven. Sergeant McCafferty gave evidence on the point and said that when Mrs. Geiger asked him for the time he looked at his watch and said either ten to seven or ten past seven, he could not remember which. Philip Burns says that he swam over to the south side of the river, put on his clothes and went up on the bridge where he waited around for five or ten minutes after being told the time, then he started for home.

Gellatly had left the swimming hole at about the same time. He went along the north bank of the river and Burns along the south bank of the river. Both were on their way home. They left the bridge at about the same time, Burns on foot and Gellatly on his bicycle. This was between 7 and 7:15 p.m.

Gellatly gave evidence that he met Truscott and Lynne Harper south of Lawson's bush at a point between the bush and O'Brien's farm. Burns says that he never did meet Truscott and Lynne Harper or either of them. While walking on his way home, he did meet Jocelyne Goddette and had some brief conversation with her. She was on her bicycle and she was near the south side of the bush closest to the station. She was going north towards the river. Further south along the road near O'Brien's farm and about two minutes later, he also met Arnold George, who was also going north and was behind Jocelyne Goddette.

When Burns met Jocelyne Goddette he had been walking for about ten minutes after leaving the bridge with Gellatly. Michael Burns, a brother of Philip Burns, says that Philip got home about 7:30 p.m.

Jocelyne Goddette, who was thirteen years of age at the time, says, in more detail than we have already outlined, that on Monday, June 8, she had a conversation at school with Steven Truscott. She said to him that on Sunday, the day before, she had gone to Lawson's barn and had seen a calf there. Steven asked her if she wanted to see two more new-born calves. She said "Yes" and he asked her if she could make it on Monday, and she said "No". He asked her if she could make it on Tuesday and she said she would try. Then on Tuesday, he repeated his invitation and she told him she did not know whether she could go and he invited her to meet him if she could go on the right-hand side of the county road just outside the fence by the woods. He repeated his warning not to tell anybody. The time for the appointment was six o'clock. She says that he called at the house at ten to six when she told him that she could not go but that she would try later. She had her supper and left the house about 20 minutes after 6 or 6:30, and went towards Lawson's barn to see if Steven was there. It would take but a few minutes to get to Lawson's barn. She stayed there for about five minutes. Steven was not at Lawson's and she went to see if he was at the meeting place. The meeting place was on the right-hand side of the county road just outside the fence by the woods. She met Philip Burns at the southerly limit of Lawson's bush and had a brief conversation with him. She bicycled north and got off her bicycle and walked slowly looking into the woods. She turned in the tractor trail and went three-quarters of the way in and then looked towards the railway bridge. She shouted Steven's name twice and then looked towards the woods and shouted it three or four times. She turned her bicycle around on the hard part of the ground and at that point she saw Arnold George going past. Arnold George also saw her on the tractor trail forty feet back. She did not see any sign of Steven on the tractor trail. When she saw Arnold George he was just going past the entrance to the tractor trail. She and George were both looking for Steven Truscott and they had a brief conversation. While they

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were talking Bryan Glover passed on his way to the bridge. He noticed them but did not stop. She came out of the tractor trail and went towards the river to the bridge. She did not see Steven at the river. She stayed there five or ten minutes and went back to Lawson's farm. She estimated that she got back to Lawson's a little before seven. She remained in the barn with Mr. Lawson for an hour and a half while he was doing his chores. The next morning at school she asked Steven why he had not been there and he just shrugged his shoulders.

Bryan Glover says that he arrived at the bridge a minute or two before George. He then looked for some friends on the west side of the river and about five minutes later returned to the bridge, saw his friends on the railway bridge over the river and went to join them. When George arrived at the bridge he says that he went over to the swimming hole, still looking for Truscott.

There is obviously something very wrong with Jocelyne Goddette's times. The jury would have to test her estimate of time along with the evidence of the time when Philip Burns and Arnold George were on the road and spoke to her and Bryan Glover who passed and noticed her, and also the evidence of Mr. Lawson. Lawson says that she first arrived at his barn at approximately 7:15. She left at 7:25. He fixes this time because she asked him the time before she left. She returned in twenty minutes to half an hour later.

Teunis Vandenpool, a boy of 15 years of age, lived on a farm on Highway No. 8 about a mile and a quarter east of the county road. On June 9 after supper he went swimming. He left his home at five or ten minutes after seven. He went west on Highway No. 8 and then down the county road. He was travelling by bicycle and was at the junction of Highway No. 8 and the county road about 7:15 or 7:20 o'clock. He didn't see any persons at or near the corner. He didn't see a car stopped. After he reached the corner he went down towards the bridge.

Between the bridge and the railroad is a field and he went down the path leading towards the river. This would be west of the bridge. He had his bathing suit on and he took off his clothes and went in the water. He remained in the water for ten or fifteen minutes and went home. He

estimates that he made the return trip to the intersection of the county road between 7:30 and 7:35 o'clock. He arrived home at a quarter to eight. He noticed that when he started to do his homework, which was immediately after he got home. He didn't know Lynne Harper or Steven Truscott. He did not see a girl on a bicycle on the county road or a boy in red jeans. Truscott was wearing red jeans that evening. There were bicycles parked on the bridge but no persons on the bridge.

Steven Truscott was back at the schoolyard at 8 p.m. or shortly after that hour. He was back at home by between 8:25 and 8:30 p.m. according to the evidence of Mrs. Truscott, and he was seen at his home by his friend Arnold George about 8:45 p.m. We deal later with the conversation between these two at that time.

Truscott admitted that he had met Gellatly. He made this admission to F/Sgt. Johnson and Sgt. Anderson of the Ontario Provincial Police on Wednesday, June 10, and to Sgt. Wheelhouse of the R.C.A.F. and Constable Hobbs of the O.P.P. on Thursday morning, June 11. F/Sgt. Johnson said that Truscott's definition of the place of meeting was "just about the brow of the hill," which is a short distance south of the tractor trail; Sergeant Anderson that it was "halfway between the intersection at the school, the public school and the bush", which is about where Gellatly said it was; Sergeant Wheelhouse that is was "about halfway between where I had picked up Lynne and the crest of the hill", which is much the same as the admission to Sergeant Anderson.

The case went to the jury with five witnesses saying that they did not see Truscott and Lynne on the road. Two of these were actively looking for him.

The Crown's submission was that after he passed Gellatly he turned into the bush with Lynne and that this accounted for the failure of the other witnesses to see him on the road with Lynne. On the other hand, three witnesses who were called by the defence, Douglas Oats, Gordon Logan and Allan Oats, say that they did see Truscott on the road. The first two, Douglas Oats and Gordon Logan, say that they saw him cross the bridge with Lynne on his way to the highway. Allan Oats says that he saw Steven on the bridge alone some time between 7:30 and 8 p.m.

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Douglas Oats, aged 11 years, said that he was on the bridge over the Bayfield River on the evening of June 9 looking for turtles. Steven Truscott and Lynne Harper came by him on the bridge. He turned around and put up his hand and said "Hi". Lynne was seated on the cross-bar of the bicycle. They were going north towards No. 8 highway. He did not see Lynne again and did not see Steven again that night. He stayed on the bridge until about 7.30 and got home about a quarter to eight. The only time that he saw Steven that night, Lynne was with him.

Gordon Logan, aged 13, first heard that Lynne Harper was missing on the morning of June 10 just before school started. The previous evening he had been down at the Bayfield River fishing and swimming. He saw Steven and Lynne go by on the bridge on Steven's bicycle. Lynne was sitting on the cross-bar on the bicycle. He made this observation when he was down at the swimming hole. He was out of the water. The two were near the north side of the bridge when he last saw them travelling towards Highway No. 8. He was standing just by the bend in the river on a big rock. This rock is 642 feet from the bridge at water level. He saw Steven about five minutes later when Steven rode back to the bridge, stopped and got off his bicycle. He does not know what Steven did from then on.

The presence of Gordon Logan at the swimming hole at 7:30 p.m. was confirmed by Beatrice Geiger, who was at the swimming hole at that time. She also said that there were people on the bridge. She could not tell whether they were men or women or children, or boys or girls. She did not pay too much attention. She thought that from where she was, had she been looking for someone she knew, she could have recognized him.

Allan Oats, 16 years of age, says that he went for a ride on his bicycle towards the river. He turned back when he was about 800 feet from the bridge. He saw Steven standing on the bridge wearing red pants and a light coloured shirt. He places the time between 7:30 and 8 o'clock.

The prosecution suggested that Douglas Oats was mistaken; that on his own admission he only saw Truscott once that evening and that the time must have been 6:30 p.m., when Douglas Oats was looking for turtles at the

bridge and Truscott was alone at the bridge. This was based on the evidence of Mrs. Geiger and Demaray.

Gordon Logan's evidence was questioned on the ground of credibility and ability to make the observation that he claimed to have made.

The credibility of Allan Oats was also attacked. He had evidence highly favourable to Truscott on Tuesday, June 9. He said that he mentioned it to nobody except his mother and no one else knew about it until Tuesday, June 16, when he was approached by Mrs. Durnin at the request of Truscott's father.

This conflict between evidence pointing to a disappearance into Lawson's bush and evidence asserting that Steven Truscott had crossed the bridge with Lynne Harper on his way to the highway and had returned alone, was the critical issue in this case and it was entirely a jury problem. The Judge's instruction to the jury on the issue was emphatic and clear:

> Now then, it is the theory of the Defence, and they brought evidence to show that, as I say this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.
>
> In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

Arnold George says that on the evening of Lynne Harper's disappearance he went to Truscott's house about 8.45 p.m. He gives the following account of their conversation:

> Q. What was said?
>
> A. Well, I asked him where he had been that night and he said: "Down at the river". I said: "I heard that you had given Lynne a ride down to the river," and he said: "Yes, she wanted a lift down to Number Eight Highway." And I said: "I heard you were in the bush with her". And he said: "No, we were on the side of the bush looking for a cow and calf." And he said: "Why do you want to know for?" and I said: "Skip it and let's play ball."

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At the preliminary hearing he had not said anything about Steven saying that he was on the side of the bush looking for a cow and calf.

Truscott in his oral evidence denied that there was ever any such visit from Arnold George or any such conversation.

Next, on the evening of Wednesday, June 10, Arnold George says that he had another conversation with Steven:

> Q. And what was said on that occasion?
>
> A. Well he said that he—like the Police had questioned him and that he had told them he had seen me down there, and it wasn't me, it was Gordie Logan; and he thought that Gordie was me and he said that I had seen him, so he told the Police that. And down there at his house he told that to me and he said that the Police were going to go down to my place to check up, so I agreed that I would tell them what was just said.

George did support Truscott's story in his statements to the police but after the discovery of the body the following day, Thursday, July 11, he retracted them. His evidence at the trial we have already outlined. It was that he had been looking for Steven and had not seen him.

Truscott, on the reference, denied that this conversation ever took place either on the evening of Wednesday, June 10, or at any other time.

On Wednesday evening, June 10, there was talk about the disappearance among five boys who were together at the bridge. These were Paul Desjardine, Arnold George, Thomas Gillette, Bryan Glover and Steven Truscott. Paul Desjardine was telling Truscott that he had heard that he had taken Lynne into the bush. The account of the conversation varies from boy to boy but there is no doubt, according to these witnesses, that a suspicion was being voiced and that Truscott was appealing to Arnold George in support of his denial and that George was supporting him to the extent of saying that Steven was at the side of the bush looking for the cow and the calf.

Truscott did not give oral evidence at the trial. His defence that he had taken Lynne Harper to the intersection where she had been picked up by a strange car was before the jury in the form of exculpatory statements given to the police. On the reference he did give oral evidence in more detail. He described his movements from the time he left school until he went home to supper. Before supper and

just before the store closed, he went to get the coffee for his mother. He left home about 6.30 p.m. and went first to the school grounds. He found no one there and rode down to the railroad tracks on his bicycle. He could see no one at the river so he turned around a couple of times and went back to the station. He said that he met no one on the way down or back. He stopped at the end of the school and was watching the Brownies. Lynne Harper came over and asked him for a lift down to No. 8 Highway. After a few minutes they walked to the county road and then got on the bicycle. He says that they left at 7.30 p.m. He fixed the time by the school clock. On the way down to No. 8 Highway he passed Douglas Oats on the bridge. He let Lynne Harper off at the highway and rode back to the bridge. When he arrived at the bridge, he looked back and saw "there was a car pulled in off the highway and she got in the front seat". He said the car was facing northeast. He described the car as a 1959 grey Chevrolet with what appeared to be a yellow coloured licence plate. He next said that he stayed at the bridge for five or ten minutes and from there saw Arnold George and Gordon Logan at the swimming hole. He then went back to the school, arriving there about 8 p.m.

On Truscott's return to the school grounds there is evidence that there was some curiosity among a group of children about what had happened to Lynne Harper. Several children had seen him leave with her. He came back alone. When asked whether they made any comment to him or whether there was any conversation with them, he replied in the following words:

> I believe one of them asked me—they said "What did you do with Harper, feed her to the fish?" and I replied that I had taken her and let her off at Highway No. 8.

When Truscott returned to the schoolyard at approximately 8 p.m, no one noticed anything unusual about his demeanour, conduct or the condition of his clothing. Most of his conversation appears to have been with his older brother Kenneth. This conversation was testified to by three witnesses who were standing fairly close. These witnesses were John Carew, Lorraine Wood and Lyn Johnston. It had to do with an exchange of bicycles and an exchange of shoes. Kenneth Truscott had with him a smaller bicycle belonging to a younger brother. Steven Truscott was going

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home and he left his own bicycle and took the smaller one with him. There was also some conversation between the two about shoes. Steven Truscott was wearing crepe-soled canvas shoes belonging to Kenneth. Kenneth was wearing a pair of Steven's high boots. No exchange was actually made.

The crepe-soled canvas shoes did not enter into the trial because of a ruling of the trial judge that the prosecution had no right to call more expert evidence. But on the reference a photograph was introduced of the impression of a shoe near the girl's body. The marks of the rubber in a foot impression near the body of Lynne Harper corresponded with the marks of the shoe worn by Truscott to this extent: The shoes were of similar manufacture, the marks resembled each other, but the most that the evidence proves is that someone wearing shoes similar to those worn by Truscott on the night of the disappearance made a foot impression close to the body of Lynne Harper. There was no further identification. The evidence does not prove that the impression was made by the very shoes worn by Steven Truscott.

Truscott was unable to state the exact time of his arrival at home but his father and mother were still there. He says that he spent the rest of the evening at home and that the first occasion on which he knew that anything unusual had happened to Lynne Harper was when her father came to the house the following morning, which would be June 10, before he had left for school. The following is his account on the brief conversation at the house:

Q. What happened when he came?
A. He asked me if I had seen Lynne.
Q. Did he ask you or did he ask your mother?
A. I believe he asked my mother and my mother called me over and I informed him that I had given her a ride to the highway.
Q. Anything else?
A. I don't remember anything else.
Q. Do you remember when the first time you mentioned, if you did mention it, a grey 1959 Chevrolet car to anybody?
A. I don't remember who the first one was that I mentioned it to.
Q. Do you remember when you mentioned it, even if you do not remember who you mentioned it to?
A. I believe it was the police.

Mr. Harper's account of the conversation is that Truscott did say on this occasion that Lynne "had hitched a

ride on No. 8 Highway". There is nothing in the record to indicate that Truscott had mentioned the car to anyone on his return to the schoolyard.

We have already said in dealing with the evidence of Arnold George that George said that he visited Truscott soon after Truscott's return to the house to enquire about Lynne Harper. He also gave evidence of another conversation the following evening when he said that he was asked to say that he had seen Truscott at the bridge. We have also mentioned Truscott's denial of both these conversations.

Truscott gave his own version of the conversation among the five boys at the bridge on Wednesday evening, June 10. It differs from the account given by the boys at the trial. Their evidence is summarized above. This is Truscott's account:

Q. Was there any conversation about Miss Harper?
A. One of the fellows mentioned something about it, yes.
Q. Do you remember what it was he said?
A. He said, "I heard you had Lynne in the bush".
Q. What did you say?
A. I asked him who had told him this and he said Arnold George did. I went over and asked Arnold George and he said he had never told anybody that.
Q. Were you in the bush with her?
A. No, sir.
Q. How was this said when it was said, that he heard you had her in the bush?
A. More or less kidding with each other.
Q. Did you make any statement that you were not in the bush, you had just been at the edge of the bush looking for calves, or anything of that nature?
A. No, sir.
Q. Had you been anywhere near the bush looking for calves with Miss Harper?
A. No, I wasn't.
Q. Do you remember any discussion about that time about calves in the bush?
A. No, sir.

Truscott denied any conversation with Jocelyne Goddette concerning the making of an appointment to go looking for newborn calves. He denied that he called at Jocelyne Goddette's house about 5:50 p.m. to confirm the appointment. He denied that on the trip down to the river between 6 and 7 p.m. he met Ken Geiger and Robb Harrington. He denied any conversation with Geiger about his mother being at the

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river. He denied that he had seen Mrs. Geiger or Paul Desjardine during the course of that trip and said that he did not remember any of them giving evidence at his trial. He denied having seen either Robb Harrington, who was with Geiger, or Ronald Demaray, who says that he was at the bridge while Truscott was there. These were all people who gave evidence that they met him and described his movements on the road between 6.30 and 7.00 p.m.

He denied that he had met Gellatly on the highway and said that he did not remember telling the police that he had met Gellatly. At the trial Gellatly's evidence had not been challenged on cross-examination.

He denied that Arnold George came to his house at 8.30 p.m. on June 9 and that he had any conversation with George at any time during that evening. This was the occasion when George said that he had heard that Truscott was in the bush with Lynne and when Truscott had replied that he was on the side of the bush looking for a cow and a calf.

He denied that he had any conversation with George the following evening, Wednesday, June 10. This is the occasion when George said that he had agreed with Truscott to tell the police that he, George, had seen Truscott at the bridge on Tuesday evening.

Truscott told the police that when Lynne entered the car at the highway intersection, it was facing northeast and that he could see the colour of the licence plate when he was standing on the bridge looking towards Highway No. 8. The police questioned this. Constable Tremblay, Ontario Provincial Police, stood on the bridge on Wednesday, June 10, with Truscott and his mother. From the bridge Tremblay noted that he could not see any licence plates on cars proceeding along Highway No. 8 and also, that when a car with black and white plates travelled north on the county road and reached the highway, he could no longer see the licence plates. The bridge is 1,300 feet from the highway intersection. A photograph was introduced which seemed to support the police evidence.

On the reference this photograph was described as being highly distorted and not representing what could be seen by the human eye standing where Truscott said he was

standing. Also on the reference, evidence was given by a team of private investigators who had various colours of licence plates that identification of colour could be made from the bridge. The Crown did not introduce evidence to contradict this.

In the final argument, Crown counsel said he accepted the evidence such as it was. His criticism of the evidence was that on the admission of the witness who drove the car, it could only be placed in the position where it was photographed by driving east across the intersection, stopping and backing up to place the car in a northeasterly position where it would catch the late afternoon sun, and that no car travelling from west to east would get into that position in the way Truscott described to pick up a hitch-hiker standing on the southeast corner of the intersection. The evidence given on the reference proves no more than this, that if a car is placed in this position at a certain time with the sun shining on the licence plate, an investigator standing at the bridge and knowing what he was looking for could identify colours, but not entirely without error.

The evidence at the reference upon this topic would seem to weaken the Crown's submission to the jury as based on the evidence adduced at the trial that Truscott could not have seen from the bridge what he alleged he had seen, i.e., that Lynne Harper entered a 1959 grey Bel-Air Chevrolet with a yellow licence plate, as it would seem that if that car had been in the one position in which the vehicle used by the witness LaBrash to carry out his test had been placed, Truscott could have made such observation. The purpose of that evidence at trial, however, was to attack the credibility of Truscott on this important part of his defence. Since the evidence was given at trial, Truscott has testified on the reference. We refer herein to the parts of his testimony which simply cannot be believed. In such circumstances, the evidence given at the reference in relation to the possibility of making the observation of an automobile so placed becomes of much less importance.

The body of Lynne Harper was found on Thursday, June 11, 1959, at 1:45 p.m., in Lawson's bush some distance in from the tractor trail. The evidence strongly pointed to this as the place where she was raped and murdered. We have

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already quoted from the instruction of the trial judge to the effect that the jury could not convict unless the jury entirely rejected the evidence of Douglas Oats and Gordon Logan that they saw Truscott on the bridge with Lynne Harper on their way to the highway intersection. All the evidence, including the medical evidence, has to be related to this critical issue.

An outline of the problem facing the jury at the trial seems to be this. First of all, they had the time of departure from the school grounds fixed with reasonable certainty by the evidence of Mrs. Nickerson and Mrs. Bohonus at not later than 7:15 p.m. Then, on his own admission, Truscott met Richard Gellatly between the school yard and Lawson's bush. He did not meet Philip Burns as he should have done if he had continued on his way to the highway. He was not seen by Jocelyne Goddette and Arnold George as he would have been if he had continued on to the highway and had returned alone from the intersection to the bridge. The jury's conclusion must have been that after passing Richard Gellatly and before Philip Burns, Jocelyne Goddette and Arnold George had an opportunity to see him, he had disappeared with the girl into Lawson's bush.

Before they could come to this conclusion the jury had to reject the evidence of Douglas Oats and Gordon Logan and they must have done so with the emphatic warning of the trial judge in their minds. On Truscott's story, the girl was proposing to go to a place where there were a few ponies. This was about 500 yards east of the intersection. Yet according to him she was still at the intersection when Truscott had returned to the bridge 1,300 feet to the south, from which point he says that he saw her getting into a car, although she was only proposing to go 500 yards. If this were true, then whoever picked her up or some other person would have had to bring her back to Lawson's bush, either dead or alive, unnoticed by anyone. If dead, he would have had to place her body in the bush and create the appearance that she had been murdered at that spot.

We do not think that there is any doubt about the place of death. The position of the body, the scuff marks and a footprint at the foot, and the flattening of the vegetation between the legs, indicated that the act of rape took place

there. There were a number of puncture wounds on her back and shoulders, some of which were caused before death and some after death. Under the wound in her left shoulder, which she suffered before death, was a pool of fluid blood lying on the vegetation. The wounds were consistent with their having been made by twigs scattered around the ground. A small quantity of blood was found on the dandelion leaves at the fork of the body. Under her left shoulder was a button from her blouse. According to the evidence of Elgin Brown, this button would be ripped from her blouse when it was torn to form the ligature with which she was strangled. Her clothing was in the area where the body lay.

There was evidence on the reference but not at the trial given in support of a theory that the girl had been killed elsewhere and her body subsequently brought back to the woods where it was found. This evidence was based on an observation from photographs of the body of what appeared to the witness to be a condition of blanching. This will be dealt with later.

We will do no more at this point with the medical evidence than attempt to summarize what was before the jury and what the issues were. The first witness was Dr. J. Ll. Penistan, who held an appointment as pathologist in the Attorney General's Department and was pathologist in charge of the laboratories at the Stratford General Hospital. He arrived at Lawson's bush at 4:45 p.m. on June 11. He described the position of the body on the ground and the state of the body and the clothing. The girl's blouse had been torn up one side and was tied tightly around the neck and secured by a knot under the jaw on the left side. There was a pool of blood under the left shoulder, enough to enable him to take a sample amounting to a dessert or tablespoonful. He described the condition of the ground below the fork of the body and took samples of dandelion leaves.

The body was removed to Clinton where he conducted an autopsy the same evening. He certified the cause of death as strangulation by a ligature. He removed from the stomach about one pint of a meal of mixed meat and vegetables. Very little of the meal had passed from the duodenum

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into the small intestine. His conclusion on the time of death is contained in the following extract from his report:

Note on time of death: This opinion, which would place the time of death between 7.15 and 7.45 p.m. on 9th June, 1959, is based on the following observations and assumptions:—

1. The extent of decomposition, which is entirely compatible with death approximately 45 hours prior to identification, having regard to the environmental and climatic conditions.
2. The extent of rigor mortis. This had almost passed off, a finding again compatible with death at the suggested time.
3. The limited degree of digestion, and the large quantity of food in the stomach. I find it difficult to believe that this food could have been in the stomach for as long as two hours unless some complicating factor was present, of which I have no information. If the last meal was finished at 5.45 p.m., I would therefore conclude that death occurred prior to 7.45 p.m. The finding would be comparable (sic) with death as early as 7.15 p.m.

The other medical evidence given by the prosecution related to the condition of Truscott's penis. On the evening of Friday, June 12, 1959, in the presence of his father, Truscott was examined by Dr. Addison, the family physician, and Dr. Brooks, Senior Air Force Medical Officer. They found what they described as two lesions, one on each of the lateral sides of the shaft of the penis, about the size of a twenty-five cent piece, oozing serum. These lesions were immediately behind the glans. The penis appeared swollen and slightly reddened at the distal end.

Dr. Addison said it looked like a brush burn of two or three days' duration. He was of the opinion that there was nothing inconsistent with the injuries having been caused by entry into a young small virgin. The injuries could have been caused by a boy of Truscott's size and age trying to make entry into an under-developed 12 year old girl.

From his examination of the penial injuries, Dr. Brooks was of the opinion that they had been incurred between 60 and 80 hours previously. In fixing the time he allowed for the fact that the injuries would not be exposed to the air.

The medical evidence for the defence was given by Dr. Berkely Brown. He is a specialist in internal medicine and a member of the staff of the Department of Medicine, University of Western Ontario Medical School. His opinion was that normal emptying time of the stomach after a mixed meal would be three and one-half to four hours.

As to the condition of the penis, he thought that it was highly unlikely that penetration would produce the lesions described. His opinion was that it is rare that the penis is injured during rape and that if it is, the injury is usually to the frenum.

We do not wish to give any impression from this brief summary that the medical evidence at trial was in any way perfunctory. It was, in our opinion, careful and detailed, and it was tested by careful and detailed cross-examination. Our purpose at the present time is to show that the medical issues before the jury were well defined. These issues were the time of death and the condition of Truscott's penis as implicating him in the commission of the crime. On the reference many more witnesses were called. Some supported Dr. Penistan's opinion on the time of death, some Dr. Brown's. Some said that the condition of Truscott's penis was consistent with rape. Others supported an innocent explanation, including Truscott himself. This evidence will have to be analysed in detail. The prosecution submits that the whole of the evidence, including the medical evidence given at trial, after being weighed by the jury leads inevitably to the conclusion of guilt and that there was no room for any other rational conclusion. The Crown's further submission is that there were no new issues raised on the reference in connection with the time of death and that there was simply more evidence relating to it and that the weight of this evidence supports Dr. Penistan's opinion that death occurred within two hours of the last known meal, that is, before 7:45 p.m.

We next set out the following more detailed summaries of the medical evidence:

(a) Medical evidence at the trial as to the time of death.
(b) Medical evidence at the trial and on the reference relating to the condition of Truscott's penis.
(c) Medical evidence on the reference taken witness by witness.

(a) *Medical evidence at the trial as to the time of death*

From the opening of the trial the attention of the jury was sharply focussed on the importance of the medical evidence as to the time of death.

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In opening the case to the jury Crown Counsel referred twice to the medical evidence as to the time of death as follows:

> On this day, Tuesday, June 9th, you will hear witnesses tell of Lynne's movements after she left school, playing football as some member of the school team. Some playing field on or near the locale of this, being driven home by her teacher, having her supper with her mother and father, and being seen walking away from her home after the completion of supper. I am avoiding, quite deliberately, giving you times in there of when she arrived home. When she had her supper. When she finished her last meal. When she left the house. I will simply say it was about the supper hour. These times are important, Gentlemen, and I want you to note them as you hear from her parents. They won't follow one another probably. The mother first and perhaps a little later the father, but I would ask you to note, when they are in the box, what she had to eat. Also when she finished her meal, and I will tell you why. You will later hear from a Provincial Pathologist who did a post-mortem on her body, and he will give you an opinion on the time of her death, based on his observation of her stomach and its contents. His opinion will be based, probably the time of death, to the time of finishing the last meal, so I will prefer you to hear that, because it is of such importance, from the lips of the witnesses, themselves.
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> * * *
>
> The body was later removed—when I say later, that same afternoon, that later afternoon, to Clinton, where Doctor Penistan, who arrived on the scene at the bush did a post-mortem. He will testify as to the cause of death and also the probable time of death.

As witnesses were called for the defence, Counsel for the Defence was required to address the jury first. His address commenced at 10.00 a.m. on Tuesday, September 29th, 1959, and concluded at 4.40 p.m. the same day. There was an adjournment for lunch from 12.45 p.m. to 2.15 p.m. and during the afternoon there was a short recess.

All that Counsel for the Defence said as to the time of death as shown by the medical evidence was as follows:

> Now then, there is the question of the time of death. The opinion of an expert is only as good as the facts on which it is based, the opinion is based. If the opinion of an expert is based on facts that are incorrect, then that opinion should carry no weight. When Doctor Penistan said to you Gentlemen: "I place the time of death between seven and seven-forty-five, and I place it at that time because a stomach with a normal meal should empty in from one to two hours, but this meal was poorly masticated and that would increase the time which would be taken to digest this food and I allowed an extra hour because of the poorly masticated meal, and allowing that hour I have placed the time of death at seven to seven-forty-five, because I concluded this food had not been in that stomach more than two hours". And you heard about his examination. The stomach was emptied into this quart sealer, and then he and Doctor Brooks took the sealer and turned it around like this, and looked at it. And they say they

saw this and they saw that. Now, what in the world kind of examination is that on the contents of the stomach to base a time of death? To give evidence on a serious charge such as this?

Here was a Government Pathologist making his examination by looking at the contents in a bottle with the light against him and the light behind him. There was no chemical examination of the contents of that stomach. There is no evidence of any chemical examination of the contents of that stomach. Doctor Penistan was asked if there was any examination to determine the hydrochloric acid content of the stomach, which is a good gauge as to the time to which digestion had progressed. No such test was made.

Now, you heard the evidence of Doctor Brown. He graduated in 1940. He spent a year in pathology and five years in the Army, doing post-graduate work for two years at London, Ontario. He took two more years in London, England. He received a degree of Member of the Royal College of Physicians. He is on the staff of the Medical school of Western University. He specializes in diseases of the stomach. He is a consultant to the Ontario Cancer Association. Consultant to the Department of Veterans' Affairs and consultant to the Ontario Hospital, but not on mental problems, but the internal physical problems. Now, there is a man of very considerable standing and must be a man who knows his specialty or he wouldn't have attained such prominence, and his specialty is the stomach. And what did he tell you? He said that the stomach normally empties in between three and a half and four and a half hours, not one to two hours, as Doctor Penistan said.

Now I suggest to you that a man who specializes in the problems of the stomach is in a very much superior position to help you as to the emptying time of the stomach, rather than a pathologist who does not specialize in the stomach or its problems, and I ask you to accept the evidence of Doctor Brown when he said that the normal emptying time of the stomach was three and a half to four hours. And he said further, because of this poorly masticated food, it would require a further hour and it would take four and a half to five and a half hours for the stomach of this girl to empty.

Now, Doctor Penistan based his estimate that this food had not been in this stomach more than two hours, on the assumption that the stomach normally empties between one and two hours. I suggest to you that if the stomach emptied in one to two hours, that people would be extremely hungry before the next meal, four or five hours later. I suggest to you that it is only proper that you accept the expert opinion of Doctor Brown. If his opinion is accepted, then you must reject the estimate of the time of death by Doctor Penistan, because it is not based on proper facts. The time of death may be very important. You heard Doctor Brown also say that it was the effort to determine the time of death by the progress which had been made in the digestion of the meal of the stomach was quite unreliable and an unsatisfactory way of determining the time of death. You heard him say that a complete examination of the small bowel would be helpful in determining how much food had passed from the stomach. You heard Doctor Penistan state that the stomach was distended with one pint of food. Now, we have no information as to how much food was consumed. I asked Mrs. Harper how much meat was served to the girl and she didn't know. Her husband had served it. So none of the witnesses gave you any information as to how much food had been consumed. Surely it would take considerably longer to digest a big meal than a small meal. You heard Doctor Brown say that if a pint of food is consumed, that the stomach will produce a pint of digestive juices and you then have

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two pints in the stomach, and according to him the stomach wouldn't be fully distended—the stomach of this girl wouldn't be fully distended unless it contained three or four pints.

And then, again, Doctor Penistan may be in error in his estimate of the contents of the stomach. You saw the jar. About a half a pint. A quart sealer, about a quarter of the sealer is filled with the contents. Now, it may be said that some part of that was used up in tests, but we know of no tests. The doctor certainly didn't use any up. I suggest to you it would be dangerous to assume that the doctor removed more than that quantity of food from the stomach. And I do, with all sincerity, suggest to you twelve men, on whose shoulders rests the question of the guilt or non-guilt of this accused, that it would be highly dangerous, in view of the evidence of Doctor Brown, to accept the evidence of Doctor Penistan on that point.

Counsel for the Crown dealt with this question of the time of death as follows:

On Tuesday, June 9th, Lynne Harper, age twelve, played ball after school, was driven home by her teacher, Miss Blair, and then had her supper of turkey, peas, etc., finishing at a quarter to six. You have the evidence of both her parents on that. When her body was found in the bush, Thursday, June the 11th, Doctor John Penistan, a Provincial Pathologist with a highly specialized education and training, and years of experience in determining causes of death and time of death, and all the particulars can only be arrived at by a doctor trained in a specialist field.

He arrived soon after the body was found and attended at the scene where it was found in Lawson's bush. He made a study of the position of the body, the surroundings, calculated the climatic conditions that applied. The marks, the terrain, made some observations on what he noticed about the flattening of vegetation between the legs. Marks, I said. This blouse about the neck. He was at a great advantage to find it there and see the body at the scene. And then he had the body removed to a Funeral Home in Clinton and performed a full post-mortem examination there. From careful study he gave the opinion that death had taken place where the body was found, in Lawson's woods. I do not believe he was cross-examined on that. That was his stated, clear opinion, that death had taken place in Lawson's woods. He gave the cause of death as strangulation by the blouse knotted around the neck. And, Gentlemen, you will have among the Exhibits you take out to the Jury room, a picture, Exhibit forty-two, that will show you how that blouse was about the neck. That picture was taken at the funeral home.

Now, Doctor Penistan, after all these observations, gave the time of death, which is important. He gave the time of death as from seven p.m. to 7:45 p.m. on the date of Tuesday, June 9th. That is an hour and fifteen minutes, two hours after the last meal, and no one has raised, I suggest, a suggestion or doubt, serious doubt but what she finished her last meal—consumed her last food at a quarter to six, as described by her parents.

Now, on what did he base his observation? On what did he base his opinion? First he had the stomach, which he described as distended with about a pint of contents. These were put in a jar. The jar was taken to Toronto, to Mr. Brown. The evidence of Mr. Brown was he turned the jar and contents over to Mr. Funk of the laboratory. You heard my explanation, that I had run out of expert witnesses. I did not call Mr. Funk, but I made him available to the defence. You haven't heard from Mr. Funk. I

only leave to you, Gentlemen, from the evidence of Doctor Penistan, what went into the jar, the amount that went into the jar, to draw your reasonable inference.

Now, he observed the limited degree of digestion or change in these contents. The absence or near absence of anything in the intestine, the small intestine leading from the stomach. He observed the extent of decomposition, and he observed the extent of rigor mortis in the body, and from those three factors he arrived at the opinion he gave you of the time of death as being from 7:00 p.m. to 7:45 p.m.

Now, what doubt does the defence cast on that opinion of Doctor Penistan, on the time of death? Obviously the defence speaks to show you that it was later, that Doctor Penistan was wrong. And on what do they rely? I might have mentioned, incidentally, that Doctor Brooks was present during the autopsy and confirmed the observations that he and Doctor Penistan each made of the stomach contents, the extent of digestion and so on. But Doctor Brooks, probably, despite his high qualifications in the general field of medicine, did not give opinions or attempt to do so on the rigor mortis factor, because he acknowledged that to be the field of Doctor Penistan.

Now in advancing their theory that death was later. What does the defence put before you? They called Doctor Brown who never saw the stomach, who never was in the woods, never saw the body, never saw the quantity of food in the stomach when it was opened, the nature of the food, never noted the emptiness of the intestines. No chance to know anything about rigor mortis, the state of the body, its decomposition, but just from learning, just from learning. He gives a time of three and a half, four hours, for an average meal. He doesn't know how much the girl ate. Nobody has any actual record of that. He gave this estimate of three and a half to four hours for an average meal to leave—mind you, Gentlemen, to empty out of the stomach. But this stomach, as described by Doctor Penistan when he removed it and looked at it, was distended with food. It wasn't an empty stomach. It was, largely, a full stomach.

So I suggest, with all respect to Doctor Brown and his qualifications, that he just hasn't any basis for giving a counter estimate on the time of death at all. I don't know whether, if you followed through on his opinion, when an average meal leaves a stomach in three and a half hours, and you found a half empty stomach, whether that means the food has been there one hour and a half, or one hour and three-quarters, I don't know how he would enlarge that. But he simply based everything on an empty stomach, which wasn't here. And again, Gentlemen, he didn't have any of those other aids, rigor mortis, decomposition and the other things to go on with at all. So I say, with all respect, there is nothing, absolutely nothing for Doctor Brown to give you, or Doctor Brown did give you, to interfere with Doctor Penistan's opinion.

Now, Doctor Brown was quoted yesterday as saying that the examination of the stomach, as a means of indicating time of death, was an unreliable test. I did not so regard his evidence. I suggest to you, Gentlemen, that what he said was acknowledging it was used, that he said it was and it has to be used with caution.

Well, you heard Doctor Penistan during his considerable time in the box, and I suggest from your observations of Doctor Penistan, his person, manner of giving testimony and his responsible official position and years of experience, you can safely assume he would be cautious in a case like this, and everything considered, taking the three bases for his opinion, that you can take it with safety that this girl was killed, that she died

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from 7:00 p.m. to 7:45 p.m. on Tuesday, June 9th. I don't know whether the doctor—I think they made it clear, but the stomach ceases to function on death and that is the basis for this test. Nothing more gets out of the stomach once death takes place.

Now, we come to apply that opinion of time of death and I suggest to you Gentlemen, it is awfully important when this girl died. Now, who was with her during this time? What person or persons had the opportunity to kill her from 7:00 p.m. to 7:45 p.m.? I suggest that a review of the facts narrows those facts like a vice on Steven Truscott and no one else.

The trial judge dealt with the medical evidence as to the time of death as follows:

Doctor Penistan said, having regard to the food that he found in her stomach, and the fact that in his opinion the stomach empties itself after a meal within two hours, that she had died within two hours after having her supper.

The evidence was that she had left home at a quarter to six, that she had finished her supper, I should say, at a quarter to six in the evening, so Doctor Penistan concluded that she had died before a quarter to eight.

Later he said:

According to Doctor Penistan, and to the medical evidence, she died at a time which is not altogether, in any view, inconsistent with her having finished her dinner at about a quarter to six. Doctor Brown says, and I must draw it to your attention, that it takes three and a half to four hours to empty the stomach and it is on the basis of that that the defence asks you to say that she could not have been killed before Steve returned at 8:00 p.m. You have Doctor Brown's testimony. It is unfortunate always, that medical men should disagree on what is more or less a scientific point. Doctor Brown says three and a half hours to four hours.

Now, the stomach, of course, was not empty. Doctor Penistan said there was still a pint of food in the stomach and he removed that pint. It is true there is not a pint of food in the bottle now, and it is for you Gentlemen to accept or reject Doctor Penistan's evidence that he took a pint out, but Doctor Brooks was there and saw the pint. Don't forget that the bottle went to the Attorney-General's Laboratories, for tests and we don't know exactly what happened to it there except it was handed to some man whom we have not seen. It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.

In his objections after the conclusion of the judge's charge, counsel for the defence said:

And, My Lord, it is the theory of the Defence that Doctor Penistan was in error when he said that the time required to empty the stomach after a normal meal was one to two hours. You did tell them that Doctor Brown said that this time was three and a half to four and a half hours, but it is the theory of the Defence if Doctor Penistan was incorrect and Doctor Brown was right, then that would throw out Doctor Penistan's calculations as to the time of death. With respect, My Lord, I would submit Doctor Brown's evidence was dismissed very summarily by Your Lordship. This is a man of very considerable prominence, and should carry a considerable amount of weight, My Lord.

In the course of a re-charge of the jury the trial judge dealt with this as follows:

I am asked to point out to you that the theory of the Defence is that Doctor Penistan is in error when he says it only takes an hour or two hours to empty the stomach and you can accept the evidence of Doctor Brown, or at least, Doctor Brown's evidence should raise a doubt in your mind. You can understand the point is that his theory is that food took three and a half hours from a quarter to six to leave the stomach, that she must have died at a time later than the time that Steven was at the river, that she must have died after Steven came home, and therefore, it couldn't be Steven who killed her. That is what the theory of the Defence is. I am not going to go over all the evidence again.

Dr. Penistan's evidence in chief as to the time of death as shown by the quantity and condition of the stomach contents was as follows:

Q. Yes, that is my next question, Doctor.

A. The stomach, under normal conditions, proceeds with the digestion of food and as it is digested the stomach empties through the duodenum into the small intestines. This process is normally completed within two hours. I have to bear in mind here that the food in the stomach, as I said, appeared to have been very poorly chewed, appeared to have been bolted, and swallowed without proper chewing, which would tend to slow down the digestion and the emptying of the stomach. I think, therefore, that while—if I found a normal meal, normally chewed, well-chewed meal in the stomach, digested to the slight extent this food was digested, I would conclude that it had not been there for more than an hour. I would, however, make some allowance for the fact of the poor chewing of the food and give as my opinion that the food had not been in the stomach for more than two hours.

Q. Could it have been for a lesser time?

A. It could certainly, sir have been for a lesser time.

Q. To what?

A. I would estimate between one and two hours.

Q. You were in the Courtroom when Mrs. Harper testified this girl finished her meal at a quarter to six?

A. I was, sir.

Q. On that basis, sir, you would put her time of death at . . .

A. As prior to a quarter to eight.

Q. As early as . . .

A. Probably between seven and a quarter to eight.

As to fixing the time of death from post-mortem changes he said in chief:

Q. Apart from the stomach, these contents, Doctor, is there any other observations that would assist in determining the cause of death or the time of death?

A. Yes, sir. I referred in my description of the body to the post-mortem changes which were beginning to occur in the fat underneath the skin and in the lungs and indeed, in most of the organs of the body. I refer also to the fact that rigor mortis was still, although

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only just, demonstrable. Having regard to the environment and the atmospheric conditions about that time, which as I recollect clearly the weather was hot and the environment was damp, conditions under which changes tend to take place rather more rapidly than usual, I felt that these—the state of the body suggested that death had occurred some two days previously.

Q. I take it, Doctor, that is supplementary to your stomach observations?

A. That is divorced from the observations on the stomach. Should I add it was my view that the changes were entirely compatible with the time of death as shows from the stomach contents and the other evidence?

In cross-examination, the question of the accuracy of an estimate made from observing post-mortem changes was dealt with as follows:

Q. Doctor, you told us about the post-mortem changes in this body?

A. Yes, sir.

Q. And there were many factors that could contribute to the variation of time that it would take for those changes to occur, would it not?

A. Yes, sir.

Q. And that is not a very accurate way of estimating the time of death. It would be difficult to tie it down within five or six hours of those changes, wouldn't it?

A. Yes, sir.

The cross-examination of Dr. Penistan was directed to showing the unreliability of an estimate of the time of death based on an examination of the contents of the stomach. It showed:

i) that the examination of the stomach contents was visual and by the naked eye;

ii) that there were differences between the description of the contents as given by Dr. Penistan at the trial and (a) at the preliminary hearing and (b) as recorded in his notes made at the time of the autopsy;

iii) that there are many factors which may slow down or speed up digestive processes;

iv) that unchewed peas, of which there were many, are not digested in the stomach at all because they are covered by cellulose;

v) that the doctor made no test of the hydrochloric acid contained in the stomach contents.

Dr. Brooks described the removal and visual examination of the stomach contents. He was not asked to give an opinion as to the time of death.

Dr. Brown's evidence may be summarized as follows:

He said, in chief, the normal emptying time of the stomach after a mixed meal containing starch, protein and fat would be three and one-half to four hours; that one hour should be added if the meal was poorly masticated; that any estimate of time of death from stomach contents must be made with caution as there are so many factors which can cause great variations; and that in cases of accidents requiring an emergency operation it is thought dangerous to operate if the patient has eaten within the past six or eight hours because he may vomit and cause suffocation.

In cross-examination he said that in the normal case the stomach would be empty at the end of three and one-half to four hours and counsel for the Crown stressed that the stomach of the deceased was by no means empty. Dr. Brown agreed that Dr. Penistan had a better opportunity of forming an opinion than he himself had because Dr. Penistan had actually seen the contents of the stomach. He said he had never before been called into court to testify as to the time of death of a deceased person.

(b) *Summary of medical evidence at trial and on the reference relating to the condition of Truscott's penis.*

At the trial, evidence was given by Doctors Addison and Brooks, who medically examined Truscott on the night of June 12 at the R.C.A.F. guardhouse at Clinton. The only other evidence by an actual observer of his condition was given by Truscott himself on the reference.

The medical examination was conducted in the presence of Truscott's father. Dr. Addison, a medical doctor at Clinton, who had practised for 20 years, described his observations as follows:

> The penis, on first examination, appeared swollen and slightly reddened on the distal end . . . By stretching the skin, pulling it upwards towards the body, there were two large raw sores—they were like a brush burn. They were raw and there was serum oozing from the sores. They were located just behind the groove on the lateral side of the penis on either side. Roughly about the size of the ball of my thumb. The diameter, circumference involved would be roughly that of a quarter—a twenty-five cent piece—each one.
>
> I have never seen one as sore as that at any time—of that nature. I have seen one a few months ago that had a cancer of the penis that looked an awful lot sorer. And I attended one, at one time, a cow stepped on, that was a lot sorer. . . . . It (Truscott's) was sorer than any I have ever seen other than those two I have mentioned.

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Dealing with the cause of these injuries he said:

> There would have to be friction in an oval shaped orifice. An oval shaped knot hole or something like that. Something of an oval shape and sufficiently rough to cause a friction or wear of the outer surface of the skin.

He expressed the opinion that these abrasions could have been caused by a boy of this size and age trying to make entry into a girl of twelve. Truscott was sexually developed, the same as any man, and trying to make entry could cause the sores on his penis.

There was no scab on these lesions, there was a serous discharge.

Dr. Brooks was the senior medical officer at the R.C.A.F. station at Clinton. He described Truscott as a sexually well developed adult. He found on each side of the shaft of Truscott's penis, a lesion just bigger than a twenty-five cent piece. There was no bleeding. There was oozing and, by the time of the examination, the oozing was stagnant. He estimated the duration of the lesions at between 60 and 80 hours before. He stated that this was the worst lesion of this nature that he had ever seen. Since he started medical school he had done 20 years of medicine and he had never seen one as bad as this.

In his opinion the lesions were caused by pushing the erect organ into a very narrow orifice. They could have resulted from penetration or attempted penetration of the private parts of a young girl such as Lynne Harper. There was no injury to the glans of the penis.

Evidence was given at the trial on behalf of the defence by Dr. Brown, of London, Ontario, who was in the Canadian Army for five years, and who subsequently did post-graduate work in internal medicine, with emphasis on diseases of the digestive system.

The facts stated by Doctors Addison and Brooks were recited to him. He stated he had seen very similar types of lesions. He said a lesion of the size of a twenty-five cent piece is a large size. He had seen lesions of at least a ten-cent size.

As to the cause of such a lesion, he said it would be highly unlikely that penetration would produce a lesion of this sort. The penis is rarely injured in rape. When injured, it is usually a tearing injury confined to the head of the penis, which has a larger circumference. When the hymen is

ruptured by the head there may be a pulling that will tear the urinary opening and the fold of skin (frenum) leading from that opening to the foreskin.

Truscott testified for the first time at the Reference. He said that the description of the lesions given by Doctors Addison and Brooks at the trial did not fit the condition that existed on the night the examination was made. The sores were a lot smaller than they had been described. There was a sore on each side, well on the way to healing. There was no oozing whatsoever. They had been in that condition for two weeks.

When he first noticed anything unusual, it was about six weeks prior to his arrest. There were little blisters. They continued to worsen until the time he was "picked up". One blister would break and it just seemed that more would appear. He did not know what caused them to break.

He did not tell his father about them because he was embarrassed. The first persons whom he told about the condition as he first noticed it were his counsel on the Reference when they interviewed him at the penitentiary. He was then asked by Counsel what it looked like when he first noticed it.

The condition had never existed before. A similar condition did develop subsequently on his back and side of the neck. The condition of his penis cleared up while he was at Guelph. It just seemed to heal and went away. It did not hurt.

On the Reference, evidence was given relating to this point by a number of doctors.

Dr. Marcinowsky described an inflamed cyst of the dorsum of Truscott's penis, at Guelph, in May 1962.

Dr. Danby, a specialist in dermatology, practising in Kingston, gave evidence as to his treatments of Truscott for dermatitis at Kingston on different occasions in respect of his face, shoulders, upper arms and ears. Dealing with the condition described by Dr. Addison, he expressed the opinion that if there were an injury which had occurred two or three days before, there would have been bleeding visible in and around the lesions.

He disagreed with Dr. Addison's opinion as to the possible cause of the lesions, i.e., attempting to have intercourse with a young girl. He had never, in his experience, seen

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lesions of the kind described attributed to forceful intercourse. He had never seen lesions on the side of a penis attributed to force in intercourse. He was not aware of any medical literature, describing such lesions, attributing them to force in intercourse.

If the condition originated in a number of blisters, that condition could have resulted in lesions of the kind described, apart from intercourse. The condition could have begun as a case of herpes simplex. The area is one where sweating, contact of skin surfaces, secondary bacterial infection and irritation could combine to produce lesions.

Dr. Wrong, of Toronto, a specialist in dermatology, was questioned as to his opinion of the view expressed by Dr. Addison concerning the possible cause of the lesions. He said that such lesions are seen in many dermatological conditions, not just following injury. They are seen with many diseases in which blisters appear on the skin.

> I would say these lesions are not diagnostic of any one specific thing and I personally, if I had examined him, with the descriptions read, would not have been able to say definitely these could not have been caused by such alone.

He said it is extremely unlikely to have such an injury caused by intercourse or attempted intercourse, but he would not say it was impossible. He had not found anything comparable to this in the standard textbooks.

It would be unusual for simple herpes to affect two sides of the penis at the same time, but not impossible. Simple herpes of itself would not produce erosions. Secondary infection could do so, i.e., simple herpes plus infection, or irritation from sweating, and the skin surfaces rubbing together.

Dr. Petty, of Baltimore, is the assistant medical examiner for the State of Maryland. He had never seen lesions on either side of the shaft of the penis allegedly as a result of intercourse of any type. He had never read of penial lesions following intercourse. It was highly improbable that they could have been caused in that way.

Dr. Camps, of London, professor of forensic medicine at the University of London, when asked about the opinion of Doctors Addison and Brooks respecting the cause of the lesions, said:

> From a mechanical point of view and from my experience I don't think that this is the sort of injury which could occur from sexual intercourse. It

is the wrong part of the organ for one thing. The commonest injury occurring in this type of forced intercourse is a tear of the prepuce, which mechanically is one place that is vulnerable and which can be pulled on, or when push and force is exerted it is pulled in that way.

Asked regarding medical literature on the subject, he had not found anything indicating a lesion of that sort.

However, so little interest is paid in textbooks to this type of injury that in many textbooks it is barely mentioned.

Dr. Simpson, of London, head of the Department of Forensic Medicine at Guy's Hospital, called by the Crown, gave the following evidence:

Q. Finally, Dr. Simpson, I think you have read and you have heard read in this Court the evidence of a Dr. Addison and a Dr. Brooks relating to penile injuries to the accused Steven Truscott, and I think, sir, I know you were aware, in addition to that evidence, the evidence of Mr. Truscott himself relating to these injuries. Have you any comments regarding those, sir?

A. Yes, sir, when I first read the description of these I had not seen a picture of them and, of course, I did not see them, but when I first read a description of them I found them perplexing, for I would agree with the evidence I heard, they are not the ordinary kind of injury one sees in forcible or difficult sexual intercourse. But having heard the evidence of Steven Truscott that he—if I understood it correctly—already had some condition of soreness on his penis, this seems to me to give a clue to the rather curious nature of these two patches.

Q. In what way, Dr. Simpson?

A. Well, I think that if Truscott was right and he had patches there, there are two possibilities. One is that these patches—I think they were described as quarter size or thereabouts, patches on each side of the penis, and the other is that these patches were rubbed in some way which caused them to become more sore or to weep or crust, and I would regard that as being consistent with the penis being thrust into or being held, to be pushed into or being held in some way in a sexual gesture as a part of a sexual assault.

(c) *Summary of Medical Evidence given on the Reference witness by witness*

Henry John Funk is an analyst in the biological field with the Attorney General's Department. On June 12, 1959, he received the jar containing the stomach contents. On a visual examination he described it as being made up of pieces and chunks. Its general consistency reminded him of a thick stew. His examination was made between June 12 and August 31. He found pineapple, celery, pickled cucumber, cauliflower, peas, onion, potatoes, and what appeared to be two types of meat. It seemed to be consistent with ham and some type of fowl. Many of the foods that were

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supposed to have been eaten by Lynne Harper he found in the mixture. The total volume of the mixture was 250 cubic centimetres—eight to nine ounces.

Dr. Noble Sharpe. He has been the Medical Director of the Attorney General's Department since 1951 and is now about to retire. From 1923 to 1950 he did hospital pathology. He received the jar from Funk on June 12. For his examination he removed between 50 and 60 cubic centimetres. He saw undigested food mixed with some that was partially digested. He recognized certain vegetables but remembers only peas, some of which had been swallowed without chewing and were whole. He made no further examination of the recognizable parts because Mr. Funk was going to make the detailed examination.

The stomach contents were strongly acid. He concluded that gastric juices had been secreted and it was not just a recently chewed and swallowed meal. His rough estimate of the time needed to develop that amount of acid was about one hour. It was quite a good amount. He saw some muscle fibres, striated muscle fibres, and knew that meat had been eaten but had no idea what kind of meat. He described the contents as resembling a thick, lumpy stew. There was little or no fluid in it. Based on the thick consistency and the fact that the acid was present, he considered that the stomach contents had not been long enough in the stomach to be suitable for passing out into the duodenum. It was not in the condition of chyme, at which stage the contents are ready to pass into the duodenum.

It is known that after an ordinary meal the contents are ready to leave the stomach at the end of two hours and that they go out in small amounts, about three cubic centimetres at a time, for the next two hours so that by the end of the fourth hour after the food has been taken, the stomach is usually nearly empty. In his opinion the stomach contents had been in the stomach for one to two hours after eating. He admitted that there are many conditions that cause variation—likes and dislikes, preparation of the food, proper cooking, whether or not the food is fatty as fatty food takes longer to digest, the state of hunger of the person concerned, whether he had been exercising before eating or taking it easy, emotions, anatomical position of the stomach, and many others.

He agreed with what he wrote some time ago in an article "Rate of Cooling as an Index of Time of Death". It is as follows:

> For a long time I had felt that pathologists are placed in an awkward position by the emphasis in courts on estimation of the time of death from the rate of cooling, rigor mortis, decomposition and stomach contents. These four bases for estimation depend on variable factors. The pathologist is usually asked by the investigating officer to give them a rough starting time for investigation or the period in which particularly to focus. This may get into the report and is later mentioned in court.
>
> Both prosecution and defence are prone to emphasize those points which are of benefit to their particular view of the case. The time based on one or more of these four examinations is at most an approximation, an inspired or educated guess. It is more likely only a probability or a hunch. It is of use to the investigator but of much less value to the court.

Dr. Cedrick Keith Simpson is head of the Department of Forensic Medicine, Guy's Hospital, London; Professor of Forensic Medicine, University of London; Lecturer in Forensic Medicine, University of Oxford; Home Office Consultant since 1935, and has done work with the Forensic Science Group of Scotland Yard since that date. The summary of his opinion is contained in the following extract:

> A. I would say that, my lord, it appears to me in this case most creditable that Dr. Penistan paid particular attention to this matter. In my own experience this is not always so. I would say that his conclusion, based, as I see it, on the presence in the stomach of something approaching a pint of relatively dry food, that is to say, without a measureable quantity of fluid which could be separated from it, from the fact that it was of a kind and quality which he observed and had confirmed in the laboratory, from the fact that this whole amount, with the exception of a little material which had passed on to the small bowel, still lay in the stomach, I would say that unless he took into consideration some unusual or extraordinary conditions, that he was right to conclude that it was likely that death had taken place somewhere up to two hours after eating that meal.

There was a fragment of food in the bronchial air passage, which is common in asphyxial deaths. The cause of death was strangulation by a ligature. There was injury to one of the voice box bones, discoloration of the face and the characteristic asphyxial hemorrhage in the lungs and thymus gland.

On an examination of the photographs taken at the scene where the body was found, there was nothing inconsistent with death having taken place where the girl was found

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and photographed. He agrees with Dr. Penistan that the twigs on the ground would cause the type of puncture wound found on the body.

As to lividity, looking at two photographs taken in the mortuary, he agreed that the chin and left cheek and region over and above the left eyebrow and the nose showed pallor against the general colour of the face, the colour he takes to be that described as lividity engorgement. The discoloration was consequent on strangulation. His explanation was that two other photographs taken where the body was found show the body turned on its left side and lying partly on some sheeting or covering. So long as the blood was fluid when this took place, it would be natural for the pressure to give these areas just where they appear to have developed. He was asked how long blood remains fluid in a dead body and he could not give any definite answer. Sometimes it never appears to clot; sometimes it clots in a short period and becomes dissolved again. The variations are so vast that no figure can be given. As to the absence of acid phosphatase on the twigs and dandelion leaves which were preserved for sampling and taken at the scene of the crime, he said:

> A. Well, I have seen many cases of both sexual intercourse against resistance as shown by injuries and other marks about the body, and I would say that in some of them one does see seminal fluid not only in the vagina but at the orifice and extending from it on to the thighs or down between the crotch, but by no means always, and I would certainly not regard the absence of spermatozoic fluid on the ground between the crotch area as giving any evidence that sexual intercourse of some kind did not take place where the body lay.

As to rigor mortis, one of the witnesses said that an arched back and the fingers indicated that this was present in the mortuary. Dr. Penistan had said that rigor mortis had almost passed away. Dr. Simpson said that he was surprised to hear the witness refer to the arched back as an indication of the degree of rigor. He said that was the natural shape of the body and that dead or alive, it would preserve its shape. He says that one sees that every day. It is a matter of common sense and personal observation.

As to the suggestion of rigor mortis in the fingers by Dr. Petty, he said that two of the fingers were being held by the assistant to hold the hand in a certain position for the taking of photographs.

His estimate of the emptying of the stomach and the time of death as indicated by it is contained in the following extract:

Q. Doctor, if I may turn for a moment, sir, to a general discussion of the stomach contents—and again in this matter I am making the assumption and premise that you have heard read the evidence of Dr. Penistan regarding the stomach content, you have heard the evidence of Mr. John Funk and you heard the evidence of Dr. Noble Sharpe—based on that premise, what do you say, doctor, as to setting of a time or approximate time of death from stomach contents?

A. Well, sir, I would say that based upon my own experience of those cases in which the time of the last meal is known, and based upon the relatively few quotations that can be listed from the textbooks in forensic medicine—I refer to Sidney Smith and Polson, in particular, and based upon the enormous—I think no other word could be used to describe it—enormous literature from the physiologists on the emptying process of the stomach, it would seem to me there is general consensus of view that the process of emptying is a gradual one which appears to be best described in terms of a half life, that is to say, during a period of time which seems to be within thirty minutes and an hour, around about forty-five minutes, perhaps, the stomach half empties itself, and then in a similar period half empties itself again, and again, and again. So that it is described as a half life. I would say that if these observations are correct—and there is an overwhelmingly large literature in support of this—that one might have expected, as Sidney Smith and Polson and my own experience, of course, one might have expected the bulk of the meal to have left the stomach inside two hours. This seems to me a generalization which experience and experiment support.

Q. Based on what you have read from the original trial transcript and what you have heard in this Court, what conclusion and opinion would you have come to in this matter?

A. As I say, I think—certainly earlier in my evidence, sir—I think that based on the amount of food in the stomach as compared with the little, the very little, I think it was described, that had started to pass into the small bowel, based on its character and the relatively little indeed which appears to be an unmeasurable quantity of food which was present, that this girl's death must, if the stomach be taken as an indication of it—and I think it is the one useful indication in this case—must have taken place within two hours of her taking that meal.

Q. Doctor, are there, as has been described in this Court, variables that do in fact affect the digestion, such as emotion?

A. Yes, sir, I think that if that view is looked at more critically, I think one has to be prepared if there is some evidence to qualify it in some way. If there is some evidence about outside conditions that—such as emergency, for instance—that may affect the stomach, then one must be prepared to qualify it, but in the absence of such evidence I would say that Dr. Penistan was quite right to give as an indication and estimation a period which is about usual, about normal, which would be likely, and the last thing I would

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say, sir, about that, is that there are of course upper and lower limits to this. Some stomachs, some stomach contents empty a little earlier and some a little later.

Q. Doctor, I just have two further questions, one dealing, sir, with the evidence that was given in this Court relating, Dr. Simpson, to changes in the decomposition of this body, and very generally, and paraphrasing again, they were referred to as swelling, bloating and lack of venous patterning and other decomposition changes. What value, if any, sir, based on your experience, do you attach to decomposition changes such as I have just mentioned to you?

A. I would say, sir, that those words, described as stated decomposition which is becoming well marked, and they did not appear to be present in this case, that the earliest of changes is commonly, usually, I think, a discolouration in the flanks of the body or in the veins rising up out of the trunk, and this is likely to be seen from about forty-eight hours, but it varies according to temperature.

Q. Were you surprised to read and to hear and not to find here swelling and bloating and a venous pattern?

A. No, sir, no, these I would not expect to be likely to become evident until about the second to third, to fourth day, or later on, that depending on the outside conditions.

Q. There was also a reference very briefly to the lack of greenish discolouration in the flanks of the body. What is your comment, if any, sir, regarding that?

A. Well, sir, this is the earliest of the signs. As I say, it would be likely to appear somewhere about the second day, the forty-eighth hour, but it need not be present. Indeed it need not appear at all.

Dr. Milton Helpern has been Chief Medical Examiner for the City of New York since 1954 and is visiting Professor of Pathology, Cornell University; Professor and Chairman of the Department of Forensic Medicine, New York University School of Medicine. Cause of death was strangulation. The food of microscopic size in the bronchials was one incident in the process of dying by strangulation. The place of death was where the body was found. He disagreed with Dr. Petty that twigs would not cause the puncture wounds. He agreed with Dr. Simpson that apparent blanching and whitening shown in the photographs to which he referred was attributable to the body having been turned on its side and that the only valid evidence on this subject was to be found in a photograph of the body before it was disturbed or turned and which showed no blanching. He disagreed with Dr. Petty that there was any evidence of rigor mortis in the arched back or the fingers.

His opinion as to stomach contents is contained in the following extract:

Q. Now, based on your experience that goes back many years, sir, based on those, the factors developed and shown by that testi-

mony, what if any opinion would you have as to how long that stomach content had been in that particular stomach of this young girl?

A. In my opinion, from the amount of food in the stomach and from the fact that this was a healthy body, the body of a healthy young girl, and from the fact that death was rapid, I think it is reasonable to conclude that the time it took this person to die was rather short, and from all these factors I would conclude that this food had been ingested no more than two hours after—that is, that death had occurred, I'm sorry, gentlemen—that death had occurred no more than two hours after the food was ingested. I think that is the rule in these cases.

Q. That is from your experience in these matters, sir?

A. Yes, I have been particularly interested in recent years in the emptying time of the stomach, and we have had enough cases in which we could find a large amount of recently ingested food, that is, easily recognizable food in large amounts and in which we were able to determine the time the food was ingested, and in those cases the food was ingested less than two hours prior to death.

I might explain, in discussing this I don't want to be—to appear to be just arbitrary about this thing. There are conditions which do slow up the emptying of the stomach, and the most common condition that does this is coma. In other words, this opinion could not be common in a man who was knocked down by an automobile and then died as a result of brain injury, having lain in a coma for several days. I have seen food in the stomach in cases like that which has been in the stomach for over a week, but in a person who is healthy, who dies suddenly or rapidly, I would say that this amount of food and the condition it was in is indicative of a time of death, about two hours or within two hours of the ingestion of the food. Now, this is the rule.

Dr. Samuel Robert Gerber has been the Coroner, since 1937, of Cuyahoga County, Ohio, which includes the City of Cleveland.

Without going into his evidence in detail, he agreed with Dr. Simpson and Dr. Helpern as to the cause of death, the place of death and the cause of the signs of blanching.

He agreed with the others and Dr. Penistan that the arched back and the fingers were no indication of rigor mortis.

His opinion was that the food had been in the stomach less than two hours after ingestion.

Dr. Charles Sutherland Petty is now Assistant Medical Examiner for the State of Maryland. He was Chief Resident in Pathology at various hospitals from 1952 to 1955 and a Teaching Fellow at Harvard Medical School in the Department of Pathology from 1952 to 1955; Instructor

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and Assistant Professor of Pathology, Louisiana State School of Medicine 1955 to 1958; Associate Professor of Forensic Pathology, University of the State of Maryland and Associate in Public Health Administration, Johns Hopkins University.

Dr. Penistan's report was put before him and he was asked for his conclusion as to the time of death. His opinion was that the time of death could only be stated within very broad limits. These broad limits are stated to be:

A. These broad limits lie anywhere between several minutes to several hours; thirty minutes to perhaps eight hours. The missing factors here: Dr. Penistan mentioned the bolting of the food or the rapidity evidently with which the food was eaten. The fact it had not been well chewed is a factor which caused him to advance the time from one hour to perhaps two hours after eating, the interval between eating and death. But I do not see that he has taken into consideration any of the many other factors which might change the emptying time of the stomach or change the amount of food that one would see in the stomach at the time of the autopsy.

Q. What are, in a general way—Would you describe the factors which must be—which cause a variation in the rate of digestion and the rate of the emptying of the stomach?

A. Well, there are many. We do not know, for example, whether this girl was taking drugs; we do not know whether this individual, in fact was emotionally disturbed; we do not know whether there was loss of the stomach contents significantly, that is, into the duodenum or, indeed, further into the small and large intestine; and, as a matter of fact, we do not know how much, if any, of the food was lost through either opening into the stomach. There are two, the top opening from the esophagus and the bottom opening into the duodenum. We do not know even, for example, whether or not there was loss of food through the esophagus either during the act of dying or after the death occurred.

On a consideration of Dr. Brocks' evidence given at the trial as to the contents of the stomach, he repeated his opinion that the estimate would vary from minutes to hours.

The evidence of Mr. Funk, the analyst, and Dr. Noble Sharpe was then put before him and he was asked to assume the correctness of the description of the contents given by these witnesses. His answer was:

Q. Now, again assuming the correctness of the description of the contents given by Mr. Funk and Dr. Sharpe, does that affect the opinion that you have expressed?

A. No, sir, it does not, because we do not know what factors were present between the time the meal was eaten and the time that death occurred.

Again returning to Dr. Penistan's evidence as between one and two hours, or prior to a quarter to eight, and probably between seven and a quarter to eight, his answer was:

> Q. The question I want to now ask you, what is your opinion as to whether the time of death can be put within such narrow limits, based on the stomach contents and the state to which digestion had proceeded, assuming the evidence of Dr. Penistan as to his observations is correct, and assuming the evidence of Mr. Funk and Dr. Sharpe, as to their observations, is correct?
>
> A. Based on the appearance of the stomach contents, the amount of the stomach contents, the degree to which the stomach contents had apparently been digested, I would find myself completely unable to pinpoint any time, a figure such as seven o'clock to seven forty-five, or a quarter to seven to a quarter to eight.

On being questioned about Dr. Penistan's finding that very little had passed through the duodenum into the small intestine, he replied:

> Q. Just taking the information as you have it, the facts I have given to you by themselves, if you were in possession of those facts and that description, what would be the limits either way in which you would place the time of death?
>
> A. Again, sir, several minutes, 20, 30, 40 minutes, perhaps five days, possibly as long as eight hours.

(NOTE: It says five days in the record. We assume that the witness must have intended to say five hours.)

He then went on to deal with rigor mortis and what is sometimes called post-mortem lividity or hypostasis. He found evidence of rigor mortis from the arched back and the position of the fingers and the position of the leg on the mortuary table "provided the leg has not been placed there deliberately or accidentally".

His conclusion was that the onset of rigor mortis is rapid in a warm environment (and the weather was very warm on June 9, June 10 and June 11). He also says that rigor mortis disappears more rapidly in a warm environment and his conclusion was that this body had been where it was found "perhaps less time than has been indicated in some of the evidence I have read". His conclusion was that death occurred later than 7:45 p.m. on June 9.

> From the photographs and the rigor mortis alone I would be unable to say precisely when death occurred but that from this amount of rigor mortis I would be inclined to put it on the light side of two days. The light side or the short side of two days, rather than forty-eight hours.

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He noted the absence of bloating and venous patterning and skin slippage. He would expect to see this sort of thing in a body dead forty-eight hours in the temperatures which were given in evidence.

Then, by way of summary:

Q. Then, Doctor, I now, having taken you over Dr. Penistan's evidence with respect to the stomach contents and his evidence with respect to the existence of rigor, his evidence with respect to the beginnings of putrefaction and having referred you to the photographs of the—Taking the total picture into consideration, the amount of fluid, the evidence of post-mortem changes as described and shown in the pictures, can you come to any opinion as to the time of death?

A. Well, the best opinion I can come to on the time of death is this: It is my opinion that the body has been dead in the neighbourhood of thirty, thirty-six hours, possibly forty hours and I am taking my time now from the autopsy time, not from the time of sighting of the body; but I cannot narrow the limits to less, perhaps, than twelve hours. I clearly have the impression from examination of these photographs, and with particular reference to those things that I have pointed out already to this Court, that the body has been dead not an inconsiderable time short of forty-eight hours; but, I cannot pinpoint that in time, less perhaps. A range perhaps of less perhaps than eight or ten or twelve hours.

Q. In your opinion is it possible for anyone, on the basis of the facts that have been disclosed with relation to the stomach contents, post-mortem changes, to place that period of death within the narrow limits of 7:00 p.m. and 7:45 p.m. on June the 9th?

A. Of course not. Not unless we know precisely what happened between the time that the child was last seen and the time when death occurred; and, of course, if we knew that we would know the time of death.

The time of the autopsy was approximately 48 hours after the girl was last seen.

He next went on to deal with the place of death. Dr. Penistan's report as to what he found when he arrived at the scene was put to him in detail. First, he did not think that the puncture wounds had been caused by twigs. He referred to the puncture wound under the left shoulder, a scratch mark on the front of the left thigh extending over the left kneecap and down to the top of the left foot, and small "interruptions" of the skin's surface on the buttock. He thought the scratch marks on the leg indicated a dragging of the body in a limp condition. He disagreed with any theory of the causation of the marks by twigs. He thought the twigs would be pressed down and would not penetrate. He demonstrated by the use of fountain pens scattered on the desk before him.

He would have expected some spots of semen, acid phosphates to be present at the crotch or very close to it or on the leaves or twigs or whatever was immediately beneath that point of the body.

As to the presence of vegetable matter in the bronchi, he thought it was in a microscopic amount. He called it a remarkable finding in view of the presence of the ligature about the neck. All the other experts thought it was a normal incident of death by strangulation.

Q. What inference did you draw or what is your conclusion from the presence of vegetable matter in the bronchi?

A. I call this a very remarkable finding in view of the presence of a ligature about the neck. The blouse or the ligature about the neck would certainly compress the neck organs and would certainly tend to cause the esophagus, or the tube leading from the mouth down to the stomach, to be collapsed; and I would find it difficult to explain how this food material, this vegetable material found its way into the lung passages that have not a route to go out of the stomach, through the esophagus, to be aspirated and drawn into the air tubes themselves. I think it is quite remarkable in view of the ligature or restricting band about the neck.

Q. What would that indicate to you about the time the vegetable matter got into the bronchi?

A. Inhalation of apparently vomited stomach contents is not an unusual thing during death. I would, therefore, believe this occured during the act of dying, possibly slightly before, during the act of attack, whatever that may have been; and, therefore, I believe this related to the death, if that is an answer to your question, sir.

Q. Are you able to form any opinion as to whether aspiration of the vegetable matter into the bronchi occurred before or after the application of the ligature?

A. As I have already indicated, I think that this occurred before the application of the ligature.

He next examined the photographic exhibits at some length leading up to the conclusion that the body was on its left side shortly after death. It is expressed in the following extract:

Q. What in your opinion caused that?

A. I believe this body laid on its left side for a period of time after death and was moved at a later time.

Q. And why do you reach that conclusion?

A. Because of the pattern of the wrinkles present and the depression on the outer aspect of the left upper arm and the blanch or relatively white areas involved in the left breast and probably also the left side of the face. I believe this is the pattern of a post-mortem lividity which develops shortly after death when the body was on that side so that the blood drained down into that side, that the hypostasis became, as forensic pathologists put it,

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fixed or partially fixed so that when the body was again placed on its back that the markings of its previous position were left and did not vanish because all of the blood had been drained out of that area into what was now the bottom and down side of the body. So, in this photograph, if taken in conjunction with the other photograph which we have seen, it is my opinion that the body was first on its left side and then was turned at a later time and put on its back in the position in which it was found.

Q. And what would cause—You say, for instance, on the left breast there is an area that is whiter?

A. Yes.

Q. What would create the whitening or lighter colour?

A. This is where the breast itself was pressing against whatever the body was lying on and prevented the blood from flowing into that area.

Q. How soon after death would the body have to lie in that position to develop this pattern?

A. This is not subjected as rigor mortis and stomach contents to any specific or definitive answers. The blood begins to settle in the body immediately following death. The point really is at what point was the body moved after death. If the body remained on its left side for a period of time after death until some of the blood was fixed, that is, there was some clotting, perhaps, of the small blood vessels, possibly some passage of red blood cells out into the surrounding tissue, then the point at which this occurred to a significant degree, but the main majority of the blood was still fluid so that when the body was shifted again now onto its back the ordinary hypostasis pattern developed. I could not say precisely, but I would say possibly the inner limit of an hour, an hour and a half, the inner limit of several hours. I do not know, four, six hours, somewhere within this period of time.

Q. How long would the body have to lie in that position?

A. I would say the body would probably have to lie there for a period of certainly an hour or two, in this region.

As to the lesions on the penis, he said that he had never seen lesions on either side of the shaft of the penis allegedly as a result of intercourse of any type. Nor did he know of any reference to this possibility in the literature. He thought it highly improbable that these lesions would be caused by intercourse.

Dr. Frederick Albert Jaffe is presently lecturing in Pathology at the University of Toronto and is an Assistant Pathologist, Toronto Western Hospital. He has been a Regional Pathologist for the Province of Ontario since 1951. He is soon to assume the duty of Medical Director of the Forensic Section in succession to Dr. Noble Sharpe.

He considered that the stomach contents and the state to which digestion has proceeded after the last known meal a most unreliable guide as to the time of death. He had read

the evidence of Dr. Penistan as to the stomach contents; also that of Dr. Brooks, and heard the evidence of Dr. Sharpe and Mr. Funk. On the assumption that the girl started her dinner at 5.30 p.m. and finished at 5.45 p.m., he would not place the time of death within the period 7.00 to 7.45 o'clock with any reasonable degree of certainty.

His opinion of the time of death, as indicated by the post-mortem changes, is contained in the following extract:

> Q. Now, dealing—passing from the stomach contents to the post-mortem changes which were observed, again assuming you heard read the evidence of Dr. Penistan as to the post-mortem changes he observed, that is, the very slight rigor that was present, the infestation of the body by maggots, and assuming the correctness of all Dr. Penistan's observations and also his statement that autolysis was present but the body had not yet begun to putrefy or had not reached a stage of putrefaction, do those facts enable you to form an opinion as to when death occurred?
>
> A. Only within very wide limits. I believe on the basis of Dr. Penistan's description and the photographs which I was able to see, that death has occurred no less than twenty-four hours before the discovery of the body.
>
> Q. Could you go any farther than that?
>
> A. To me the really outstanding feature of the body, both basing my view upon the autopsy protocol and Dr. Petty's description of the photographs, is the absence of those changes of decomposition which one would expect to find in a body which had allegedly lain two days in an environment which was certainly very hot and humid. This to me is one of the outstanding characteristics of this body. I would place the time perhaps half way between twenty-four and forty-eight hours.

He agreed with Dr. Petty as to the cause of the blanching.

Dr. Francis Edward Camps is a lecturer in Forensic Medicine at the London Hospital Medical College, Royal Free Hospital Medical College and the Middlesex Hospital Medical School and a professor of Forensic Medicine at the University of London.

His opinion of the significance of the contents of the stomach is contained in the following extracts:

> Q. First of all, Dr. Camps, what is your opinion as to whether the contents of the stomach and the state to which digestion has proceeded in relation to the last known meal consumed by the deceased, is a reliable guide to the time of death?
>
> A. It is so variable that this generally has been described as being of no value in assessing the time of death within a limited period. That is to say, what you can say is, first of all, that the contents indicate the nature of the last meal that the person has had. In other words, it enables you to say they have had nothing else to eat since the last meal. And, secondly, that death has occurred

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within a number of hours. It is possible, by taking other matters into consideration, to place perhaps within that number of hours a distance in one or other direction; but other than that, it is quite impossible.

* * *

Q. Assuming the correctness of the observations of Dr. Penistan and Dr. Brooks and Dr. Sharpe and Mr. Funk, what is your opinion as to whether on this—on that basis you could, with any reasonable degree of certainty, state that the time of death of the deceased was between the hours of 7:00 p.m. and 7:45 p.m., having regard the fact that she finished her last known meal at 5:45?

A. I would say it is quite impossible and, in fact, I would say it could be dangerously misleading to the investigating officers.

As to rigor mortis, he disagrees with Dr. Penistan's finding in the following extract:

Q. Does the evidence with respect to the existence of rigor mortis and its extent enable you to express any opinion with respect to the time when death occurred?

A. No. I think, once again, there is so much variation in rigor mortis that, at the best of times, you cannot express an answer except within a reasonably broad limit. In this particular case I think it was a pity that the examination for rigor mortis was not done at 1:45 but waited until 7:15. But, on the basis of the appearance of the body, of the fact that the appearance is, to some extent, and I can say no more than that, present again only at the scene of the crime but also on the autopsy table, I think one must assume that rigor mortis was pretty established still, certainly a little earlier in the evening.

On this point he is in direct conflict with Doctors Penistan, Simpson, Helpern and Gerber. As to post-mortem changes, his opinion is expressed in the following extract:

Q. You have also heard the evidence read of Dr. Penistan with respect to the other post mortem changes—that is, the presence of autolysis, the infestation of certain parts of the body by maggots, and assuming again the correctness of those observations, does that enable you to determine the time of death?

A. No. I would like to make it quite clear, if I may, I am in no way criticizing Dr. Penistan's observations. The only thing here is, first of all, that the autolysis I find supremely surprising for forty-eight hours, to be so little in the temperature and under these conditions.

In the temperatures established during the 48-hour period, he would have expected to find more post-mortem changes than were found on this body. The implication of this is contained in the following extract:

Q. Does he not refer to autolysis in paragraph 4?

A. Yes, that is right. Yes, I would repeat what I said, that the temperature, even putting it at its lowest, for forty-eight hours I

> would expect to find more post mortem changes than were found in this body. The implication of that, had I been there, would have been, having found the stomach contents in the condition which could be to indicate death at the end of one hour or up to nine or ten hours, would make me put my time of the death closer to the ten than to the one. That is the only observation I can make. I find, also, it is very remarkable from this point of view that there is no green discolouration of the abdomen on the right side, which we normally reckon to appear somewhere about forty-eight hours. So that would also tend to put it back.

He explained the blanching in the same way as Dr. Petty, i.e., that the body had lain on its side. He thought an hour might be reasonable. It might have been much less than that.

He expressed some doubt whether the puncture marks described by Dr. Penistan would have been caused by twigs. He thought they would more likely cause scratch marks, not a straight hole. He thought that some sort of sharp thing that might have caused the scratch mark down the leg might have caused the puncture marks.

Because of the absence of acid phosphatase, he expressed the opinion that where the body was found was not the place where the rape occurred. He thought that if it had occurred here, there would have been more injury on the back.

As to the injury to Truscott's penis, he did not think it was the kind of injury that could occur from sexual intercourse. The commonest injury is a tear of the prepuce. "However, so little interest is paid in textbooks to this type of injury that in many textbooks it is barely mentioned."

Another body of medical evidence had to do with dermatology.

Dr. Emilian Marcinkovsky is a physician at the Ontario Reformatory at Guelph. On March 3, 1961, he treated Truscott for an infected burn of the right internal ear. He treated him with compresses and chloromycetin. He found that Truscott was sensitive to this drug and he was kept in hospital. On June 28, 1961, there was further treatment.

On December 27, 1962, Truscott was suffering from dermatitis in the armpits. The doctor thought it was the result of chemicals, the detergent in the washing. He called it contact dermatitis.

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On May 15, 1962, he treated him for an inflamed cyst of the dorsum of the penis. On May 24, he marked the medical card "Cyst now not inflamed. Excision will be indicated if frequently inflamed."

Dr. Norman McKinnon Wrong. He graduated in 1927 from the University of Toronto and has been on the teaching staff since 1932. From 1954 to 1962 he was Associate Professor of Medicine in charge of Dermatology at the University of Toronto. His opinion on the cause of the lesions on the penis is:

Q. What is your opinion as to whether the lesions—the lesions as described, could be caused in that way?

A. The lesions described, or what we call erosions of the skin, such erosions are seen in many dermatological conditions, not just following injury, superficial injury of the skin, and we see them with many diseases in which blisters appear on the skin, so that I would say these lesions are not diagnostic of any one specific thing, and I personally, if I had examined him, with the descriptions read, would not have been able to say definitely these could not have been caused by such alone.

Q. Have you any opinion as to the likelihood of an injury such as that being able to be caused by intercourse or attempted intercourse?

A. I would think it rather unlikely or extremely unlikely. I would not say impossible, but I would say extremely unlikely that a lesion on the side of the shaft of the penis would be caused by intercourse.

Q. Are you familiar with any medical literature attributing lesions of that kind on the sides of the penis to trauma or injury involved in or received during forcible or violent intercourse?

A. I have not gone over the medical literature exhaustively, but I have not found anything comparable to this in the standard textbooks.

He also was of the opinion that it was most unlikely that the abrasion on the right labia of the deceased about the size of a finger-nail, was caused by a penis. He thought that the condition of the penis described by Dr. Brooks and Dr. Addison indicated simple herpes.

As to the precise conditions observed by Dr. Addison and Dr. Brooks, he explained them as follows:

A. I think simple herpes plus infection or plus irritation from sweating and the skin surfaces rubbing together. I don't think that simple herpes in itself usually produces erosion, but secondary infection could very well produce these erosions.

He had never seen any lesions on the shaft of the penis which had been attributable to forcible intercourse or trau-

ma. He had seen injury about the meatus and around the frenum, but never traumatic lesions on the shaft of the penis as a result of intercourse.

Dr. Charles William Elliott Danby is an Assistant Professor of Medicine at Queen's University, and the Consultant in Dermatology for the three federal penitentiaries at Kingston, Collins Bay and Joyceville.

He treated Steven Truscott on January 30, 1964, for infected dermatitis of the left side of his face extending from the level of his eyelid down to below the mouth, with an oozing, scaling and crusty condition. His opinion was that this was secondarily infected dermatitis due to some agent that had irritated his skin. Truscott told him that it had been present for a year. The doctor saw him on five subsequent occasions, the last time being April 24. There was good improvement up to March 1st. Then, on April 15th, he had a patchy nummular type of eczema involving the back part of his shoulders, upper arms and his face and ears. On his last visit, April 24, he had improved.

Counsel then put to him the description of Truscott's condition that was given by Dr. Addison and Dr. Brooks at the trial.

Q. This was the view expressed by Dr. Addison, a brush burn of two or three days' duration, was his description. But that is part of the description. Assuming the size, the description of the raw sore, oozing, having the appearance of a brush burn of two or three days' duration; from that description would you be able to reach any conclusion as to the nature and cause of these injuries?

A. I would think that in the area where these lesions have been described, if it were an injury that had occurred three days before, or two days before, there would have been haemorrhage or bleeding visible in and around these lesions. Now, one must remember that in this area the skin is very thin. I would think a good comparison would be the thickness of the skin of your eyelid. If we remember that the skin is made up of two parts, the epidermis and dermis. For convenience, the epidermis is the outer layer of the skin, below which there are blood vessels ready to bleed and is not thicker than six one hundredths of a millimetre. It is tissue paper thin. I would think that if this had been due to injury there would have been haemorrhage.

Q. Would you be able to give any information as to the extent or the degree of the bleeding or haemorrhaging that would occur from injury of that kind?

A. I have in the past, and I still do occasionally, perform an operation called dermo-abrasion of the skin in which we abrade the skin in order to improve the appearance of scars. Now, we do not have to abrade it very deeply to get copious bleeding.

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He went on to say that he did not think that these lesions could have happened by the penetration or attempted penetration of the organ into the private parts of a young girl. He had seen six or seven cases of a tearing of the praeputium. He was not aware of any medical literature on this subject.

Next, he dealt with the injury to the labium majus. This was testified to by Dr. Penistan and Dr. Brooks. He thought it very unlikely, if not impossible, that this could occur from an attempted penetration.

He thought that the condition described by Dr. Brooks and Dr. Addison was herpes simplex (cold sores).

There was, in addition, evidence given by psychiatrists called by the Crown and the Defence. We do not consider that this evidence assists us in coming to our conclusion.

Conclusions

After all the evidence given on the Reference, the issues are still the same as those which faced the jury—who raped and killed this girl. The evidence both as to fact and opinion has to be considered as a whole. We begin with Truscott's oral evidence on the Reference. It differs from the evidence given by all those witnesses who saw him on the road before 7 p.m. and described his movements. These movements give an impression of aimless loitering of no particular significance to him. This may account for his failure to remember whom he had met and who had seen him. On the other hand, although as a boy of 14½ years, he had heard all these witnesses give evidence at the trial. The evidence had some connection with that of Jocelyne Goddette and to the jury could have indicated that he was waiting for someone and that the person for whom he was waiting was Jocelyne Goddette, who by her subsequent actions indicated that she was looking for him and did not find him.

The evidence of the time of departure from the school grounds is of decisive importance in this case. According to Mrs. Nickerson and Mrs. Bohonus, it was not later than 7.15 p.m. and Truscott had appeared about 7 p.m. On the Reference Truscott for the first time gave his time of departure as within a minute of 7.30 p.m. By 7.30 Richard Gellatly and even Philip Burns on foot were back at home.

But Truscott had told the police that he did remember meeting Gellatly. Gellatly remembered meeting Truscott and he was not cross-examined. One of the certainties in this case is that this meeting did happen. We find it impossible to accept Truscott's evidence given before us that he and the girl left at 7.30 p.m. and that they did not meet Gellatly.

Further, Jocelyne Goddette, according to Mr. Lawson's evidence, left Lawson's barn at 7.25 p.m. If Truscott's time is taken, she would have been on the road ahead of him. So would Arnold George, for she and George were on the road near the bush at approximately the same time. Jocelyne Goddette and Arnold George could not have failed to see Truscott and the girl if they had left the school grounds at 7.30 p.m. The case for the prosecution, as put to the jury, was that Truscott and Lynne were ahead of Jocelyne Goddette and Arnold George and were not seen after passing Gellatly.

Our conclusion is that Truscott's evidence on the Reference does not and cannot disturb the finding implicit in the jury's verdict, that after passing Gellatly, Truscott and Lynne went into Lawson's bush.

It is also implicit in the jury's verdict that the girl died where she was found in Lawson's bush and that she was not picked up at the intersection and subsequently brought back dead or alive by someone other than Truscott. We do not think that this conclusion could be disturbed by anything to be found in the evidence given at the trial or on this Reference.

We have described the conditions found by Dr. Penistan when he went to the scene. Dr. Petty and Dr. Camps said that they would have expected to find spermatozoic fluid at the crotch or in the blood at the crotch or on the leaves and twigs in the immediate area of the crotch if intercourse had taken place where the body was found. Dr. Simpson said that he "would certainly not regard the absence of spermatozoic fluid on the ground between the crotch area as giving any evidence that sexual intercourse of some kind did not take place where the body lay". Dr. Penistan said that the intercourse took place "while the child was dying, when the heart had stopped or had almost stopped beating". His reason for this conclusion was that although the

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injuries to the parts were severe, the bleeding from them was extremely small.

Dr. Petty developed a theory based upon an examination of the photographs that the body must have lain on its left side for an hour or two following death. We have quoted at length from his evidence and that of others on this subject. He found signs of blanching on the left side of the face, the left breast and the left arm from certain photographs taken after the body had been moved both at the scene and after transportation to the mortuary. These signs are not apparent from the photograph of the body lying on its back, taken at the scene before the body was turned on its side. Dr. Simpson, Dr. Helpern and Dr. Gerber all said that if the photographs did indicate some blanching, the simple explanation was to be found in the movement of the body at the scene and afterwards. The descriptions given by Dr. Penistan and Dr. Brooks of the condition of the body at the autopsy were inconsistent with the existence of any blanched areas on the face capable of demonstrating hypostasis. They were the only ones who saw the body. The others were testifying from their observation of photographs.

Dr. Penistan said that the face was dusky in colour as far down as the ligature and that this dusky colour was caused by strangulation and not by post mortem changes. This colouring was absent from the rest of the body except perhaps for the arm, where some post mortem lividity had occurred. He pointed out that this was a dependent part whereas the front of the face was not. The colour of the face was due to the fact that the blood could not escape past the ligature and not due to hypostasis, that is, a condition caused by settling of blood in the dependent parts of an organ.

Our conclusion on the evidence relating to blanching is that whatever traces suggesting this condition were observable from the photographs are to be attributed to the movement of the body in the bush, movement to the mortuary and movement in the mortuary. This evidence does not disturb our conclusion that the place of death was where the body was found.

On the subject of rigor mortis, we think that the man who actually saw the condition had an overwhelming ad-

vantage over those who were testifying from photographs. He says that the condition had almost passed off. Yet Dr. Petty testified to rigor mortis from what others described as the natural arching of the back and a natural position of the fingers which were being held by the assistant in order that a photograph could be taken. We are of the opinion that Dr. Penistan's evidence on rigor mortis must be accepted and that defence evidence on this subject tending to put the time of death at a later hour must be rejected.

On the question of the contents of the stomach and the state of digestion as indicating the time of death, there was diversity of opinion. Doctors Sharpe, Simpson, Helpern and Gerber supported Dr. Penistan's opinion that death occurred prior to 7.45 p.m. Dr. Petty, Dr. Jaffe and Dr. Camps rejected any possibility of such precise definition. We have already set out their opinions in detail earlier in these reasons. There is no need of repetition. We do, however, wish to explain that with each medical expert we chose the opinion which he expressed in his own words in examination-in-chief. We think it is better done this way because we could not see that on cross-examination any expert retracted or seriously modified what he said in chief.

We think that the evidence indicates that this was the same meal that the girl had finished eating at 5.45 p.m. We know the time of the meal. This was a normal healthy girl of 12 years and 9 months who had eaten a normal meal. There is no evidence of any complicating factor apart from an expression of annoyance because she could not go swimming.

Dr. Petty spoke of factors which might change the emptying rate of the stomach—drugs (which seems to be out of the question in this case), loss into the duodenum, loss through the esophagus during the act of dying or after death occurred. We have the definite evidence of Dr. Penistan on loss into the duodenum. He says there was very little. It is difficult to think of loss through the esophagus when one considers how this girl died. There were microscopic particles of food in the bronchii, a common occurrence in death by strangulation.

Again we say that this opinion evidence must be related to all the other evidence. We have the known facts of the

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meal, the time when she finished, that she was in the school grounds engaged in normal activity after the meal and before she started down the road. We have the time when she started down the road and it was not later than 7.15 p.m., not 7.30 as Truscott said. She was found 42 hours later in a bush off the road at 1.45 p.m. on Thursday, June 11, 1959. The jury's verdict must have rejected Dr. Brown's time of three or four hours after the meal because it contained no possibility of accuracy in relation to this case if they came to the conclusion that Truscott did not take the girl to the intersection.

We are faced with the same problem. No new issues were raised before us but there was a great volume of new evidence. The weight of the new evidence supports Dr. Penistan's opinion. But the decisive point in this case is still the one put to the jury by the trial judge and decided against the accused.

The Court heard 467 pages of new oral evidence on this Reference. According to firmly established rules, none of this would have been admissible had these proceedings been by way of appeal. But in view of the terms of the Order of Reference the Court decided to hear everything and did hear everything that the parties thought relevant.

Another aspect of the medical evidence related to the condition of Truscott's penis. Truscott, in his evidence before us, introduced an explanation of the condition of his penis, as described by Dr. Addison and Dr. Brooks following their examination on Friday evening, June 12, 1959, three days after the girl's disappearance. They saw the condition and described it in detail. Their opinion was that it was consistent with forcible intercourse with a girl of the age of Lynne Harper. Truscott's father was present when this examination was made. Truscott and his counsel were present in court when the evidence of the two doctors was given. There is no indication in any of the evidence that was before the jury that these injuries were the result of a pre-existing condition. On the reference, Truscott said that there was a pre-existing condition which started about six weeks before he was picked up. This is his evidence:

> A. It was about six weeks before I was picked up. And it started off, what appeared to be little blisters, and continued to worsen from there until it was in the state it was when I was picked up.

Q. What caused it to worsen? How did its appearance change?
A. Well, one blister would break and it just seemed that more would appear.
Q. Do you know what caused them to break?
A. No, I don't.
Q. Now, when you first noticed this condition that you described did you tell your father about it?
A. No, I didn't.
Q. Was there any reason why you didn't.
A. I was too embarrassed.
Q. Do you recall the first person to whom you described this condition when you first noticed it?
A. Yes, I do.
Q. Who was it?
A. It was yourself and Mr. Jolliffe.
Q. Myself and Mr. Jolliffe. And where did you describe that to us?
A. Collin's Bay penitentiary.

We find it impossible to accept Truscott's statement that he had never described the condition of his penis, as it existed prior to June 9, 1959, to anyone before he described it at the penitentiary to his counsel on the Reference. It may be that, on his first discovering the condition he was too embarrassed to tell his father about it. But when the condition existing on June 12 was discovered by Dr. Addison and Dr. Brooks on their medical examination of him, in the presence of his father, and when those two doctors described the condition which they found at the trial, and drew inferences from it, it is incredible that no disclosure was made by him to his father and to his then counsel as to the condition which he says had existed for six weeks before he was picked up.

If the condition which Truscott described did exist for some time prior to June 9, we have the evidence of Dr. Simpson that the patches could have been rubbed, causing them to be more sore, and that this is consistent with a sexual assault. Dr. Danby and Dr. Wrong, the two expert dermatologists called by the defence on the Reference, who testified on this matter, both recognized the possible impact of irritation in activating the condition described by Truscott.

Our conclusion is that there was a pre-existing condition and that it was disclosed by him prior to his trial, although no evidence about it was given before the jury. The serious condition found and described by Dr. Addison and Dr.

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Brooks was consistent with the aggravation of a pre-existing condition resulting from a sexual assault upon Lynne Harper.

When the case went to the jury, they had before them the evidence given at the trial which we have summarized above. It was all circumstantial. Their verdict read in the light of the charge of the trial judge makes it clear that they were satisfied beyond a reasonable doubt that the facts, which they found to be established by the evidence which they accepted, were not only consistent with the guilt of the accused but were inconsistent with any rational conclusion other than that he was the guilty person. On a review of all the evidence given at the trial we are of opinion that, on the record as it then stood, the verdict could not be set aside on the ground that it was unreasonable or could not be supported by the evidence. Indeed, it being implicit in their verdict that the jury completely rejected the evidence of those witnesses who said that they had seen Truscott pass over the bridge with Lynne Harper, and Truscott's statements as to having seen Lynne Harper enter a motor car, we are of opinion that the verdict was in accordance with the evidence.

We are also of opinion that the judgment at trial could not have been set aside on the ground of any wrong decision on a question of law or on the ground that there was a miscarriage of justice. It follows that, in our opinion, the judgment of the Court of Appeal for Ontario[1] dismissing the appeal made to it was right.

On this Reference we heard the additional evidence summarized above. It disclosed differences of opinion amongst the expert medical witnesses who testified. As has already been pointed out, none of this fresh evidence would have been allowed if the case had come before us on an appeal in the ordinary way under s. 597A of the *Criminal Code*. Because of the terms of the Order-in-Council referring the matter to us, we decided to receive this evidence and it becomes our duty to weigh it with a view to determining whether it causes us to doubt the correctness of the judgment at the trial. We have come to the conclusion that it does not.

1 (1960), 32 C.R. 150, 126 C.C.C. 109.

There were many incredibilities inherent in the evidence given by Truscott before us and we do not believe his testimony. The effect of the sum total of the testimony of the expert witnesses is, in our opinion, to add strength to the opinion expressed by Dr. Penistan at the trial that the murdered girl was dead by 7.45 p.m. We have dealt above with the evidence which we heard as to what observation of a car at the junction of Highway No. 8 and the county road could be made from the bridge 1,300 feet to the south.

We have already stated our conclusion that the verdict of the jury reached on the record at the trial ought not to be disturbed. The effect of the fresh evidence which we heard on the Reference, considered in its entirety, is to strengthen that view.

We turn now to certain legal objections taken by counsel for the defence on the Reference. He argued that the learned trial judge should have declared a mistrial because Crown counsel, in his opening address to the jury on September 16, said in part:

> I might say then that in sequence that on Friday night—I should say the Friday a statement was taken from the accused by Inspector Graham and the other Police, one of the other Policemen, signed that night by him...

At this point he was stopped by the trial judge.

The Court of Appeal for Ontario rejected this submission on the ground that in his opening address read as a whole Crown counsel had made it clear to the jury that the statements made by Truscott to the police which he intended to introduce were not in the nature of "confessions at all or anything like that".

In our opinion there is another ground on which the submission should be rejected. In the discussion had in the absence of the jury after the learned trial judge had stopped Crown counsel from making any further reference to the statement he made it plain that if the statement, when tendered, was ruled inadmissible he would be prepared to declare a mistrial. On the afternoon of September 18, the statement was ruled inadmissible but counsel for the accused did not then or at any subsequent point in the trial ask that a mistrial be declared. We think it clear that defence counsel elected to proceed with the trial and that the verdict cannot be impugned on this ground.

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Defence counsel also submitted that the trial judge erred in permitting Jocelyne Goddette and Arnold George to be sworn. The determination of this question depends on the interpretation to be placed on s. 16 of the *Canada Evidence Act* which was considered in this Court by Anglin C.J.C., in *Sankey v. The King*[1], where he said:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicted, from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *Crim. Code*, section 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable.

We are of opinion that the learned trial judge properly exercised the discretion entrusted to him and that there were reasonable grounds for his concluding that both Jocelyne Goddette and Arnold George understood the moral obligation of telling the truth.

The reasons of our brother Hall indicate that he would have ordered a new trial on a number of grounds. Since we feel obliged to differ from the opinion he has expressed, we think it necessary to state our view on each of the grounds dealt with in his reasons.

1. *Truscott's admonition to Jocelyne Goddette to keep the appointment secret.*

The judge's ruling on this point was favourable to Truscott. He limited the effect which the jury could give to Jocelyne Goddette's evidence on the appointment to an explanation of why she was on the road looking for Truscott.

We think the evidence had a wider relevancy. According to many witnesses, Truscott was moving about the road between 6.30 and 7 p.m. The suggested inference from this is that he was looking for Jocelyne Goddette. Then he turned up at the school grounds at 7 p.m. and talked to

[1] [1927] S.C.R. 436 at 439-40, 48 C.C.C. 195, 4 D.L.R. 245.

Lynne Harper. His explanation of the conversation was that she was looking for a ride to the intersection.

It is said that this was uncontradicted. It could not be otherwise with an unheard conversation between two persons, one of whom was dead at the time of the trial.

The conversation between Truscott and the girl is open to another interpretation. It took place only a few minutes after Truscott had been on the road looking for Jocelyne Goddette according to the Crown's submission. It was open to the Crown to put it to the jury that he was taking Lynne Harper when Jocelyne Goddette failed to appear, and taking her on the same errand.

The admonition to Jocelyne Goddette to keep the matter secret is no more a reflection on Truscott's character than the invitation itself. It is part and parcel of the same conversation and one part cannot be separated from the other. The jury was entitled to know what the whole conversation was and the witness when testifying to such a conversation should not be compelled to stop at a certain point. This was early in the trial. The girl's credibility was involved. No one knew at this stage whether Truscott would give evidence at the trial. If she had only been permitted to tell one part of the conversation, it is impossible to tell how counsel for the defence would have used that.

We do not think that any of this conversation between Truscott and Jocelyne Goddette was any reflection on Truscott's character. To put it at its worst for Truscott, it means no more than this: that he had a tentative date arranged with Jocelyne Goddette. He wanted a date with a girl that night and he took Lynne Harper when Jocelyne Goddette was not available. We have already mentioned that this has some bearing on the submission of the prosecution that his story of the ride, the sole purpose of which was to take her to the intersection, may not have been true. It does not amount to trying to prove bad character or a disposition to murder and rape.

Counsel at the trial was satisfied with this instruction given by the trial judge. He had no reason to object and

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there is no ground for saying that on this point there should be a new trial. Counsel on the reference did not take this objection.

Maxwell v. The Director of Public Prosecutions[1] is no authority for the rejection of the evidence in question here. In that case, a person was charged with manslaughter as a result of the performance of an abortion. He gave evidence of his good character. He was cross-examined about a previous trial for manslaughter involving another alleged abortion. He had been acquitted at that trial. The cross-examination was held to be bad on two grounds—as not being relevant to the issue before the jury and because it did not tend to impair the credibility of the accused as a witness.

2. *The bicycle tracks.*

This has to do with the bicycle tire marks which were found in the field north of Lawson's bush. Corporal Erskine gave evidence about these tire marks which he had photographed. Defence counsel did object to the admissibility of the evidence from the photographs. The tire marks were similar to the marks that would be made by Truscott's bicycle.

Defence counsel emphasized that these tire marks were of little or no significance in the case. He dealt with the matter in the following extract:

> Then there was evidence about marks along the roadway at the north side of the bush, and Exhibits twelve, thirteen and fourteen were taken by Corporal Erskine and filed here. These exhibits showed the dried mud along the north edge of the bush in this little laneway or driveway. Now, these were taken, according to the note on the back, on the 13th of June. We heard the evidence of the Sergeant from the R.C.A.F. Station as to the rainfall. In June there had been a trace of rain on the 1st. No rain from then until either the 10th or the 11th, when it was .24 or .27 inches, about a quarter of an inch. .24, I think he said. He said if it was .25, it would be a quarter. However, it makes no difference because it was after the 9th of June, which is the important date. But we had no rain in June prior to the 9th, except a trace, and you heard Sergeant Calvert say a few drops or a little sprinkle you would walk out in without putting a coat on.
>
> Now I suggest to you that it is quite clear from all these pictures that these tracks were made when the mud was soft. You can see where the mud squeezed up between the little irregularities in the tire. It must have been soft to make that mark. It couldn't possibly happen if this dirt was in the hard-packed condition that we find it in these conditions. That dirt must have been baked hard long before the 9th of June. We have the

[1] [1935] A.C. 309, 24 Cr. App. R. 170.

temperatures in the eighties, high temperatures, hot weather. My friend may say to you that May was a rainy month. You heard Sergeant Calvert go over the rainfall for the last sixteen days of May, and .25 or .2, so and so of rain. Very light rain. The total rain in sixteen days, something over three inches. Many of you men are farmers. You know the effect of these pictures much better than I do. You can use your own good judgment as to how long it took for that land to become parched like that, how many days before the pictures were taken the last rainfall had occurred and these tracks made there.

Immediately afterwards he pointed out that the evidence showed that Truscott had been along the tractor trail at least three times, the last one of which was about a week before the 9th of June. He and his friend were building a tree fort in the bush. Crown counsel dealt with that in the following way:

The bicycle marks, Gentlemen, I am not going to linger over. Corporal Erskine's evidence that he found tire marks, combinations of the two wheels, but they are in as Exhibits. You will have them with you. That he made comparison and that he found those marks in the laneway and you will remember the distance down. I, frankly, don't. That they compare. That they are a combination. Now, it is true there could be similar tires, certainly, but where you get radically different tires—you look at them and you will find them in combination, it would seem to be fairly strong evidence that that bicycle was down there.

But gentlemen, as I said about a circumstantial evidence case, that is the beauty—there is nothing beautiful about this at all—but that is one of the strong facts about it. You have a pile of facts and if there is one or two that are not conclusive you still, you still have the conclusive proof of the facts that are there.

A defence witness was called to say that Steven and he had a tree house or fort or something, and that Steven was in with his bicycle. I wouldn't waste your time by arguing that isn't a possibility, but I just put this forward for what it may seem to be worth for you, that that is more evidence that Steven was down that lane with that bicycle. By no means conclusive it was that night he was down. The Defence went to great efforts to counteract those marks.

That soil—or that weather expert, Calvert, Sergeant Calvert, about the dryness. Now we all know this about farms, if you get an area near a bush and there are lots of trees in that lane, and that area will stay a longer time damp. Other things might be quite dry, adjacent portions, even if you don't get any rain. There was plenty of rain in May and none in June, but there could be dampness, I suggest to you what is elementary, enough to make those marks, but that is only one of the great stack of facts that are amassing for your assistance.

The trial judge dealt with them as follows:

Nothing belonging to the accused boy was found in the locality, in the neighbourhood of the body, as you will recall. There was a tire mark in the field about seventeen feet north of the fence that ran along this lane, and Constable Erskine, who testified, said that the marks of the tire were similar, I think that is as high as he put it, were similar to the tires

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that were put in evidence of the bicycle belonging to the accused boy, and you are asked to find that those marks were made by this bicycle. That is what the Crown asks you to find. The bicycle is not a common one.

If the trial judge's remarks are taken in conjunction with the address of Crown counsel and the defence, there could be no doubt here that the issues were squarely before the jury, and defence counsel did not see fit to object to the charge on this point.

We cannot agree that it was conclusively shown that the tire marks must have been made many days preceding June 9th, nor that the learned trial judge should have directed the jury in the light of the evidence of the meteorologist Calvert to exclude from their consideration the evidence relating to the tire marks. It was for the jury to weigh the evidence of the tire marks in the light of the evidence given as to the weather conditions. We do not think that anyone took this evidence as a salient feature of the case. The salient feature of the case is Truscott's disappearance from the road after the meeting with Gellatly.

3. *The locket*

This was worn by Lynne Harper on the evening of June 9th. It was not found on her body but hanging on the wire fence that ran along the west side of Lawson's bush. The inference is open that whoever murdered Lynne Harper removed the locket from her neck. To do so he had to unclasp it. It was found unclasped and suspended on the wire fence. Truscott had described the locket in some detail. The evidence was properly admissible and the question was one of weight for the jury.

The matter of the locket and its significance to the jury was raised in the address to the jury of counsel for the defence. His suggestion to the jury was that the place where the locket was found was the place where the girl was taken into the bush either alive or dead. This suggestion is contained in the following extract from his address:

> Now the evidence would indicate that if Lynne Harper were dragged in there, through that wire fence, that she was dragged in at a point on the County Road about three hundred feet south of the north edge of the bush. And the reason for saying that is this, that that is the point where Corporal Sayeau says the locket was found.
>
> Now, we have this locket. Do you remember a locket was put in as an Exhibit? A locket and chain, and that the chain was delivered to Mrs.

Archibald by Sandra. You remember the little girl, Sandra Archibald. When Sandra gave the locket to her mother, the mother said the chain was open, and Sandra told you how she found the locket and chain suspended partly over one wire. Part of it may have been on the ground and part of it was suspended over the wire on the fence, with the chain on the outside and the locket on the inside, or vice versa. Probably you will remember that better than I do. But that appears to be where—the point where this girl was brought, or her body entered that area. Now, I suggest if Truscott took Miss Harper in at that point, somebody would have seen it. The fence there was in much better condition than the fence on the north side. It is most unlikely that he would drag the bicycle in. If he had dragged it in there would be, in all likelihood, some mark on the bicycle.

The Crown was entitled to answer this proposition and we do not regard that answer as theorizing "without one iota of evidence", "inflammatory" or a "fanciful theory".

4. *Car bearing Licence No. 981-666*

When Truscott was asked by the police what he had seen on the road when he took Lynne Harper to the intersection as he said, he mentioned Richard Gellatly and he also said that he had seen on the road an old model Dodge or Plymouth car bearing licence No. 981-666 but that the first three digits may have been in a different order. He also said that there was a man and a woman in this car. There was such a car with licence No. 891-666 belonging to a Mr. Pigun, who was then stationed at Clinton. A number of people, including Mr. Pigun, who owned cars with licences bearing some resemblance to the number given, were called to testify and all said that they were not on the county road on the evening of June 9th. Hall J. is of opinion that the Crown was not entitled to call these witnesses because this was a collateral matter and Truscott could not be contradicted on it.

In our view, this was not a collateral matter. It was strictly relevant to the fact in issue—whether Truscott was on the road when he said he was. In effect, he said that from leaving the school grounds with Lynne Harper and until his return, that he was never off the road and that he saw a car bearing a certain licence number. The owners of all these possible cars say that they were not on the road.

The inference that the jury was asked to draw in part from this evidence and from all the other evidence is that Truscott did not see and could not have seen the car that

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he described; that if he had actually been on the road all the time he would not have made such a statement because he would have known better and that, in consequence, he was not where he said he was at the material time. Facts relevant to this issue are not collateral facts.

5. *The Judges' Instruction*

It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.

The criticism made is that the extract above quoted was a misdirection and that the jury should have been told that as between Dr. Penistan and Dr. Brown, if the evidence of Dr. Brown left a reasonable doubt in their minds as to the time of death, they must acquit. We disagree with this proposition. The choice was not simply between Dr. Brown and Dr. Penistan. That evidence had to be considered in relation to the whole of the evidence, and a reading of the trial judge's instructions in full to the jury makes it plain that that is what they were told to do.

These are the instructions that he gave to the jury, in summary, at the very end of his charge:

Now, Gentlemen, in order to arrive at a verdict in this case—before I mention that, I wish to say to you this. You will have to ask yourselves, about each branch of the evidence. Is it consistent with the boy's guilt? And is it inconsistent with any other rational conclusion? But you just can't separate one piece of evidence from the other from the rest of the evidence. You will have to ask yourselves on the whole evidence which you accept, on the whole evidence that you accept, is this evidence susceptible of any other conclusion than that this boy is the killer of Lynne Harper? But if you think any other rational conclusion possible on this evidence, you will acquit him, and if the evidence raises a doubt in your mind, you will acquit him. When I say raises a doubt in your mind, I mean a reasonable doubt. Not a foolish doubt or a doubt because you are hesitant about doing your duty, and I am sure I need not say to a Jury of the County of Huron that I know you will accept your responsibilities in this matter, come what may, and that you will bring in a verdict according to your conscience. It must not be a doubt that is raised by fear, prejudice or caprice, but an honest doubt of a Juryman endeavouring to do his duty.

In order to bring in a verdict you must all agree upon it. If you do not agree you cannot bring in a verdict—you disagree. There is no obligation on any of you to agree. If, after you have discussed it fully, and considered it dispassionately among yourselves, you should disagree with your fellows, it is your duty to express your disagreement. Do not forget what I said about the onus of proof. The onus of proof is entirely on the Crown. It never shifts. There is no obligation whatever or any duty

on the prisoner to prove his innocence. It is for the Crown to prove his guilt and the Crown must prove that guilt beyond a reasonable doubt. You must feel sure about it.

Now, Gentlemen, as I see this case you may bring in a verdict of course, of not guilty. The jury is always able to do that if the Crown has not proved its case or you have even a reasonable doubt about it. You may bring in a verdict of not guilty or you may bring in a verdict of guilty as charged. There is no other verdict open to you in this case on this evidence.

6. *Dr. Brooks should not have been permitted to give his opinion that the sores on Truscott's penis and the condition of the body at the scene indicated a very inexpert attempt at penetration.*

Dr. Brooks graduated in medicine in England in 1943. He was registered to practise in England in 1946. He is a member of the College of General Practitioners in Canada. He was the Senior Medical Officer at the R.C.A.F. Station at Clinton, Ontario.

He saw these penial lesions. He had an opinion as to their cause. He thought they were about three days old. He also had an opinion about the injuries to the girl which he had seen in the bush and in the mortuary.

We are of the view that a general practitioner with this experience is entitled to give his opinion to the jury as to the cause of the conditions that he found, whether it is a physical cause or any other cause. This kind of evidence is not limited to specialists. *Regina v. Kuzmack*[1] does not state any such rule.

In *Regina v. Kuzmack,* the accused was convicted of murder. It was alleged that he had stabbed a woman and severed her jugular vein. His defence was that the death was an accident. He said that the woman attacked him with a butcher knife and that she was killed accidentally when he was trying to take the knife away from her. The woman also had cuts on the fingers of the right hand. The doctor who testified as to the cause of death also said that when the right hand was put up to the neck, the wounds on the fingers were in the same direction as the wound on the neck. His conclusion was that the hand was on the neck when the knife was put into the neck. His conclusion was rejected by the Appellate Division as "a mere guess which

[1] (1954), 110 C.C.C. 338, 20 C.R. 365.

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anyone might have made". Whether or not this was a correct ruling in the particular case is of no concern now. But the ruling is not authority for rejecting the opinion of a general practitioner as to the cause of lesions which he had personally observed and described.

7. *Admissibility of the underpants as evidence.*

These were the garments that Truscott was wearing at the time of his arrest and were taken from him then. They were very dirty and showed traces of blood and male sperm. It was open to the jury to infer that these were the underpants that Truscott was wearing on June 9 and to decide whether the traces of blood and male sperm had any significance in the case. The trial judge cannot withdraw consideration of such evidence from the jury.

8. *Extracts from the instructions given to the jury in relation to the evidence of Philip Burns.*

It is said that the trial judge gave contradictory instructions regarding the evidence of Philip Burns, and the following extracts are cited in support of this conclusion:

> Now the first is that Philip Burns was, of course, not sworn, and he said he didn't see Lynne and Steve on the road as he went north, and no one corroborates him in that respect, so that his evidence is worthless so far as you can use it in convicting the accused boy.
>
> * * *
>
> Then you, of course, won't forget Philip Burns' evidence that he left the river around between seven to seven-ten or thereabouts, seven-fifteen, and walked up the road and saw nothing of Steve and Lynne as he went up the road. That evidence was given, as I told you before, without Philip Burns being sworn.

We do not interpret the first extract, when read in context, as being a direction to the jury that Burns' evidence was worthless. The jury had been recalled as a result of objections raised by counsel to the charge, and in the first sentence of that extract the trial judge is only stating what that objection was, and not his own ruling upon it. This is made clear by the next three following sentences:

> But you could hardly corroborate a statement that I didn't see somebody. You may corroborate that he wasn't on the road, and I expect that is what Philip meant, that Steve and Lynne weren't on the road as he passed along it.

Now, of course, he met Jocelyne and he met Arnold George as he went along that road, and they were sworn, and they said that they didn't see Lynne or Steve on that highway, so in that respect their evidence is capable of corroborating Philip's.

In our opinion this instruction was correct.

9. *Direction regarding the evidence of Douglas Oats and Gordon Logan.*

The learned trial judge dealt with the effect of the evidence of these two boys in the following passage from his charge:

Now then, it is the theory of the Defence, and they brought evidence to show that, as I say, this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the Police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.

In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

In our opinion this was a clear-cut, positive direction to the jury as to the impact of the evidence of Oats and Logan, if accepted by the jury, and there is a positive direction to acquit if Truscott's story, supported as it was by that evidence, were believed. The jury is not directed that they could only acquit if they believed that story, but that, if they believed it, they must acquit. The continuing onus upon the Crown to prove its case beyond reasonable doubt, and the absence of any obligation upon the accused to prove his innocence was clearly stated on more than one occasion, as shown in the extract from the charge previously quoted.

What this particular passage does, and quite properly does, is to make clear to the jury the vital importance of the evidence of Oats and Logan, and to stress that they could not convict Truscott unless his account of what happened was completely rejected as having no truth in it.

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10. *Reference as to the possibility of Truscott having returned with Lynne Harper from No. 8 Highway.*

In charging the jury the trial judge had two undisputed facts from which to start. First, that Truscott had ridden Lynne Harper on his bicycle north on the county road toward No. 8 Highway. Second, that her raped and dead body was found in Lawson's bush, and that, in consequence of that, someone had brought her there, alive or dead. The Crown's case was that Truscott had taken her there, and that he had never taken her to No. 8 Highway. The case for the defence was that Truscott had left her at that highway, and had returned alone, she having been picked up in a car at the highway, and that some unknown person had brought her back to Lawson's bush. The trial judge apparently felt obligated to discuss all possibilities and suggested the possibility of her having been brought back from No. 8 Highway by Truscott.

In our opinion this was unnecessary, but when he finally dealt with the matter, in answer to a request by the jury for further direction of evidence, corroborated or otherwise, of Lynne Harper and Steven Truscott having been seen together on the bridge on the night of June 9, he made it abundantly clear that there was no witness who said that he had returned to the bridge with her, and that there were two witnesses, Allan Oats and Logan, who said he was on the bridge alone.

We cannot agree that the effect of the judge's direction on this point withdrew from the jury the most vital issue in Truscott's case. It was quite clear from the charge that the jury could not convict Truscott if they accepted Logan's evidence.

11. *Reference to Truscott's "calmness and apathy".*

In his charge the trial judge put the question "You will ask yourselves and you will ask yourselves the reason if this boy is guilty, why he has shown such calmness and apathy."

Counsel for the defence had urged that Truscott's demeanour and attitude, when he returned to the school yard and was seen there by a number of children, was completely

inconsistent with guilt, and in putting this question to the jury the trial judge sought to raise this issue in their minds.

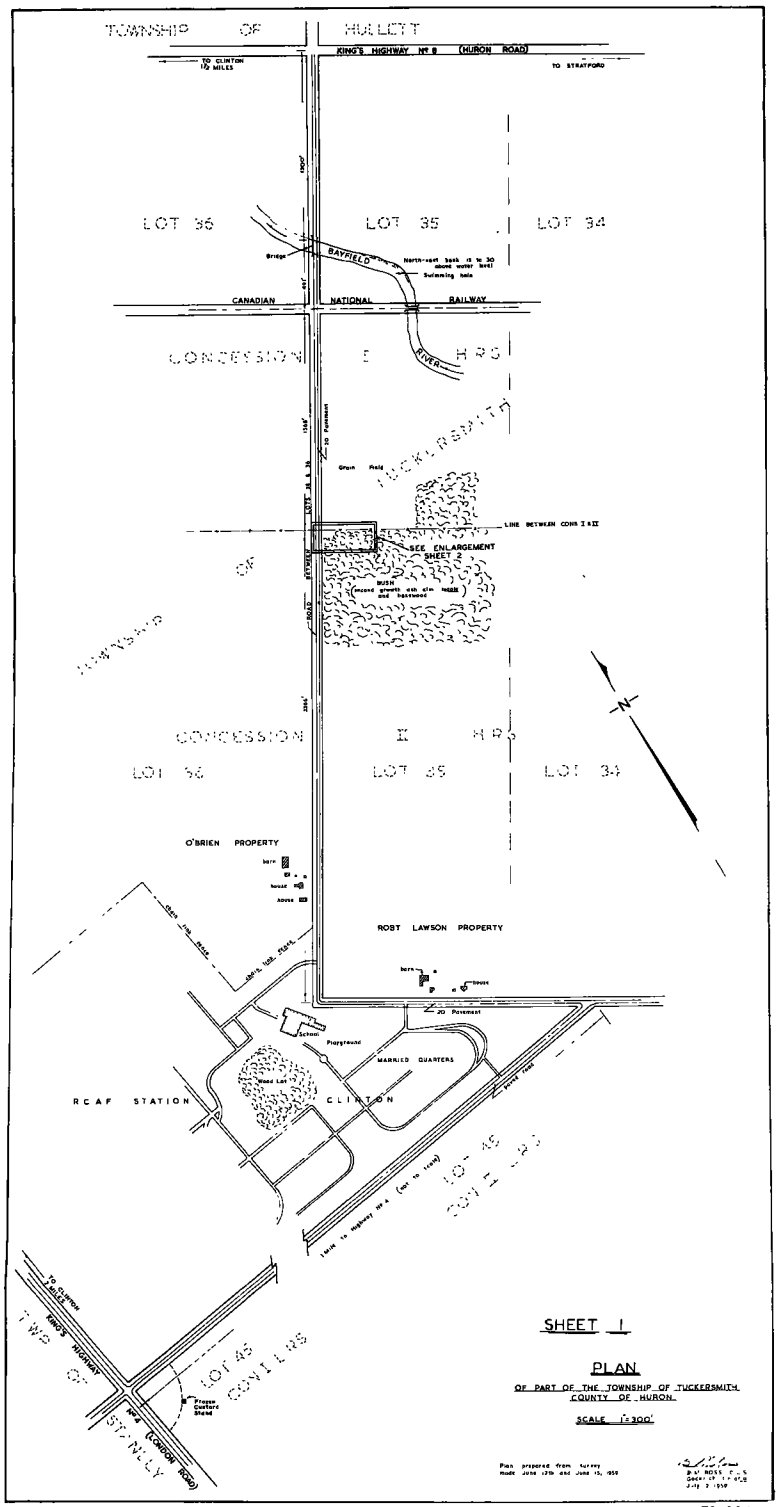
What he meant is clearly illustrated in his original charge, when he said "It is pointed out by the Defence, and very properly so, and it is something you must consider, and that is his demeanour when he returned, that he seemed to be natural."

He then cited the evidence of three children who had seen him at the school yard, who described his appearance as "normal".

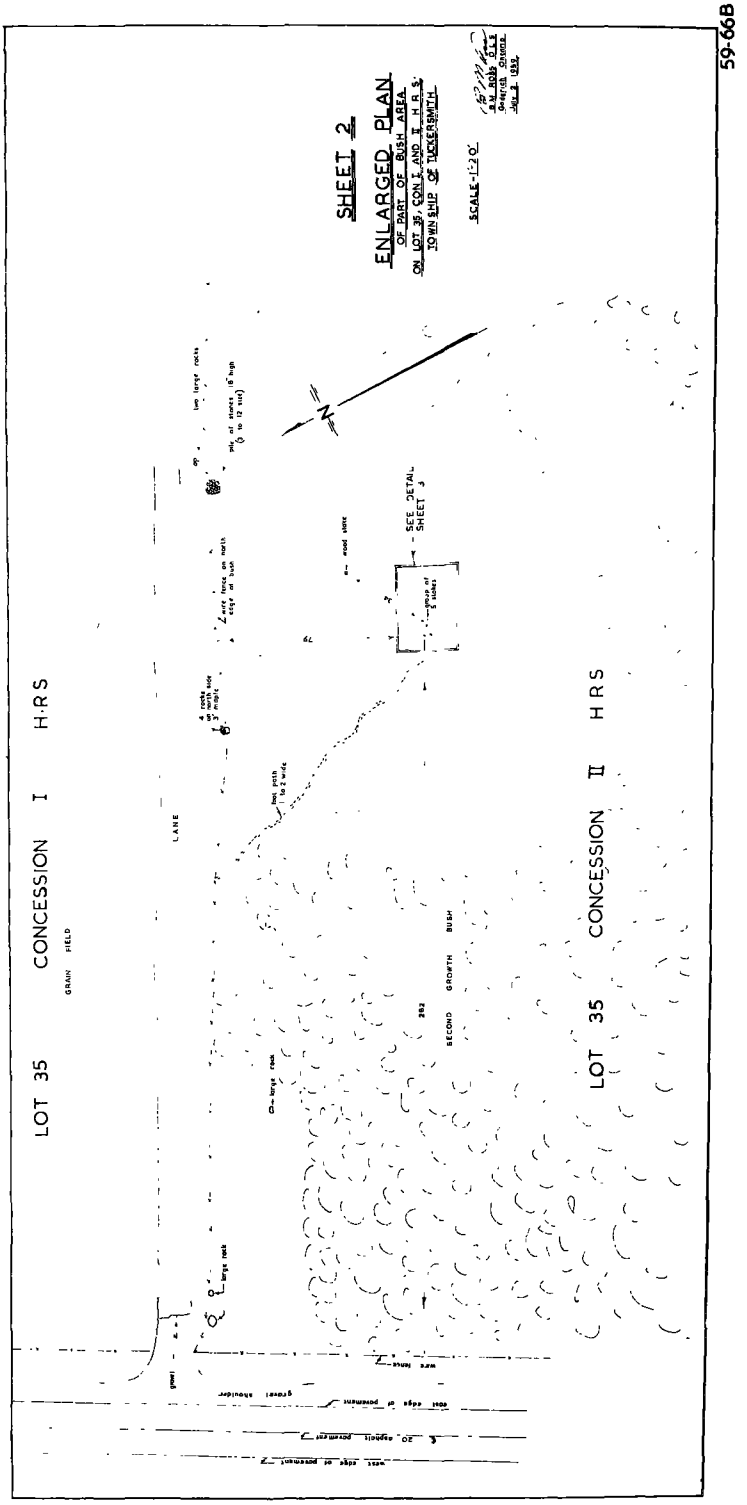
From time to time in the course of these reasons we have mentioned the fact that defence counsel took no objection to certain rulings made by the trial judge, certain evidence that was introduced to which objection is now taken and certain comments of the trial judge and Crown counsel made in the course of the proceedings. It should be clearly understood that it is not suggested that the failure of defence counsel to object to the admissibility of evidence or to any part of the trial judge's charge or to any comments by the judge or counsel in the course of the proceedings constitutes an answer to any valid objections now made to the conduct of the trial. The failure of defence counsel to make such objections is only mentioned in these reasons for the purpose of indicating that counsel who acted on Truscott's behalf do not appear to have attached any importance or validity to the objections in question.

Answer to the question submitted on the Reference

For all of the foregoing reasons our answer to the question submitted is that had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the *Criminal Code* of Canada, on the existing record and the further evidence this Court would have dismissed such an appeal.


TOWNSHIP OF HULLETT
KING'S HIGHWAY No 8 (HURON ROAD)
TO CLINTON 1½ MILES
TO STRATFORD
LOT 36
LOT 35
LOT 34
BAYFIELD
Bridge
North-east bank is 30 above water level
Swimming hole
CANADIAN NATIONAL RAILWAY
CONCESSION I H R S
RIVER
TUCKERSMITH
Grain Field
LINE BETWEEN CONS I & II
SEE ENLARGEMENT SHEET 2
BARN
TOWNSHIP OF
CONCESSION II H R S
LOT 36
LOT 35
LOT 34
O'BRIEN PROPERTY
barn
house
shed
ROST LAWSON PROPERTY
barn
house
20' Pavement
School
Playground
MARRIED QUARTERS
Road Lay
RCAF STATION CLINTON
Paved road
Main to highway No 4 (not to scale)
LOTS 35 & 36 CONS I & II
TWP OF STANLEY
LOTS 35 CONS I & II
To Goderich
KING'S HIGHWAY No 4 (London Road)
Picnic Shelters
Shed
SHEET 1
PLAN
OF PART OF THE TOWNSHIP OF TUCKERSMITH
COUNTY OF HURON
SCALE 1"=300'
Plan prepared from survey made June 12th and June 15, 1959

59 66 A


59-66B
SHEET 2
ENLARGED PLAN
OF PART OF BUSH AREA
ON LOT 35, CON. I AND II H.R.S.
TOWNSHIP OF TUCKERSMITH
SCALE-1:20'
LOT 35 CONCESSION I H.R.S
LOT 35 CONCESSION II H.R.S
GRAIN FIELD
LANE
SECOND GROWTH BUSH
SEE DETAIL SHEET 3
N

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RE: TRUSCOTT

HALL J. (*dissenting*):—Steven Murray Truscott, then age 14½ years, was tried before the Honourable Mr. Justice Ferguson and a jury at Goderich in September 1959 on an indictment as follows:

> The Jurors for Our Lady The Queen present that Steven Murray Truscott on or about the 9th day of June, 1959, at the Township of Tuckersmith, in the County of Huron, did unlawfully murder Lynne Harper, contrary to The Criminal Code of Canada.

On the 30th day of September 1959 the jury returned a verdict of guilty with a recommendation for mercy. An appeal to the Court of Appeal for Ontario[1] by Steven Murray Truscott against his conviction was dismissed on the 21st day of January 1960. By Order-in-Council P.C., 1960-87, dated the 21st day of January 1960, the sentence of death passed upon Steven Murray Truscott upon his conviction on the indictment aforesaid was commuted to a term of life imprisonment in the Kingston Penitentiary. Application for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario was refused on the 24th day of February 1960.

Section 597A of the *Criminal Code* was enacted in 1961, providing as follows:

> 597A. Notwithstanding any other provision of this Act, a person
>
> (*a*) who has been sentenced to death and whose conviction is affirmed by the court of appeal, or
>
> (*b*) who is acquitted of an offence punishable by death and whose acquittal is set aside by the court of appeal,
>
> may appeal to the Supreme Court of Canada on any ground of law or fact or mixed law and fact. 1960-61, c. 44, s. 11.

By Order-in-Council P.C. 1966-760, dated the 26th day of April 1966, pursuant to s. 55 of the *Supreme Court Act*, His Excellency The Governor General referred to the Supreme Court of Canada for hearing and consideration the following question:

> Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by section 597A of the Criminal Code of Canada, what disposition would the Court have made of such an Appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?

[1] (1960), 32 C.R. 150, 126 C.C.C. 109.

When the application was made in February 1960 for leave to appeal to this Court from the Court of Appeal of Ontario, s. 597A had not yet been enacted. The application so made was under s. 597(1)(*b*) which provided that an appeal lay by leave to the Supreme Court on a question of law alone. The application then made was restricted to the following grounds:

1. Was there any evidence of such a character that the inference of guilt of the Appellant might, and could, legally and properly be drawn therefrom by the jury?
2. Was the Appellant deprived of a trial according to law by the remarks made by Crown Counsel in his opening to the jury?
3. Did the learned trial Judge err in allowing the Crown witnesses, Jocelyne Goddette, Anold George, and Tom Gillette to be sworn?
4. Did the learned trial Judge err in failing to properly define corroboration for the jury?
5. Did the learned trial Judge err in instructing the jury that certain unsworn witnesses were in fact corroborated?
6. Did the learned trial Judge err in his charge to the jury in regard to the doctrine of reasonable doubt?

On the reference in this Court, the substantial grounds upon which the trial and conviction were challenged were materially different from the foregoing although there were included some elements of the same grounds, but essentially this is a completely new procedure and the Court must now deal with law and fact and with questions of mixed law and fact. Much new evidence was heard in these proceedings under the authority of the Order-in-Council and the accused himself testified for the first time. He maintained his innocence as he had done since his conviction in 1959.

Having considered the case fully, I believe that the conviction should be quashed and a new trial directed. I take the view that the trial was not conducted according to law. Even the guiltiest criminal must be tried according to law. That does not mean that I consider Truscott guilty or innocent. The determination of guilt or innocence was a matter for the jury and for the jury alone as its dominant function following a trial conducted according to law.

The case against Truscott was predominantly but not exclusively one of circumstantial evidence. I recognize fully

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that guilt can be brought home to an accused by circumstantial evidence; that there are cases where the circumstances can be said to point inexorably to guilt more reliably than direct evidence; that direct evidence is subject to the everyday hazards of imperfect recognition or of imperfect memory or both. The circumstantial evidence case is built piece by piece until the final evidentiary structure completely entraps the prisoner in a situation from which he cannot escape. There may be missing from that structure a piece here and there and certain imperfections may be discernible, but the entrapping mesh taken as a whole must be continuous and consistent. The law does not require that the guilt of an accused be established to a demonstration but is satisfied when the evidence presented to the jury points conclusively to the accused as the perpetrator of the crime and excludes any reasonable hypothesis of innocence. The rules of evidence apply with equal force to proof by circumstantial evidence as to proof by direct evidence. The evidence in both instances must be equally credible, admissible and relevant.

Applying the foregoing to the trial under review, I find that there were grave errors in the trial brought about principally by Crown Counsel's method in trying to establish guilt and by the learned Trial Judge's failure to appreciate that the course being followed by the Crown would necessarily involve the jury being led away from an objective appraisal of the evidence for and against the prisoner. The Crown approached the prosecution on the theory or hypothesis that young Truscott had planned to take Jocelyne Goddette into Lawson's bush to have some improper relations with her and when she failed to show he was so intent on taking some girl to Lawson's bush that evening that when Lynne Harper came to him in the school yard he seized upon this accidental meeting to persuade her to go with him and to her death. This approach is borne out (1) by Crown Counsel's statement in his opening address to the jury as follows:

> I should deal with the accused, who is in the same grade, although older than the deceased girl, and at the same school. He was, at the time, and still is, the son of a Warrant Officer who also lives in the Married

Quarters on the Station. Now, in considering the movements of this accused relative to the crime, you will hear from one, who may be a very important witness in your estimation, Jocelyne Goddette. She is a girl from the same grade, and she will tell you of arrangements she made with Steven Truscott at school on the Monday and the Tuesday before, in or near this same bush where this body was found, to look for a certain purpose she will outline. You will hear that better from her lips as to their arrangement together to go to this bush, and that was at, let us say in the area of six o'clock, roughly. *You will hear better the times from her and certain things said by way of caution of bringing anyone or telling anyone.*

(The italics are mine.)

and (2) by the questions put to Jocelyne Goddette which stressed the secrecy of the original arrangement with Jocelyne for the two to meet at about six o'clock on the county road near the bush area. The evidence given by Jocelyne Goddette as to her arrangement to meet with Truscott was as follows:

Q. And on Monday, June 8th, Jocelyne, did you have a conversation with Steven Truscott?

A. Yes, sir.

Q. Will you tell what that conversation was, please?

A. Well, on Sunday, I had gone to Bob Lawson's barn and I had seen a calf there. I mentioned that to Steve on Monday, and he asked me if I wanted to see two more newborn calves . . . And I said: "Yes". And he asked me if I could make it on Monday and I said: "No", because I had to go to Guides.

MR. HAYS:

Q. Make what?

A. If I could go with him to see the calves and I said: "No".

Q. Where were you to go with him?

A. Well, he didn't tell me on Monday.

Q. Well, go ahead?

A. And then he asked me if I could make it on Tuesday and I said I would try. And then on Tuesday, he told me if I could go and I just told him I didn't know, and he said to meet him, if I could go, on the right-hand side of the County Road, just outside of the fence by the woods, *and he kept on telling me not to tell anybody because Bob didn't like a whole bunch of kids on his property.*

(The italics are mine.)

Q. Now, that is on Tuesday, June 9th, is it, that that conversation is, Jocelyne?

A. Yes, sir.

Q. And when were you to go?

A. Well, at six o'clock.

Q. On Tuesday?

A. Yes, sir.

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Q. And where—did you see Steven later after school?
A. Yes, sir. He came to my house at ten before six and I didn't answer the door, my brother did, and Steven asked me if we had any homework and I said we had English for our English test on Wednesday, and when he was just getting on his bike to go away, I told him I didn't think I would be able to make it because we were just starting supper, but that I would try.

This evidence was admissible and relevant to establish why Jocelyne said she was looking for Truscott that evening excepting possibly the words I have put in italics, but reading as it does the phrase was rather innocuous because it gives the reason for keeping quiet, and with nothing more the learned judge could have told the jury to ignore it. Even a failure to do this would not have been serious. However, after some intervening questions and answers the subject was deliberately reopened and the following question was put to Jocelyne by Crown Counsel and an answer solicited which emphasized the secret aspect of the proposed meeting of these two teen-agers:

Q. Was there any more conversation between you then, on Tuesday?
A. Well, he just kept on telling me to "don't tell anybody to come with you", and that is all.

and this was magnified by the learned judge who, following this question and answer, said:

HIS LORDSHIP:

Q. Say that again. He just kept on telling me what?
A. Not to tell anybody.

This was when the damage was done. These last two answers were wholly inadmissible. In dealing with this particular item, the majority opinion says:

> The admonition to Jocelyne Goddette to keep the matter secret is no more a reflection on Truscott's character than the invitation itself. It is part and parcel of the same conversation and one part cannot be separated from the other. The jury is entitled to know what the whole conversation was and the witness when testifying to such a conversation should not be compelled to stop at a certain point.

That observation is only partly correct in that it is incomplete. It expresses the ordinary rule but that rule is subject to a number of exceptions. It is often the duty of counsel to forewarn a witness not to volunteer or blurt out as part of the narrative in an answer evidence that while part of that

narrative is inadmissible as, for instance, references to confessions or admissions made by an accused or evidence of bad character and many others. It is not a case of volunteering or blurting out that is being dealt with here but a conscious and deliberate drawing from the witness evidence that was bound to be prejudicial and as an integral part of establishing the Crown's theory that Truscott was planning harm to Jocelyne Goddette.

The evidence had no probative value to prove Truscott murdered Lynne Harper and should have been rejected when tendered by the rule which excludes evidence of similar acts which Viscount Sankey said in *Maxwell v. Director of Public Prosecutions*[1] was "one of the most deeply rooted and jealously guarded principles of our Criminal Law". Having thus laid this foundation, Crown Counsel elaborated the theory and put it forward as proof of Truscott's guilt in his summation to the jury saying:

> Now, there is substantial support for Jocelyne's evidence that she went looking for Steven, and support for her evidence of these conversations. She went on to tell how she couldn't go with him on Monday night. Well then, there was a tentative date for six o'clock on the Tuesday night. And that he, Steven, came to the house and called for her. He called there at ten minutes to six but she was having her supper, *and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl.*

(The italics are mine.)

* * *

> Here is the relevancy of that, Gentlemen. He missed his first prospect and what more logical and likely person to accept his proposal to go with him on short notice than a girl he knows is fond of him, soft on him, whatever you will, and likely to take up his invitation?
>
> Now, we are told—again we come back to Mrs. Nickerson and Mrs. Bohonus. They talked and she sat on the bicycle tire and they went—I suggest that they then went down to the bush. I suggest that is a reasonable inference, that Steven gave Lynne the new-born calf invitation that he had previously extended to Jocelyne, and that he gave her that, either at the school or as they rode—walked or rode, and if it wouldn't sound like a good proposition to an adult or to some girls, older girls, other girls, we must remember, it was coming from a boy that she liked. She was fond of. That she would want to be with. And, unfortunately, that may have removed what would otherwise be a little caution. And also, there was evidence that Lynne was interested in ponies, at least, and

[1] [1935] A.C. 309 at 317, 24 Cr. App. R. 170.

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had gone to this house on the highway, to see ponies. I don't think, Gentlemen, I am asking you to make too much of a deduction but what she would be very likely to fall for the lure of the new-born calves coming from Steven, *and that she went with him to the bush and to her doom.*

(The italics are mine.)

There was no evidence of the conversation between Truscott and Lynne in the school yard or as they left together excepting Truscott's statement to the police that Lynne had asked him for a ride to No. 8 Highway which from the nature of things was uncontradicted. There was no suggestion in the evidence of those who saw Truscott and Lynne together in the school yard from which it could be inferred that Truscott was trying to induce or persuade Lynne to go anywhere with him. Mrs. Bohonus said it was Lynne who appeared to her to be doing the talking.

The learned judge in his charge to the jury recognized the impropriety of this prejudicial and inflammatory appeal but too late to undo the harm as I shall discuss later. Notwithstanding what the learned judge said in this regard, it is significant to note that at pp. 54 and 55 of the Crown's factum on this reference is to be found:

> It is submitted that the following inference may be properly drawn from the evidence adduced at the trial and from that evidence supplemented by the evidence on the Reference:
>
> (1) *Truscott was bent on taking a girl into Lawson's Wood on June 9th.* His expressed purpose was to look for new-born calves, but this was coloured by his desire for secrecy;

(The italics are mine.)

The majority opinion also says:

> We do not think that any of this conversation between Truscott and Jocelyne Goddette was any reflection on Truscott's character. To put it at its worst for Truscott it means no more than this: that he had a tentative date arranged with Jocelyne Goddette. He wanted a date with a girl that night and he took Lynne Harper when Jocelyne Goddette was not available. We have already mentioned that this has some bearing on the submission of the prosecution that his story of the ride, the sole purpose of which was to take her to the intersection, may not have been true. It does not amount to trying to prove bad character or a disposition to murder and rape.

This appears to ignore the reality of the situation when considered in the actual setting as it was being developed at the trial by Crown Counsel and entirely repugnant to what Crown Counsel said in the extracts from his summation to

the jury quoted above when he said, referring to Truscott having called for Jocelyne Goddette *"and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl"*, and when he followed that with his reference to Lynne Harper and said that Truscott gave Lynne the new-born calf invitation and *"that she went with him to the bush and to her doom"*.

The majority opinion rightly points out that the facts in *Maxwell v. Director of Public Prosecutions* differ materially from those of the case at bar. It was not the factual situation that Viscount Sankey was dealing with in the extract that I have quoted. He was stating a long established principle applicable to many factual situations. *Maxwell*'s case was an obvious if not a flagrant violation of the principle. Violations can and do occur in less obvious instances. The present case is one of those. Crown Counsel was pursuing a planned course of action that included the subtle perverting of the jury to the idea that Truscott was sex hungry that Tuesday evening and determined to have a girl in Lawson's bush to satisfy his desires, if not Jocelyne, then Lynne.

It was inevitable that this horrible crime would arouse the indignation of the whole community. It was inevitable too that suspicion should fall on Truscott, the last person known to have been seen with Lynne in the general vicinity of the place where her body was found. The law has formulated certain principles and safeguards to be applied in the trial of a person accused of a crime and has throughout the centuries insisted on these principles and safeguards being observed. In the great majority of cases adherence to these fundamentals is not difficult but in a case like the present one, when passions are aroused and the Court is dealing with a crime which cries out for vengeance, then comes the time of testing. It is especially at such a time that the judicial machinery must function objectively, devoid of inflammatory appeals, with the scales of justice held in balance.

This standard was not lived up to in the trial under review in a number of instances which one by one were

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damaging to Truscott and taken collectively vitiated the trial. Nothing that transpired on the hearing in this Court or any evidence tendered here can be used to give validity to what was an invalid trial. A bad trial remains a bad trial. The only remedy for a bad trial is a new trial. Accordingly, the validity of the trial is, in my view, the dominant issue. With deference to contrary opinion, I see no purpose in erecting a massive and detailed structure of evidence, inference and argument confirming a verdict that has no lawful foundation upon which to rest.

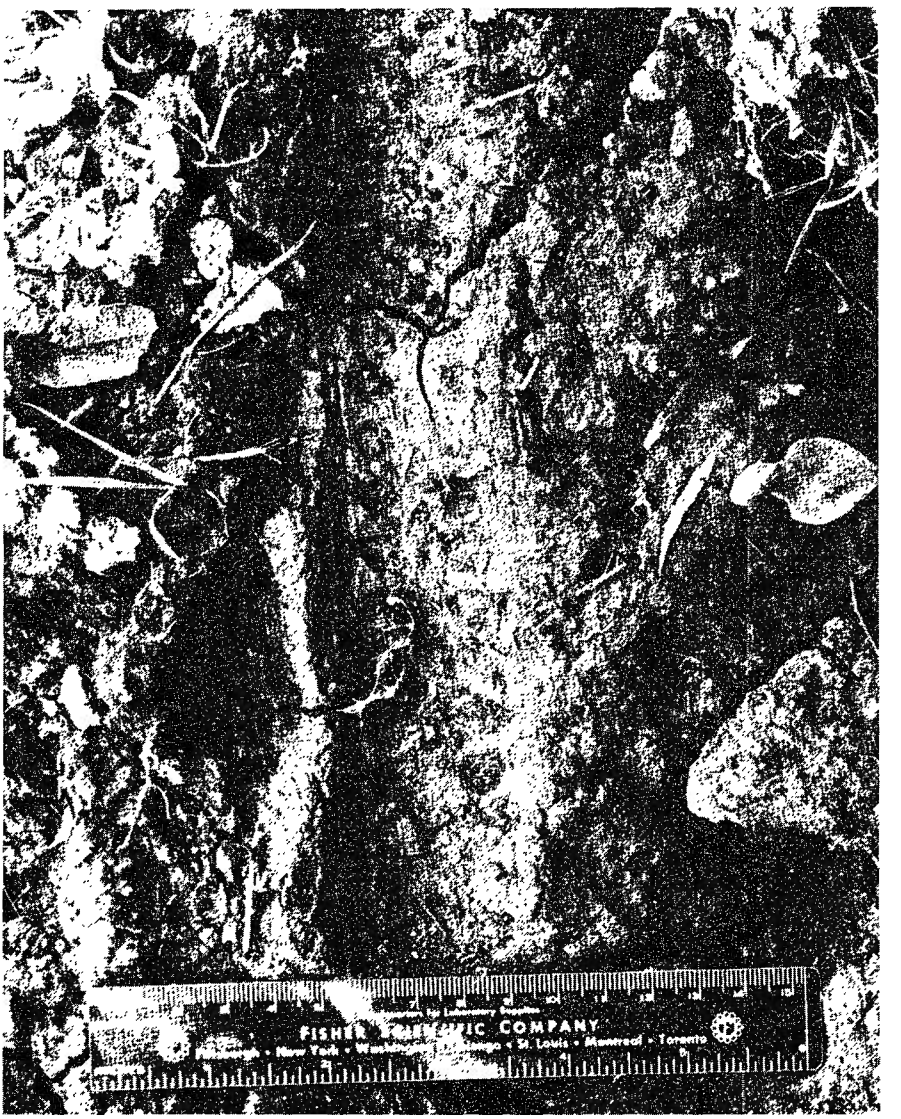
It was the Crown's theory at the trial that Truscott took Lynne into Lawson's bush by way of the tractor trail, having carried her on the handle bar of his bicycle to a point on the tractor trail some 350 feet east of the county road and then induced her to enter the bush through the fence, concealing his bicycle nearby. It must be observed in passing that at the hearing in this Court Mr. Bowman, of Counsel for the Crown, advanced the theory that Truscott took Lynne into the bush from the county road at or near the point where the locket was later found hanging on the fence. Crown Counsel at the trial had an altogether different theory which he put forward concerning this locket —but I shall revert to this later.

At the trial the Crown led evidence to show that Truscott entered the tractor trail with Lynne. This was evidence by Corporal Erskine, the very first witness called by the Crown, that on the 13th day of June (two days after Lynne's body was found) he observed and photographed certain bicycle tire marks which corresponded with the tread on the tires of Truscott's bicycle. Defence Counsel objected to the photograph (Exhibit 13) being received, but was overruled by the learned judge who said regarding the photograph:

> Mr. Hays seems to think it has something to do with the case. I don't think I can rule it out on the grounds you put forward.

This Exhibit 13 shows conclusively that the tire marks photographed by Corporal Erskine must have been made many days preceding June 9th. The marks were made when

the soil in which they were imprinted was wet and there had been no rain in the area, with the exception of a trace in the night of May 31st-June 1st and that throughout the period June 1st to June 9th the temperature had been in the high 80's and low 90's. Perhaps the best way to illustrate the impossibility of these tire marks having been made on June 9th is to reproduce Exhibit 13 showing the parched terrain with the wide cracks in the surface. Here is a reproduction of Exhibit 13:



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Notwithstanding that the evidence completely negatived the use of these tire marks as evidence implicating Truscott on June 9th, Crown Counsel argued to the jury in his summation as follows:

> The bicycle marks, Gentlemen, I am not going to linger over. Corporal Erskine's evidence that he found tire marks, combinations of the two wheels, but they are in as Exhibits. You will have them with you. That he made comparison and that he found those marks in the laneway and you will remember the distance down. I, frankly, don't. That they compare. That they are a combination. Now it is true there could be similar tires, certainly, but where you get radically different tires—you look at them and you will find them in combination, it would seem to be fairly strong evidence that that bicycle was down there.
>
> But, Gentlemen, as I said about a circumstantial evidence case, that is the beauty—there is nothing beautiful about this at all, but that is one of the strong facts about it. You have a pile of facts and if there is one or two that are not conclusive you still, you still have the conclusive proof of the facts that are there.

The learned judge should have charged the jury in the light of the evidence of the meteorologist Calvert and with Exhibit 13 before him that they must exclude from their consideration the evidence relating to these bicycle tire marks. This he failed to do, but instead, and in my opinion wrongly, left the jury to understand that they could use that evidence as part of the proof against Truscott that he had ridden Lynne along that tractor trail the night she disappeared. He said:

> Nothing belonging to the accused boy was found in the locality, in the neighbourhood of the body, as you will recall. There was a tire mark in the field about seventeen feet north of the fence that ran along this lane, and Constable Erskine, who testified, said that the marks of the tire were similar, I think that is as high as he put it, were similar to the tires that were put in evidence of the bicycle belonging to the accused boy, and you are asked to find that those marks were made by this bicycle. That is what the Crown asks you to find. *The bicycle is not a common one.*

(The italics are mine.)

That was misdirection on a salient feature of the evidence for it was part and parcel of the Crown's case at the trial that Truscott took Lynne into the bush from the tractor trail and that he had hidden his bicycle so well that it was not seen by Jocelyne Goddette when, as she says, she went along the tractor trail looking for Truscott and calling his name. This presupposes that Truscott had the foresight to anticipate that Jocelyne would come along the tractor trail looking for him and to conceal his bicycle against that

eventuality; a theory that attributed to Truscott a carefully planned design to harm Lynne and escape detection.

The majority opinion, in dealing with the matter of the bicycle tire marks, says: "We do not think that anyone took this evidence (the tire marks) as a salient feature of the case." I find it difficult to see how this statement can be substantiated. Who knows what the jury considered salient? This evidence was regarded as sufficiently important by Crown Counsel as to insist that it be received.

I referred earlier to Mr. Bowman's theory that Truscott took Lynne into the bush from the county road at or near the place where Lynne's locket was found on the fence. In his argument to this Court, Mr. Bowman said:

> My submission was, my lord, that they disappeared from the county road, and my submission was that it might be reasonably inferred that they went into the wood, and that they got into the wood through the barbed wire along the county road. It was broken down in two or three places, and the locket was found there, which could have some significance. They could have gone in any where, my lord, but I submit that there is one possible way. Whether or not that is what the jury accepted I cannot say.

However, at the trial, in dealing with this locket, Crown Counsel put forward a more sinister theory which, if accepted by the jury as Crown Counsel intended it should be, made the 14½ year old Truscott out to be a cunning criminal who, having taken the locket from Lynne when he strangled her, *later and before he was taken into custody planted the locket where it was found to mislead the police* and to lay the foundation for a defence to be used later if necessary that Lynne was murdered elsewhere and then brought to where she was found. He said to the jury:

> Now, the Defence has raised the matter of a locket. And do you recall Steven's statement to Constable Hobbs and Corporal Wheelhouse—maybe it is Sergeant Wheelhouse on Thursday. He was interviewed by Hobbs and another officer, Johnson, I believe on Wednesday. And then when Hobbs went back on the Thursday, he said: "Have you anything to add?" "Yes, she was wearing a necklace like a gold chain and heart, possibly plastic." I am not sure whether one or the other officer put in the word "Plastic".
>
> "With an Air Force Crest embedded in it." Mark you, not on it, but in it, and sure enough, it is in it, not on it, but in it.
>
> Now, I ask you, Gentlemen, is that not an awful lot of details for this boy to have observed about this locket, if it is Lynne's, as he would ride along the road with her. Would he be able to give such a minute description of it as that, if that is all the chance he had to observe it? Now, Gentlemen, the Defence introduced this matter of the locket on the basis that it was found on the west—on a wire of the fence on the west

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side of the bush along the County Road. And the theory is, I take it, from what my learned friend said yesterday, that in some way she was murdered elsewhere, brought back and dragged through the fence and this pulled off and stuck on the fence.

* * *

I have a theory, Gentlemen, to put forward only for your consideration, and that is this: that her attacker removed that locket, undid the fastener when the girl was dead, and he couldn't have got it off any other way, it is just too small to go over her head. And he took it off and took it with him and studied the detail after that he could never have studied in the interval of time that she was on the bicycle, to have found that that crest was embedded in the locket. It is only theory, Gentlemen. Reason it out for yourselves. And then if you deduce it that way, ask yourselves the possible identity of anyone who would take a souvenir away from a body like this. Who would want to take it away? Would it be someone rather young? Would an older man ever be bothered with it? You may have difficulty reasoning out the "why". But ask yourselves this, if it were taken, studied out so that these details could be given, *could it have been taken back and planted, so to speak, where it was found?* And what is the point of that? Remember, there is Wednesday, Thursday, Friday, before the accused is arrested, but the investigation is on.

(The italics are mine.)

The learned judge permitted Crown Counsel to so theorize to the jury without one iota of evidence to support the theory that Truscott under suspicion as he then was had the cunning to *plant* the locket where it was found—a theory that was prejudicial and inflammatory. This was error in a material aspect.

Now, what was the evidence regarding this locket? First, it was not actually identified as the one Lynne was wearing on June 9th. Lynne's father, F/O L. B. Harper, refused to say the locket produced in Court was Lynne's, saying only that Lynne had one similar to it. Mrs. Harper said she did not know whether Lynne was wearing her locket or not that evening and when shown the locket she said, "I couldn't say certainly. It looks like it. It was very similar." The locket produced in evidence was said to have been found by a ten year old girl, Sandra Archibald. Her unsworn evidence was as follows:

Q. Sandra, when you were out picking berries, did you find something valuable?

A. Yes.

Q. Where did you find it, Sandra?

A. I found it near the woods where Lynne was found.

Q. Could you say just where it was?

A. I can't remember.

Q. What did you find, Sandra?
A. I found a locket, like a necklace.
Q. Pardon?
A. I found a heart-shaped necklace.
Q. A heart-shaped necklace?
A. Yes.
Q. Could you describe it? Tell us about it a little more?
A. It was whitish and had this Air Force thing inside, and when I found it, it was open.
Q. What was open, Sandra?
A. The chain that you put around your neck.
Q. And where was it, Sandra?
A. Well, the chain, it was hanging on the fence and it was inside, in some grass and the heart was outside.

Her evidence as to finding the locket was not corroborated. Having found it, she said she took it home and gave it to her mother the same day. The mother, Mrs. Aida Archibald, testified as follows:

Q. Are you the mother of Sandra Archibald, who testified here yesterday, Mrs. Archibald?
A. Yes sir.
Q. And I produce to you a locket which is Exhibit twenty-three in this matter. Would you look at it, Mrs. Archibald. Did that come into your possession at any time?
A. Yes sir.
Q. At what time?
A. Around ten to five on June the 19th.
Q. From what source?
A. From my daughter. She picked it up.
Q. That is Sandra, who testified?
A. Yes sir.
Q. And what did you do with it?
A. Well, at the time I didn't know what to do.
Q. What did you do?
A. And some of the kids...
Q. Never mind what anybody said. What did you do?
A. I turned it over to two S.P.'s.
Q. Who was that?
A. Sergeant Johnson and Mr. Wheelhouse.
Q. At the time your girl gave it to you, was the clasp open or closed?
A. It was open, sir.
Q. When you turned it over it was in the way you got it?
A. I put it in a Kleenex, sir.

Truscott had told Constable Hobbs on June 11th that Lynne was wearing a gold chain necklace with an R.C.A.F. crest in it when giving the ride to Lynne on his bicycle. It was from this evidence that Crown Counsel was permitted

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to dramatize the locket incident into a formal submission that it was *planted* where it was found by Truscott to mislead the police.

It was not the only fanciful theory put forward by the Crown to the jury to prejudice Truscott without any supporting evidence. Evidence was led that Truscott told police officers Wheelhouse and Hobbs on the Thursday that he had seen an old model Dodge or Plymouth car somewhere on the county road on the evening of June 9th bearing Licence No. 981,666. The Crown called a witness from the Department of Transport, one Saunders, to show that Licence No. 981,666 was registered to one Thompson of Brampton. Thompson, on being called, said he was not near Clinton at all that evening. Saunders testified that Licence No. 189,666 was registered to one Vasil of Toronto and was for a 1957 Pontiac four door; that Licence No. 198,666 was issued to one Mika of Scarborough for a 1955 Buick; No. 819,666 was in the name of McLaren of Drumbo and was for a 1957 Oldsmobile hard top. Then as to No. 918,666 registered to a Miss Wilkins of Kitchener for a 1949 Plymouth, Miss Wilkins was called and said her car was never out of the Kitchener area; finally as to No. 891,666, a Mr. Pigun then on the R.C.A.F. Station at Clinton was called to establish that his car, a 1949 Chevrolet Sedan, was not on the county road on the evening of June 10th. Now all this evidence was, in my opinion, inadmissible. Truscott had not volunteered having seen a car with Licence No. 981,666 in proof of having taken Lynne to No. Eight Highway. He does not suggest that he met that car north of the tractor trail. His statement in this regard as given by Constable Hobbs is as follows:

> Q. What was the next you saw of Steven Truscott?
>
> A. I next saw Steven Truscott at the school at the R.C.A.F. Station, Clinton. It was the following morning, Thurdsay, June the 11th, 1959. I was accompanied by Sergeant Wheelhouse of the R.C.A.F. Police. We went into the school and inquired of Mr. Trott, the teacher, if we could have a room in which to question various children regarding the missing girl, with hopes of finding some information as to where she might be. I started off by having Steven brought into the room and I asked him if there was anything further he could add to our conversation of the date previous. He said: "Yes, she was wearing a gold chain necklace that had a heart with an R.C.A.F. crest in it." I asked him if he had seen anyone else while he was giving the ride to Lynne on his bicycle. *He replied that he had seen Richard Gellatly. I asked him*

> *if he saw any other vehicles, motorcycles or motorcars during this ride. He replied that he had seen an old grey Plymouth or Dodge.* I asked him if he could remember the occupants. He said: "A man and a lady." I said: "By any chance, Steven, can you remember the licence number of the car?" He said: 'Yes, it was 8 . . ." pardon me. "It was 981 666." I asked him if he saw anyone else. He replied that on the way down he had waved to Arnold George, who was swimming in the river. I asked him again to repeat the licence of this old grey Plymouth or Dodge and he did, without hesitation. He said: "981,666." I asked him what he did after watching the others swimming at the river. He replied that he cycled back up the County Road. I asked him a third time to repeat the number of this motorcar, this old grey Plymouth or Dodge, and without hesitation again, he gave me the number 981,666. Our conversation ended and I went to a telephone to get a registration check on this licence number.

(The italics are mine.)

The majority opinion says in connection with this item: "In our view, this was not a collateral matter. It was strictly relevant to the fact in issue—whether Truscott was on the road (the County road) when he said he was." The fact is Truscott never suggested that he was not on the County road. He told police he carried Lynne northward on that road and on the Crown's theory he carried her 3,366 feet before he reached the tractor trail—well over half a mile. It was at this time that he met Richard Gellatly and on being further questioned told of having seen the car with Licence No. 981666. No suggestion here that he was saying he saw that car north of the tractor trail. If there is one fact upon which Crown and Defence and all Counsel were in agreement it is that Truscott carried Lynne on his bicycle from the south end of the County road to a point at least as far north as Lawson's bush. The statement regarding this car was accordingly a collateral matter. Evidence in contradiction of it was therefore inadmissible; it was tendered as Crown Counsel said:

> Now, this is only on the question of credibility. There is nothing in the main theory of this case that bears on that car, as far as I know. But again, if a man, or a young man, is telling falsehoods, *I put it forward as indicative of a guilty state of mind.*

But even more improperly it was argued by Crown Counsel that it was additional evidence of Truscott's cunning. He put it to the jury this way:

> 891,666 a 1949 grey Chevrolet registered to Mr. Pigeon. Now, we called Mr. Pigeon. He is with the R.C.A.F. Station at Clinton. We called him and he testified how on the night in question he went down from his

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garden on Number Four Highway, south to Brucefield going out, not by the east side—not by the County Road at all, but down through what is described as the main gate. I don't say he used that expression. You will be able to figure it out from the map. He never was near where Truscott put him, *and I suggest, Gentlemen, with respect, that Steven Truscott had seen that car around in the interval between the Tuesday and the Police coming to him, and he was getting some ammunition ready and he snapped out a number on the gamble that that car might have been on the County Road.* He got one digit off on the number. He got a shade off on the make. It is a Chev. against a Plymouth or Dodge. He had the grey right. But it misfired because we were able to bring before you Mr. Pigeon, and he never was on the County Road that night, and he related his movements.

(The italics are mine.)

The learned judge admitted this evidence and this was error. The error was compounded and the real damage done when he permitted Crown Counsel to make the charge of fabricating evidence without stopping him then and there. Without this unsupported suggestion, the calling of seven witnesses on this aspect of the case alone would have been nothing more than a waste of time, but all this time was used so Crown Counsel could put to the jury the idea that Truscott had fabricated the story in preparation for his defence. One may question in this connection why the evidence was limited to a transposition of the first three ciphers only. If one of the 6's be transposed with the figure 1 the number of possibilities is greatly increased.

The learned judge showed that he was well aware that the case was one where the jury might be influenced by the nature of the crime for he warned them at the beginning of his charge as follows:

> There is another matter I should like to mention to you. The circumstances of the killing of this little girl are shocking. As I said, they are revolting in the extreme, and one would think that only a monster could be guilty of such a killing. The accused is charged with this monstrous crime and he is just a lad of little more than fourteen years, fourteen and a half. Now, you must not permit the fact of his youth in any way to prevent you from bringing in a verdict in accordance with your conscience. Nor, on the other hand ought you to allow the revolting nature of the facts surrounding this case in any way influence you to bring in a verdict which is, in any way, shape or form, contrary to the evidence, or based on anything but the evidence. You must not be prejudiced in any way.

But that warning came too late. It was nullified in advance by the manner in which the Crown had elected to build its case and by the judge's failure to exclude the evidence with

which I have dealt and by his failure to stop Crown Counsel when in his speech to the jury he advanced subtly worded inflammatory arguments which should have been repudiated on the spot. Only in respect of the reference to Jocelyne Goddette did the judge tell the jury to disregard what Mr. Hays had said and in this particular instance the warning came much too late. It was not possible in my opinion to undo the damage done by this belated direction. There are instances where a trial judge may, by directing the jury to purge from their minds evidence which should not have been heard or to completely ignore erroneous statements or arguments made to them, enable a Court of Appeal to say under s. 592(*b*)(iii) that no substantial wrong or miscarriage of justice has occurred, but the present case is not one of those. The errors and inflammatory arguments were too numerous and too integrated into the whole of the case as to be capable of coming within the exception provided for by that section.

The evidence was as conclusive as evidence can be that Lynne was strangled and raped. It was argued on behalf of Truscott both at the trial and before this Court that Lynne was not murdered where her body was found. I do not find it necessary to go into this phase of the case in detail because, in my view, the evidence was such that the jury, if the issue had been properly left to them, could find that she was murdered at the place where her body was found. I will deal later with this aspect of the charge.

More important, however, in so far as Truscott is concerned is the submission that the evidence failed to establish that her death occurred prior to 7.45 p.m. on June 9th. If she was murdered later than this time, Truscott could not be the guilty person. It is as simple as that.

The argument that death was later than 7.45 p.m. June 9th was stressed by Defence Counsel at the trial. Both the Crown and the Defence went fully into the medical aspects of this issue before the jury.

In summary, at the trial Dr. Penistan the pathologist had testified that in his judgment death had occurred in the period between 5.45 and 7.45 p.m. June 9th, basing his opinion on the fact that Lynne had finished her supper at a quarter to six and that when the autopsy was performed, it

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was found that the stomach had not emptied as it would normally have done within two hours. Another medical man, Dr. Berkley Brown, a specialist in internal medicine on the staff of the University of Western Ontario, called on behalf of Truscott, testified that the stomach would not empty for a matter of three and a half to four hours. Here was a conflict on a decisive aspect of the case which the jury would have to resolve. The learned judge charged the jury as follows:

> According to Doctor Penistan, and to the medical evidence, she died at a time which is not altogether, in any view, inconsistent with her having finished her dinner at about a quarter to six. Doctor Brown says, and I must draw it to your attention, that it takes three and a half to four hours to empty the stomach and it is on the basis of that that the defence asks you to say that she could not have been killed before Steven returned at 8:00 p.m. You have Doctor Brown's testimony. It is unfortunate always, that medical men should disagree on what is more or less a scientific point. Doctor Brown says three and a half hours to four hours.
>
> Now, the stomach, of course, was not empty. Doctor Penistan said there was still a pint of food in the stomach and he removed that pint. It is true there is not a pint of food in the bottle now, and it is for you Gentlemen to accept or reject Doctor Penistan's evidence that he took a pint out, but Doctor Brooks was there and saw the pint. Don't forget that the bottle went to the Attorney-General's Laboratories, for tests and we don't know exactly what happened to it there except it was handed to some man whom we have not seen. *It will be for you to say whether you accept Doctor Penistan's theory, an Attorney-General's Pathologist of many years' standing, or do you accept Doctor Brown's evidence.*

(The italics are mine.)

The last sentence was clearly a misdirection to the jury. The jury should have been told that as between Dr. Penistan and Dr. Brown, if the evidence of Dr. Brown left a reasonable doubt in their minds as to the time of death, they must acquit. No jury can be told that they have to accept the evidence of one witness or that of another. The burden is on the Crown to satisfy the jury on every material aspect of the case beyond a reasonable doubt. I do not find it necessary to go in detail into the medical evidence given on the reference in this Court. This has been done in the majority opinion and is seen to be contradictory in the extreme. This much must, however, be said that it tends strongly to increase the doubt a juryman may honestly have had as to the time of death, if properly charged.

The medical evidence tendered in this Court and not heard by the jury cannot be used to nullify the damage

done by this misdirection. The jury should have been properly charged. This Court cannot substitute its view of the medical evidence for that of the jury.

There is, however, one aspect in particular of the medical evidence heard in this Court that has an important bearing on the case. It is the evidence relating to the penile lesions. At the trial the Crown, on the evidence then before the Court, argued that the sores on Truscott's penis as described by Drs. Addison and Brooks had been caused by rape or forced intercourse. That was the theory of the Crown and the case went to the jury on this hypothesis. As such, it was, I think, the most damaging piece of evidence at the trial connecting Truscott with Lynne's death. The point was stressed by Crown Counsel. He said in part:

> Now, Gentlemen, Doctor Addison is a General Practitioner in the Town of Clinton, and has been for many years. You heard his background, his qualifications, and I suggest to you, one and all, that Doctor Addison comes into this case with no axe to grind and is worthy of credence. That Doctor Addison was an impressive witness, that is for you, Gentlemen. You saw him and heard him. Now, Doctor Addison would know all about, from his years and years of general practising, know all about the shape and nature and so on, of the private parts, both of a man and of a twelve-year old girl. And Doctor Brooks would know the same thing, and both those men pledged their opinion in that box, that the injuries to the accused's private parts were such as could have been caused by penetration of a young twelve-year old girl's private parts, and they went further, that observing these wounds, they would give their opinion they were from two to three days old.
>
> * * *
>
> Gentlemen, that is right in Doctor Addison's line and right in Doctor Brooks' line, and they gave that time as being two, three, four days, which would bring it right to the indecent assault on this girl, within latitudes, but you didn't get any help from Doctor Brown. To my best recollection of his evidence, he never talked about that at all. He couldn't. He didn't see them. If you received his evidence differently, use it. But I just submit, in short, that Doctor Brown's evidence in the abstract, we might call it, no matter how well intentioned, just can't, I respectfully suggest, throw any shadow of doubt on the opinions of Doctor Addison and Doctor Brooks as to cause and time that I have gone over.

The medical evidence given in this Court greatly negatived this theory although it was said that having sores of the kind described, they could be aggravated or rubbed by intercourse or by some other cause. There is a great difference in the two positions. The possibility of aggravation of an existing condition by one of two or more causes is altogether different from the assertion that the sores were

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initially caused by raping the girl. This becomes of greater significance when the admissibility of Dr. Brooks' evidence at the trial is considered.

Particular stress was placed on Dr. Brooks' evidence that in his opinion the sores on Truscott's penis indicated "a very inexpert attempt at penetration". Dr. Brooks' evidence on this point was inadmissible. He was testifying as an expert as to a matter that was not in his special knowledge and the evidence was prejudicial to the prisoner. The majority opinion deals generally with the admissibility of Dr. Brooks' evidence. The only part which I consider inadmissible is the phrase just quoted.

In *Regina v. Kuzmack*[1], the right of a medical witness to testify as an expert, was dealt with by Porter J.A. as follows:

> When the doctor gave his evidence before the jury he was called as an expert to give his opinion as to the cause of death. Such an opinion is admissible when, but only when, the subject on which the witness is testifying is one upon which competency to form an opinion can only be acquired by a course of special study or experience. It is upon such a subject and such a subject only that the testimony is admissible. In the testimony of the doctor in this case, having described the wound in the neck, he went on to discuss two small cuts on the hand of the deceased, stating that they had been caused by a sharp instrument and could have been caused by the knife.
>
> "Q. Those cuts on the right hand, on the fingers, did they have any particular significance to you? A. The only thing I can say is to point out that when the hand was put up to the neck the wounds in the fingers were in the same direction as the wound in the neck. Q. And what is your conclusion from that? A. I would say that they could have occurred at the same time. Q. In what manner? A. I should think that the hand was at the base of the neck when the knife was put into the neck."
>
> The latter conclusion was quite incompetent for the doctor to give as an expert because it was merely conjecture and not on a subject requiring any special study or experience. It was a mere guess which anyone might have made. Yet it was given to a body of laymen by a doctor with the weight that ordinarily attaches to an opinion expressed by a professional man, and a doctor in particular.

There were references to another piece of evidence which, in my judgment, were very prejudicial to the prisoner. They are the references to the male sperm said to have been found on the underpants Truscott was wearing on the Friday night when he was arrested. Crown Counsel invited the jury to speculate from the dirty appearance of the

[1] (1954), 110 C.C.C. 338 at 349-50, 20 C.R. 365.

garment that the undershorts in question were those Truscott had been wearing when he assaulted Lynne. Here is how he put it:

> My suggestion to you, Gentlemen, is that these are the underwear he was wearing, whether he took them off temporarily or not at the time of the indecent assault on the girl, and he did get this sperm at that time. You are just as capable as I on reasoning that out, and I would be less than fair to you if I said or left you with the impression that you had nothing to go on. I tell you what I think you can go on. You can forget the evidence of bowel movement. You can overlook that when you get the garment out, and you can look at the rest of the underwear, and you can figure, as I suggest to you, that it was worn a long time, and that is about all I can be of assistance to you, in this respect. Forget the fecal matter and just look at the other, and I think you will arrive at the conclusion—I suggest you will arrive at the conclusion he had it on for a good many days, and that you may be able to make the deduction that that is what he was wearing. As I say, whether he had it off temporarily, or not, at the time of the actual attack, and that the sperm is from the attack on the girl.

In his charge to the jury, the learned judge said:

> It is said that the soiled underpants are consistent with innocence. You will recall the underpants that were taken off the boy at the jail were fouled as well as soiled. You need not pay any attention to the fouling. Mr. Brown, who examined them in the laboratory, said that they showed evidence of blood inside and out. Inside and out. There were minute quantities, but particularly around the fly.

After the judge had finished his charge, Crown Counsel, amongst other things, in discussing objections to the charge, said:

> And the other thing, My Lord, in your reference to the shorts at the jail, the Crown does attach great significance to the finding of male sperm on those shorts. Your Lordship mentioned blood. Your Lordship did not make reference...

and on recalling the jury, the learned judge said in part:

> Then, of course, the Crown relies very much on the fact that male sperm was found on the dirty underpants. That is consistent with an act of sexual intercourse, but of course, it is by no means conclusive that it is the result of sexual intercourse at all or sexual intercourse with this girl. It could be the result of other things, you know, but it is a circumstance which is not inconsistent. *It is consistent with an attack on this girl.*

(The italics are mine.)

All this might have been unobjectionable if there had been evidence upon which the jury could have found that the underpants in question had been those actually worn by Truscott on the evening of June 9th. But there was no evidence to that effect. The point was conceded in the

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argument before this Court. That being so, the references by Crown Counsel and particularly what the learned judge said were prejudicial in the extreme based as they were on something that was not in evidence at all. Those underpants should never have been marked as an exhibit or shown to the jury. In any event, if reference could have been made to these underpants, then it was incumbent upon the learned judge to put to the jury the defence which had been urged by Truscott's counsel that the medical evidence established that male sperm had a very short life. That sperm ejected on the Tuesday would have been dead and not identifiable as such long before Friday night in the circumstances of the heat and filthy condition as testified to. This he did not do.

A great deal of discussion took place regarding the evidence of the children who testified at the trial, some under oath, some not. I do not find any error in this regard. The learned judge exercised the discretion he had and in my view that discretion ought not to be interfered with. He charged the jury correctly that the unsworn testimony had to be corroborated before it could be acted upon. His charge on the subject of corroboration was correct. I must, however, refer specifically to the manner in which he dealt with the evidence of Philip Burns who had not been sworn. In instructing the jury, he referred to this witness and said correctly:

> Now the first is that Philip Burns was, of course, not sworn, and he said he didn't see Lynne and Steve on the road as he went north, and no one corroborates him in that respect, so that his evidence is worthless so far as you can use it in convicting the accused boy.

However, when the jury was recalled a few minutes later for more instructions, he said concerning this same witness:

> Then you, of course, won't forget Philip Burns' evidence that he left the river around between seven to seven-ten or thereabouts, seven-fifteen, and walked up the road and saw nothing of Steve and Lynne as he went up the road. That evidence was given, as I told you before, without Philip Burns being sworn.

How can one evaluate the effect on the jury of this contradictory instruction?

Nor was this the only instance of contradictory and confusing instructions. The conflict between the evidence for the Crown on the one hand pointing to Truscott having

taken Lynne into the bush by way of the tractor trail and the evidence for the Defence that he had continued northward across the bridge with Lynne on the handlebar of his bicycle was, as stated in the majority opinion, the most vital issue in the case and it was one entirely for the jury. The learned judge in his charge put the issue to the jury as follows:

> Now then, it is the theory of the Defence, and they brought evidence to show that, as I say, this little Douglas Oats saw them going across the bridge and then, in a few minutes, according to the boy by the name of Gordon Logan—Gordon Logan also says he saw them going north on the bridge and in about five minutes he says he saw Steven return alone. Well, as regards Gordon Logan, it will be for you Gentlemen to say whether you believe his evidence, and it is very important, Gentlemen, because if you believe the Defence theory of this matter and believe Steven's statement to the Police and to other people, that the girl was driven to Number Eight Highway and entered an automobile which went east; it is my view that you must acquit the boy if you believe that story.
>
> In other words, I will put it this way. In order to convict this boy, you have to completely reject that story as having no truth in it, as not being true. You have to completely reject that story.

The concluding sentence of the first paragraph of the above was clearly misdirection. The second paragraph was a proper charge and put the accused's case favourably to the jury, but what did it convey to the jury when he equated the error with the correction by introducing the latter with *"In other words"*? A judge may state a proposition incorrectly and effectively correct the mistake but he does not do it by equating two divergent propositions.

Additionally, real and irreparable harm was done to the accused on this vital issue when the jury, having asked for a redirection as follows:

> FOREMAN OF THE JURY:
>
> A redirection of evidence, corroborated or otherwise, of Lynne Harper and Steven Truscott being seen together on the bridge on the night of June the 9th.

the learned judge, after reviewing the evidence in some detail, said:

> That is the evidence with respect to him being on the bridge, the two of them being on the bridge together, the only evidence. They were there in the neighbourhood of seven twenty-five or seven-thirty, but as I pointed out to you, you must reject the story that he went to Number Eight and the girl got in a car there, you must reject that story to convict him. If you find that although he went to Number Eight Highway with the girl and he brought her back again—and she was back, somebody brought her back—you will have to find he did bring her back again—then

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the going back and forth across the bridge is of very little importance—very little importance, because the question is, did he kill her? That is the point in this case. If there is any other help I can give you, don't hesitate to ask me, Gentlemen, but that is all I can say about it now.

and still later when the jury was recalled a fourth time:

HIS LORDSHIP:

Bring the Jury back, please.

...Jury returned.

HIS LORDSHIP:

I dislike having to bring you back so often and interrupt your deliberations, but I do it only at the request of Counsel.

I told you when you were last out here, that if Steve brought Lynne back across the bridge, if he brought her back across the bridge, it doesn't make much difference whether he went over the bridge or not, but there is, of course, no eye witness that says that he did. No eye witness said that Steve and Lynne came back from Number Eight Highway, across the bridge, although there is Allan Oats and Logan who say that they saw Steve on the bridge alone. Logan saying five minutes after he went north he came back alone. Somebody brought her back some time. Somebody brought her back some time.

This introduction of the idea or theory that Truscott may in fact have taken Lynne to Number Eight Highway and brought her back to the bush had not the slightest foundation in the evidence or in any inference which could be drawn from the evidence. It came wholly out of thin air. The Crown's case was that Truscott had not taken Lynne to Number Eight Highway at all.

These redirections, particularly in view of the Foreman's question as quoted above, must on any objective reading of what was said, compel acceptance of the argument that the most vital issue in Truscott's case was actually withdrawn from the jury's consideration at this late time in the trial when they were told:

I told you when you were last out here, that if Steve brought Lynne back across the bridge, if he brought her back across the bridge, it doesn't make much difference whether he went over the bridge or not, but there is, of course, no eye witness that says that he did.

and coming as it did after the learned judge had said in his charge:

Now you see, if the accused boy drove or rode Lynne Harper to Number Eight Highway, then you must ask yourselves who brought her back, because somebody brought her back. Somebody brought her back. Is it possible that the accused brought her back? You will ask yourselves and you will ask yourselves the reason, if this boy is guilty, why he has shown such calmness and apathy. Is it because there is an element of truth in his

story that he took her to Number Eight Highway, because somebody brought her back. Did he bring her back, if he took her?

The reference to 'apathy' in this passage by the learned judge was purely gratuitous. The word itself or a condition or conduct so describing Truscott does not appear in the evidence. It had been urged that his appearance and conduct were normal. The learned judge wrongly transposed 'normal' into 'apathy'. The dictionary definition of 'apathy' is 'insensibility to suffering or feeling'. 'Apathy' in relation to the crime in question here was a description highly damaging to the accused.

As previously mentioned, it was urged as a defence that Lynne had not been killed where her body was found. I have already expressed my view on this branch of the case. I think the jury was entitled on the evidence before them to find against this contention. But it was a defence open to the accused on the evidence and which had to be left to the jury. Here again, in my view, the learned judge withdrew that defence from the jury when in his charge he said:

> The Defence theory, what the Defence asks you to believe, is that she was attacked elsewhere and brought back dead. That she was attacked elsewhere, killed some place else. That theory, of course, is contrary to the medical evidence which says she bled at the place where she was found dead. She bled there and she could not have bled there if she were dead. If she was dead there would be no bleeding.

When Truscott returned to the school yard about 8:00 p.m. on June 9th, he was asked by Warren Hatherall, "What did you do to Lynne Harper—throw her to the fish" to which he replied, "No I just let her off at the highway like she asked." The following morning Lynne's father came to the Truscott home at 7:30 a.m. to inquire if the Truscott boys had seen Lynne. The older boy Kenneth said "No". Then Steven said "Yes, I took her to the corner on my bicycle and she hitched a ride on number eight highway". Later that same morning at 9:30 a.m., Truscott was interviewed by the police and he told the police that he had picked Lynne up outside the school the evening before between seven and seven-thirty; that Lynne told him she may go to see the people in the little white house on the highway and that she had to be home at eight or eight-thirty. He also said that having left Lynne off at number eight highway he cycled back to the bridge and while there

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looked back and saw her getting into a late model Chevrolet, which had a lot of chrome and could have been a BelAir model. He also said it appeared to have a yellow licence plate. He was interviewed several times in the next few days and told the same story, adding some details as he was questioned more closely.

The Crown took the position that Truscott was lying as to his movements after he reached the Lawson bush area on the county road. Accordingly, a great volume of evidence was tendered and received to convince the jury that Truscott was lying and that he had not gone any further north on the county road than the tractor trail at the north limit of Lawson's bush. No objection can be taken to this procedure because the Crown had the burden of establishing beyond a reasonable doubt that Truscott had taken Lynne into the bush and there murdered her, in other words, to translate Truscott from the situation that he had had the opportunity to commit the crime into the certainty that he was the only one who could, in the circumstances, have done so.

It was for the jury to weigh that evidence. In the evidence so to be weighed was the vital question whether in fact Truscott could have seen and recognized a Chevrolet BelAir car with a yellow licence plate. Truscott insisted to the police that he had. The police evidence at the trial supported by photographs was that licence plates could not be seen from the bridge where Truscott said he was when he said he saw Lynne get into the car. On the evidence which the jury then had, the jury could reasonably have believed that Truscott was lying in saying that he saw a yellow licence plate. However, in referring to this important point, the learned judge confused the statement by Truscott to the police that he had seen a yellow licence plate with the statement made in respect of the old car with Licence No. 981,666. In his charge to the jury dealing with being able to see a car on number eight highway from the bridge, he said:

> The boy was asked by the Police, naturally, what happened, and he told the Police that he took her down to Number Eight Highway. He repeatedly told the Police that, and she got in a car. The Police took him down to the bridge and he pointed the spot where he was standing on the bridge, and the bridge is thirteen hundred feet south of Number Eight Highway, and they conducted certain experiments there to demonstrate that not only was it not possible, according to the police testimony, to see

the numbers on a licence plate, but that you couldn't distinguish the licence plate at thirteen hundred feet. You heard the officers testify that that couldn't be seen.

Now, you have to regard, of course, for the differences in ages and the possibility that a man at age forty has not as good eyesight as a boy aged fourteen. The Crown asks you to say that the story is a fabrication because you couldn't see the licence plate, much less could you read the numbers at that distance. And if he brought her back, if it was he who brought her back, it doesn't matter much. It doesn't matter much

and later said:

The Crown submits the story about going away in a car is a complete falsehood because you couldn't read the licence plate from the distance that Steve says you could read it,...

When Defence Counsel drew the error to the learned judge's attention, he recalled the jury and said in part:

I made an error in telling you that the number Steve gave of the car, was the car on Number Eight Highway. This was a car on the County Road, but it was not the car on Number Eight Highway.

That would have corrected the error effectively, but having so corrected the mistake, he continued:

You will recall the Police went down and took photographs of the car, took photographs of the road with a car at the end of the road, and a car at Number Eight Highway, and they ask you to find from that and from the evidence of the Police officers, themselves, that it would have been impossible to have seen the licence plate of the car from the bridge and therefore, the story told by the accused is a fabrication.

neutralizing the correction he had made by inviting the jury to conclude from the photographs and the police evidence that no one could have seen the licence plate at that distance and in consequence Truscott's story was a fabrication.

On the reference in this Court it was shown that a yellow licence plate on an automobile at the intersection of number eight highway could be seen from the bridge if the car was in a certain position at the intersection. The Crown did not attempt to controvert this evidence. I am bound to say that had the evidence given on the reference regarding what could be seen from the bridge and concerning the unreliability of the photographs used by the Crown on this point been before the jury in the first instance, the jury could reasonably have taken an entirely different view of Truscott's story as put in evidence by the police *and of his credibility.*

At the trial the Defence stressed that Truscott could not have raped and murdered Lynne in the forty-five minute

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time interval that he was away from the school yard because if he had done so his clothes and person must necessarily have shown evidence of a struggle and he would have been blood stained and his appearance abnormal. The evidence was all one way that on his return to the school yard at about 8:00 p.m. he was normal without any blood on his clothes or on his person and that he chatted with some school mates before continuing on home to babysit as he had been asked to do by his mother. The mother too testified that there was no blood on the clothing and that the boy was normal as usual.

The learned judge dealt with this aspect of the defence as follows:

> At about eight o'clock the accused boy appeared back at the school. Ask yourselves, on this evidence, is there any explanation, on any construction of it, of the whereabouts of the boy between around seven-thirty and the time he appeared back at the school. John Carew saw him around eight o'clock and Lyn Johnson saw him and Lorraine Wood saw him come back and he stopped and talked to his brother, Kenneth. They heard some conversation about the trading of wheels and about the shoes he was wearing. Oddly enough, the older brother, Kenneth, has not appeared in this case. It is pointed out by the Defence, and very properly so, and it is something you must consider, and that is his demeanour when he returned, that he seemed to be natural. William Wilkes, who is age fifteen, who was called by the Defence—bring William Wilkes in, if he is here. He is in grade Nine at the Clinton Collegiate Institute.
>
> He says that they sat on the ground for ten or fifteen minutes and he talked to Steve, who appeared perfectly normal, and there were no marks on him or anything of that kind. Lyn Johnson says that he appeared to be normal. Lorraine Woods says he appeared to be normal, but I point out, Gentlemen, there are two sides to that meeting. There was a group of boys and girls playing around in this locality. They were all acquaintances. Perhaps I shouldn't say all. Lyn Johnson and Lorraine Wood were acquaintances of this boy. There was a group of children. Truscott didn't go over to them. He didn't go over to them, didn't spend any time with them. He talked to his brother and that is all, and then he went directly home. He may have been normal, but did he do what you would think a boy of that age would do, meeting his girl friends and boy friends when he came back on to the grounds. He was asked by Warren Hatherall, who had seen him go away, he was asked: "What did you do with Harper, feed her to the fishes?" Hatherall wasn't sure whether he answered or not. He didn't give an answer that Hatherall could give us, anyway.
>
> Stewart Westey corroborates Hatherall in part in that respect, because he says that when Hatherall asked the question, Truscott said: "I let her off at the highway like she asked."
>
> And William McKay, he wasn't sworn, a child age ten, said he saw Steve leave with Lynne and return alone and he asked Steve where Lynne was. Of course, his evidence unsworn testimony, age ten, is corroborated by Westey and by Hatherall. As I pointed out, Truscott didn't stop and talk to these boys, he went directly home. Miss Johnson and Lorraine

Wood were not closer to him than fifteen feet. It is for you to say whether *at that hour of the night* they were in a good position to observe his demeanour and the looks of his clothes.

(The italics are mine.)

The jury who heard this direction could not but be influenced into believing that Truscott somehow kept away from anyone who might have sensed abnormality in his conduct or observed blood on his clothes or person. Any fair reading of the evidence given by those who were in the school yard when Truscott returned at 8.00 o'clock must convince one that Truscott did not keep away from anyone there, but on the contrary acted very normally while staying on the school premises for some ten to fifteen minutes. The reference to 'that hour of the night' would imply that the evidence indicated a condition of poor visibility. It was actually about 8.00 p.m. daylight saving time nearing mid-June when according to all the evidence on the point it was still broad daylight. Lyn Johnson, a witness for the Crown, who was, as the learned judge says, not closer than fifteen feet (she said about twenty-five feet) was able to describe how Truscott was dressed. She said in answer to Crown Counsel:

> Q. How was Steven dressed?
> A. He had a red pair of jeans on and a whitish shirt and brown canvas boots with thick rubber soles, and red socks.

A trial judge has the right to express his own opinion or opinions in the course of his charge to the jury, but he has the *duty* to put the defence of the accused fairly to the jury. This he did not do on this branch of the case.

For all of these reasons, as stated at the beginning, I would quash the conviction and direct a new trial.

Because I take the position that there should be a new trial, I have refrained from commenting on many aspects of the evidence such as the evidence of Jocelyne Goddette for the prosecution and that of Gordon Logan for the accused and that of many other witnesses and factors, the weight and value of which will be for the new jury if there is one. However, it should, I think, be said that if Jocelyne Goddette's evidence is accepted as sworn to by her it was about 6.30 p.m. and not at 7.30 p.m. that she was along the county road and the tractor trail looking for Truscott. In this connection the majority opinion says, "There is some-

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thing very wrong with Jocelyne Goddette's times". She could be mistaken as to the time but it must cast doubt on her testimony that Truscott came to the Goddette home at about ten minutes to six. The interval between the two events was very short. That Truscott went to the Goddette residence shortly before six was an important and integral part of the Crown case. Jocelyne Goddette was the Crown's key witness in disproof of Truscott's story that he had taken Lynne further north than the tractor trail.

In several places throughout the majority opinion the point is made that as to such and such evidence or ruling or absence of ruling no objection was taken at the trial by Defence Counsel.

I could cite a score of decisions of this Court which say categorically that failure of counsel to object to the admissibility of certain evidence or to a trial judge's rulings in the course of the trial or to his charge to the jury, is not an answer to the objection or objections when advanced even for the first time in this Court. There are situations when the failure to object in the first instance will preclude counsel from being allowed to change his position, instances exist where the failure to object was intentional or not exercised and held in reserve to be raised on appeal and so on. In all of these, of course, the Court frowns upon the objection being raised for the first time on appeal. No such situation exists here. The consequences of Defence Counsel's failure to object at the trial do not fall upon counsel, but upon the client, in this case a 14½ year old boy on trial for his life.

I appreciate that after nearly eight years many difficulties will be met with if a new trial is held both on the part of the Crown and on the part of the accused, but these difficulties are relatively insignificant when compared to Truscott's fundamental right to be tried according to law.

Solicitors for S. M. Truscott: G. A. Martin and E. B. Jolliffe, Toronto.

Solicitor for the Attorney General for Ontario: W. C. Bowman, Toronto.

Solicitor for the Attorney General for Canada: D. H. Christie, Ottawa.

MARY ISOBEL THIESSEN (*Plaintiff*) ....APPELLANT;

AND

THE WINNIPEG SCHOOL DIVISION No. 1 (*Defendant*) ..... RESPONDENT.

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*Mar. 22,23

May 23

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Failure of caretaker to remove piece of apple from class room floor—Teacher injured by fall—Whether liability on part of employer.

On returning to her class room after lunch a teacher slipped as she entered the door. Looking down, she observed that the floor was wet and she looked further into the room and noted that there were pieces of apple on the floor which had been crushed as if stepped on. The teacher did not then enter the room but went to the principal's office and informed a secretary of what she described as the "mess" in the room. The secretary informed her that a caretaker would be sent to clean it up. The teacher returned to the class room and just before classes began a caretaker came into the room and asked her what was wrong. The teacher told him to "look at the mess on the floor", and the caretaker, although he did nothing in the teacher's presence before leaving the room, said he would clean it up. The bell then rang and the teacher proceeded to another room.

The plaintiff, who was taking the first class after the lunch hour break in the room in question and who entered the class room just ahead of her students, noticed one piece of apple on the floor and put it to one side by the blackboard. She noticed nothing else unusual in the room and proceeded with her teaching duties. There was, however, a small piece of apple near one of the front desks which was observed by one of the students just before the plaintiff stepped on it and fell.

In an action for damages for the injuries she sustained as a result of the accident, the plaintiff's claim was dismissed by the trial judge and his judgment was affirmed, on appeal, by a majority of the Court of Appeal. A further appeal was then brought to this Court. From the evidence an inference was drawn by the trial judge and the majority of the Court of Appeal that the caretaker, prior to the plaintiff's entry into the room, had returned to clean up the debris. The question raised was whether the failure of the caretaker to have removed the small morsel of apple from the floor constituted negligence giving rise to liability on the part of the defendant School Division.

Held (Spence J. *dissenting*): The appeal should be dismissed.

Per Cartwright, Martland, Judson and Ritchie JJ.: The plaintiff had failed to discharge the burden of proving that at the time of the accident the class room was in an unsafe and dangerous condition and that the defendant through its officers or employees knew or ought to have known of such a condition. To place a common law duty upon the defendant of ensuring that every morsel of apple was cleaned from every floor of the class rooms used by pupils during the lunch hour was too strict an interpretation of the duty owed by an employer to its employees.

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

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Per Spence J., *dissenting*: The defendant, through notice of the secretary to the principal, had knowledge of the lack of safety. The caretaker attending in the class room as a result of such notice was not informed that certain specific pieces of debris lay on the floor but was told to observe the debris that was there, did so and undertook to clean up that debris as was his duty. He failed to carry out his duty and a piece of apple was left lying there so that the plaintiff slipped and fell.

[*Naismith v. London Film Productions Ltd.*, [1939] 1 All E.R. 794; *Wilsons & Clyde Coal Co. Ltd. v. English*, [1937] 3 All E.R. 628, distinguished; *Regal Oil & Refining Co. Ltd. et al. v. Campbell*, [1936] S.C.R. 309, applied.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from a judgment of Tritschler C.J.Q.B. Appeal dismissed, Spence J. dissenting.

H. G. H. Smith, Q.C., and *Leon Mitchell*, for the plaintiff, appellant.

C. Gordon Dilts and *R. S. Cook*, for the defendant, respondent.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] (Freedman J.A. dissenting) affirming the judgment rendered at trial by Tritschler C.J.Q.B., whereby he dismissed the appellant's claim for damages arising out of an accident which occurred on January 9, 1962, when the appellant, who had been a school teacher for twelve years and was at the time employed by the defendant School Division, slipped on a small piece of apple which was on the floor of class room 21 at the Grant Park School in the City of Winnipeg.

On the day of the accident, Margaret McRitchie, who was a substitute teacher of only one year's experience and who appears to have been in charge of the class room in question, returned to "her room" after lunch and slipped as she entered the door. Her evidence in this regard reads as follows:

> I didn't fall but my foot slipped a bit, and when I looked down it was wet, *and I looked further into the room and I noticed there*

[1] (1966), 57 W.W.R. 193.

was apple on the floor—pieces of apple, and pieces that had been crushed as if they had been stepped on, and I didn't go into the room at all. I just turned right around and went into the next room, which is Mrs. Joyce Cartwright's room, and she was there and I told her I found a mess on the floor in my room, and I was going to report it to the office and she thought I had better do that.

(The italics are my own.)

Q. What did you do?
A. I went to the office right away.
Q. Yes?
A. And I reported it to one of the secretaries there.
Q. What did you say to the secretary as near as you can remember?
A. Well, I told her there was a mess on the floor in my room, and she said she would send one of the caretakers down to clean it up.
Q. What happened?
A. I went back to my room and just before classes began the caretaker—one of the caretakers came into the room and he asked me what was wrong, and I told him to look at the mess on the floor, and he said he would clean it up.
Q. Was this before classes started in the afternoon?
A. Yes, it was before classes started. I can't remember whether it was before the bell rang or whether it was after the bell rang, but I think it was before the bell rang.
Q. You spoke to the caretaker and he said he would clean it up?
A. Yes.
Q. Did he do anything in your presence?
A. No, he didn't do a thing. He just left.
Q. And then the bell rang and what did you do?
A. Well, I had to go into the typing room to teach...

The appellant, who was taking the first class after the lunch hour break in room 21 and who entered the class room just ahead of her students, noticed one piece of apple on the floor and put it to one side by the blackboard but she says: "There was nothing else that was there that I saw." It is a fair inference from the evidence, and one which was drawn by the learned trial judge and the majority of the Court of Appeal, that "the caretaker had returned and had attended to the mess which Mrs. McRitchie had brought to his attention". There was, however, one small piece of apple about an inch in diameter near one of the front desks which was observed by one of the students just before the appellant slipped on it and the question raised by this appeal is whether the failure of the caretaker to

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have removed this small morsel of apple from the floor constituted negligence giving rise to liability on the part of the respondent School Division.

It was the practice at the Grant Park School for certain of the class rooms to be used as lunch rooms for the students who had brought their lunch and the arrangement in this regard was that the students themselves "were not to leave crumbs or papers or anything remaining from their lunch on the desks or on the floor". They were asked to put it in the waste basket during the lunch hour and the caretaking staff was required to go into these lunch rooms after the lunch period and before class reconvened in order to empty the waste paper baskets and if there was anything in the vicinity of the waste baskets to pick it up. The rooms were swept by the caretaking staff after the close of school at night and before opening in the morning.

The appellant had been a teacher at Grant Park School for three years and must be taken to have been aware of the system that was followed in this regard and it is a factor to be considered, although not a conclusive one, that there was no evidence of any other accident having occurred as a result of the condition of the class rooms after the lunch period.

In the course of the dissenting opinion rendered by Freedman J.A. in the Court of Appeal, he referred to the cases of *Naismith v. London Film Productions Ltd.*[1] and *Wilsons & Clyde Coal Co. Ltd. v. English*[2], as recognizing the existence of a duty resting upon employers to make the place of employment as safe as the exercise of reasonable skill and care will permit. It is pointed out that in both these cases the Courts were dealing with conditions of dangerous employment. In the *Wilsons & Clyde Coal Co.* case a haulage plant was put in motion in a mine underground at a time when an employee was in an exposed position where he was caught by a rake and crushed. In the *Naismith* case a film "extra" whom the employer had provided with inflammable material which covered her costume, was seriously burned. In both cases a high duty was found to rest upon the employer to ensure the safety of the employees concerned.

[1] [1939] 1 All E.R. 794.

[2] [1937] 3 All E.R. 628.

It is to be observed that Viscount Simonds in *Davie v. New Merton Board Mills Ltd.*[1], at p. 620, after referring to the case of *Wilsons & Clyde Coal Co. Ltd. v. English, supra,* went on to say:

> My Lords, I would begin, as did Parker L.J., with a reference to the familiar words of Lord Hershchell in *Smith v. Charles Baker & Sons* in which he describes the duty of a master at common law as 'the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk', words that are important both in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common law, thus described by Lord Hershchell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation.

The case of a man working underground under conditions of potential danger and the case of an actor clothed by an employer in inflammable material are cases in which the subject-matter was found to have created a duty falling little short of absolute obligation but no such conditions, in my opinion, apply in the present circumstances and I am satisfied that the duty owed by the respondent to the appellant in the present case is that which was concisely stated by Sir Lyman Duff in *Regal Oil & Refining Co. Ltd. et al. v. Campbell*[2], at p. 312, where he said:

> By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property.

I do not think that the appellant in the present case has discharged the burden which she assumed by her pleadings, of proving that at the time of the accident:

> ...class room 21 was in an unsafe and dangerous condition in that parts of the floor thereof were strewn with slippery substances and the Defendant, through its officers and employees knew or ought to have known of the said dangerous and unsafe condition of the said floor of which the Plaintiff was ignorant.

There is no doubt that the appellant's unfortunate accident occurred in the course of her employment and if this case were covered by *The Workmen's Compensation Act,* R.S.M. 1954, c. 297, she could no doubt recover compensation, but to place a common law duty upon the respondent

[1] [1959] A.C. 604.

[2] [1936] S.C.R. 309.

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School Division of ensuring that every morsel of apple was cleaned from every floor of the class rooms used by pupils during the lunch hour is, in my opinion, too strict an interpretation of the duty which an employer owes to its employees and with the greatest respect for the view expressed by Mr. Justice Freedman, I do not think that such an interpretation is justified by the decided cases.

For these reasons I would dismiss this appeal with costs.

SPENCE J. (*dissenting*):—I have had the opportunity of reading the reasons of my brother Ritchie. I shall adopt his statement of facts although for the purpose of these reasons I shall have to extend them. I regret I am unable to concur in my learned brother's conclusion.

As Freedman J.A. pointed out in his dissenting reasons in the Court of Appeal for Manitoba, in the absence of direct testimony as to how and when the piece of apple came upon the floor, the Court is left with the task of resolving the matter on the basis of inference, and the determination of the issue is made less complex by reason of the fact that there is substantially no contradiction of testimony. Therefore, the issue of credibility does not arise.

Firstly, in reference to whether the general cleaning had been carried out after 1:00 p.m. on the day of the accident in accordance with the practice outlined by Ritchie J., the learned trial judge, Tritschler C.J.Q.B., found:

> I am satisfied that in the course of the system prevailing, room No. 21 had, after lunch, received the usual treatment of removal of the contents of the wastebasket, at which time the caretaker would have picked up any loose debris near the basket;

I cannot be satisfied that this is a proper inference from the evidence. The only factual evidence on the subject was given by Harold Sly, who was the head janitor of the Grant Park School at the time in question. He, as did the principal Mr. R. W. Welwood, described the system but, in my view, he could not give any evidence as to whether that system had been complied with as to room 21 on the day of the accident. It is true that in answer to the question:

> Q. Do you know whether or not room 21 was cleaned at the noon hour on January 19th, 1962; do you know that?

he replied:

> A. That is a large question. Yes, it was cleaned. To my knowledge, it was cleaned.

But it should be noted that in answer to the following question:

Q. You did not actually clean it yourself?

Sly replied:

A. Not that I know. That is a long time ago.

And in cross-examination, the witness described the procedure in answer to the question:

Q. You don't know if one of them did not do what he was supposed to do?

as follows:

> I don't think that was the case because we went down the halls, you know, like a gang, and I took this side and you took that side and so on, and I don't think there was anything missed.

And in answer to the question:

Q. Do you remember whether you saw room 21 or not?

he answered:

A. No, I don't remember if I saw room 21.

In fact, in examination-in-chief, Sly had testified that he only knew the plaintiff slipped in one of the rooms two or three weeks after the accident occurred.

I am, therefore, of the opinion that the head janitor's evidence was simply that the system called for he and the other janitors walking down the hall and one after the other entering the class rooms, removing the wastepaper baskets and picking up anything that happened to be lying nearby, and that he has no memory whatsoever of the date of January 21st; no memory that he was ever in room 21 and no positive knowledge that any fellow janitor was in room 21.

It should be pointed out that according to the report made by the principal of the school to the Superintendent of the School Division dated February 8, 1962, and produced at trial and marked as ex. 7, the principal had knowledge that the accident occurred about five minutes before the end of the first period in the afternoon of January 19th. In his evidence, Mr. Welwood testified that his assistant, Mr. Lee, was called by the plaintiff and informed of the accident and at that time Mr. Lee reported to Mr. Welwood that it was approximately five minutes before the end of the first period. Therefore, Mr. Welwood had on the very

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day of the accident full information of the time the accident occurred and his letter (ex. 7) describes that accident as one which occurred when the plaintiff:

> Slipped on a small piece of potato chip which had been left after someone's lunch on the floor of room 21.

Therefore, he not only knew the exact time and date of the accident but that it had been ascribed to the result of a part of lunch left on the floor. It matters not whether that part were a potato chip or a piece of apple. He was able to investigate at once whether the wastebasket had been collected and that the floor had been cleaned in the fashion which the system required at between 1:15 and 1:30 p.m., and the defendant should have been able to adduce exact evidence upon that subject at the trial. Such evidence was not called. Therefore, were it necessary to make a finding of fact upon the evidence which I have outlined, I would have inferred that this general clean-up had skipped room 21 that day. I can see no other explanation for the general mess of apples which Mrs. McRitchie saw when she went to enter the room.

It is not necessary, however, to make any finding in reference to that general clean-up.

Mrs. McRitchie was a substitute teacher who had in charge room 21 as her "home room", and she testified that after she left the staff room to return to room 21 "to assemble classes" she was just about to enter the said room 21 when her foot slipped. Looking down, she observed that the floor was wet and she looked further into the room and noted that there were pieces of apple on the floor which had been crushed as if stepped on. Mrs. McRitchie did not then enter the room but went to the principal's office and informed a secretary of what she described as the "mess" in the room. The secretary informed her that a caretaker would be sent down to clean it up. Mrs. McRitchie then returned to room 21 and just before the classes began, *i.e.*, just before 1:30 p.m., a caretaker came into the room and asked her what was wrong. Mrs. McRitchie told him to "look at the mess on the floor", and the janitor said he could clean it up.

Mrs. McRitchie's memory was that that was just before the bell rang. The caretaker said that he would clean up the

mess but he did nothing in Mrs. McRitchie's presence—"he just left", and then when the bell rang, Mrs. McRitchie left room 21 to cross the corridor to another room and commence her teaching duties.

The plaintiff was in her own home room, room 24, and her home room class was in that room. At the commencement of the first class, she left room 24 and entered room 21 followed by the members of the class who occupied her own home room to whom she was to deliver a lesson in room 21. Room 24, her home room, was a typewriting room and full of typewriters, and it was used frequently for typing classes. The plaintiff's students followed her into the room. As the plaintiff entered the room she noticed a piece of apple on the floor, and with her foot she pushed the apple over to one side close to the blackboard so that it would not be stepped on by either her or others. She saw nothing else unusual in the room and proceeded with her teaching duties until almost at the end of the class. After she had been going up and down the aisles checking the students' work she commenced to walk from the aisle closest to the window to her desk at the front of the room. She stepped on a piece of apple which was lying evidently opposite the end of the aisle closest to the window and about three feet in front of the front desk. That piece of apple had been observed by no one until just the moment the plaintiff's foot descended on it when the pupil sitting at the front desk, Susan Kathryn Read, happened to look down and see it, unfortunately too late to warn the teacher. The resulting fall caused the plaintiff the injuries for which she seeks damages in this action.

Tritschler C.J.Q.B. held that under these circumstances the plaintiff had not discharged the onus upon her which she must discharge in order to succeed against the defendant School Division. The inference he drew from the evidence which has been outlined in greater detail by my brother Ritchie and which I have very shortly summarized was that this piece of apple on which the plaintiff slipped was either deposited on the floor in the school room after the janitor, following Mrs. McRitchie's notice to him, had attended and cleaned up "the mess" which was then present, or, still later, during the time when the plaintiff was

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carrying out her teaching duties in the room. I am of the opinion that the evidence cannot support either such inference.

In the first place, there is not one word of evidence to show that any pupil was present in that room from the moment when Mrs. McRitchie first went to enter it and then retired going to complain as to "the mess", and the moment when the plaintiff entered followed by her pupils. One would believe that it would be very unlikely to have carried on the examination and cross-examination of Mrs. McRitchie without making reference to the presence of pupils if pupils were present. I am of the opinion that the inference from the evidence is exactly opposite, *i.e.*, that Mrs. McRitchie went to enter an empty room, found the debris on the floor, went to complain to the secretary in the principal's office, returned to an empty room, pointed out the debris to the janitor when he arrived, and then left that empty room at 1:30 to carry on her teaching duties. The very short lapse of time would seem to make any rowdiness in which apples could be thrown during that period impossible. Mrs. McRitchie is not sure whether the janitor arrived in answer to her complaint before or after the bell rang at 1:30 p.m. If it was before, it must have been only moments before. Mrs. McRitchie did not leave the room until the bell rang. The plaintiff entered the room to teach a class for that first period commencing at 1:30 p.m. and there must have been only a very few moments between Mrs. McRitchie's departure and the plaintiff's arrival, so that there simply was no time for the spread of this debris to occur even if there were some evidence that there were pupils who were able to do so.

I am further of the opinion that the second or alternative inference drawn by Tritschler C.J.Q.B. also is not feasible. That inference would imply that during the time the plaintiff was teaching the class the pupils were tossing apples or an apple or a piece of apple around the class room. It should be noted that the plaintiff was the regular teacher of this class. She had been a teacher for twelve years and she had been a teacher in that school for three years. This was no raw recruit teaching the class and the class would realize full well that any such conduct when their regular teacher was in charge would result in immediate and severe disci-

pline. Moreover, the girl in front of whose desk the piece of apple was lying gave evidence and no question was addressed to her in examination or cross-examination to even infer that the piece of apple could have landed in the position in which it lay at the time of the accident during the course of the class.

I am, on the other hand, of the opinion that the only possible inference from all of the evidence is as follows: The janitor having had the debris pointed out to him by Mrs. McRitchie departed to obtain his cleaning equipment returning when Mrs. McRitchie had left the room and in the few brief moments or even seconds prior the plaintiff's entry attempted to clean up the debris in a rough and ready fashion. One could understand that he would not wish to delay the commencement of the first class but, of course, it being his duty to remove what was quite evidently a source of danger he should have done so even if it had meant the delaying of the commencement of the class for a few moments. That such a piece of apple on the floor was dangerous was demonstrated by the fact that Mrs. McRitchie slipped without injury to herself as she was about to enter the room and later the plaintiff slipped on another such piece of apple and suffered serious injury.

If the proper inference is the one which I have just outlined then I think the liability of the defendant is clear.

I adopt Ritchie J.'s quotation from *Regal Oil Refining Co. Ltd. et al. v. Campbell*[1], a decision of this Court in which the duty of the master as to the servant was set out as "to take reasonable care and to see that the plant and the property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property."

We are not here concerned with a situation where without the master's knowledge the plant became unsafe nor with the question of whether or not the master should have known of the lack of safety. Here, the master, through the notice of the secretary to the principal, had knowledge of the lack of safety. The caretaker attending Mrs. McRitchie as a result of such notice was not informed that certain specific pieces of debris lay on the floor but was told to

[1] [1936] S.C.R. 309.

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observe the debris that was there, did so and undertook to clean up that debris as was his duty. He failed to carry out his duty and a piece of apple, not hidden but in the open part of the room, was left lying there so that the plaintiff slipped and fell. It might easily be true that that piece of apple, if it fell close to the windows, would be in more of a shadow than if it had landed closer to the front of the room, but it was the duty of the caretaker to look for pieces of debris despite the fact that they might have been in the more shaded part caused by the light from the windows.

Freedman J.A., in his dissenting judgment for the Court of Appeal for Manitoba, dealt also with a paragraph from the judgment of the learned Chief Justice of the Queen's Bench, which he quoted and which I shall quote:

> From the time she entered the room plaintiff was the only means defendant had for learning about the condition of the room. She was the eyes of defendant School Division. What she saw she judged reasonably safe. I agree with her judgment. Even if the second piece of apple had been on the floor when the caretaker was there (and there is not evidence to support this) he was not negligent in failing, during the short time he was in the room, to see what was not apparent to plaintiff herself during her comparatively long stay in the room. I do not find fault with her failure to see it; nor would I fault the caretaker.

I am in complete agreement with Freedman J.A. when he differs with the view there expressed. On the particular facts in this case, the eyes of the employer were the eyes of that janitor who was called in to the room, had the debris pointed out to him, and undertook to clean up the debris.

I am of the opinion, as was indeed the learned Chief Justice of the Queen's Bench and all the members of the Court of Appeal, that no contributory negligence can be charged against the plaintiff.

For these reasons, I would allow the appeal and give judgment in favour of the plaintiff for $15,000 general damages, special damages as agreed, and costs throughout.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiff, appellant: Mitchell, Green & Minuk, Winnipeg.

Solicitors for the defendant, respondent: Thompson, Dilts & Co., Winnipeg.

HECTOR McELROY (*Defendant*) .....APPELLANT;

AND

DAVID COWPER-SMITH and ROBERT WOODMAN (*Plaintiffs*) RESPONDENTS.

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*Mar. 2, 3
May 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Libel—Damages—Whether award so inordinately large as to be wholly erroneous estimate—Mitigating circumstance negating award of punitive or exemplary damages.

Practice—Default of defence—Proof of publication of alleged libel not required.

In an action for libel alleged by the plaintiffs (a lawyer and an insurance executive) to have been uttered in a letter and in a document entitled "To whom it may concern" which accompanied the said letter, the defendant filed no statement of defence. The plaintiffs noted the pleadings closed and applied for a *praecipe* for entry for trial for the assessment of damages. The plaintiffs' solicitor served notice of such entry personally upon the defendant. When the matter came up for trial, the defendant neither appeared nor was represented by counsel, and the Court proceeded under those circumstances to hear the action. The trial judge awarded damages in the amount of $25,000 to both plaintiffs. On appeal, that judgment was affirmed by the Appellate Division and a further appeal was then brought to this Court.

Held (Spence J. *dissenting*): The appeal should be allowed.

Per curiam: In Alberta, upon default in defence the defendant is to be taken to have admitted the facts set out in the statement of claim. Accordingly, the plaintiffs were not required to prove publication of the alleged libel. *Sulef v. Parkin and Breno* (1966), 57 W.W.R. 236, followed.

Per Martland, Judson, Ritchie and Hall JJ.: Defamation of a professional man is a very serious matter and ordinarily would be visited with an award of substantial damages, including punitive or exemplary damages if the circumstances so warrant. However, in the circumstances of this particular case, the award of $25,000 to each of the plaintiffs was so inordinately large as to be a wholly erroneous estimate. It was obvious that the plaintiff was temperamentally unstable and that he was given to making unreasoned and extravagant statements about the plaintiffs. No reasonable businessman would be likely to be affected in his dealings with the plaintiffs by the defendant's statements and as reasonable businessmen constituted the most important source of potential clientele for both the plaintiffs, their exclusion from the persons likely to be affected by the alleged libels was a factor which should have been taken into account as a mitigating circumstance negating an award of punitive or exemplary damages.

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

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Per Spence J., *dissenting:* This Court is justified in interfering with an award if it is of the opinion that the damages are so large that it must be considered that the trial judge applied a wrong principle of law, or that the verdict is a wholly erroneous estimate. As to the only question of principle which appeared in the reasons of the trial judge, if that judge did include amounts for exemplary and punitive damages in the awards of the two plaintiffs he was entitled in law to do so and there appeared to be sound reason for awarding such damages. As to whether the verdict was a wholly erroneous estimate, under the circumstances the award was not so inordinately high that it represented an altogether erroneous estimate of the damages which the plaintiffs had suffered.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Milvain J. Appeal allowed, Spence J. dissenting.

R. J. Gibbs, for the defendant, appellant.

W. A. McGillivray, Q.C., for the plaintiffs, respondents.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

HALL J.:—I agree with my brother Spence that publication of the libel sued on was admitted when no defence was filed on behalf of the defendant and also that exs. 3, 4 and 7 were properly received when tendered in aggravation of damages.

The real question in this appeal is whether the award of $25,000 to each of the respondents was so inordinately large as to be a wholly erroneous estimate in the circumstances of this particular case. I think it was. I would not, in any way, underestimate or discount the damage that can be done to a lawyer or to an insurance executive by false allegations of misconduct and dishonesty. Defamation of a professional man is a very serious matter and ordinarily would be visited with an award of substantial damages, including punitive or exemplary damages if the circumstances so warrant.

In the present case it is obvious that the appellant was temperamentally unstable and that he was given to making unreasoned and extravagant statements about the respondents. The learned trial judge made it apparent that he was aware of this instability and exs. 3, 4 and 7 are themselves additional proof of it.

My brother Spence has indicated his opinion "that the ordinary hard-headed businessman might be little affected by these statements from someone he knew to be of unstable character". I would be more inclined to say that no reasonable businessman would be likely to be affected in his dealings with the respondents by statements coming from the source which they did in this case, and as I feel that reasonable businessmen constitute the most important source of potential clientele for both the respondents, I think that their exclusion from the persons likely to be affected by the alleged libels is a factor which should have been taken into account as a mitigating circumstance negating an award of punitive or exemplary damages.

I think the appeal should be allowed and the case remitted to the trial division for an assessment of damages having regard to the foregoing. The appellant should have such costs in this Court as are taxable in a *forma pauperis* appeal and his costs in the Appellate Division.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, by a judgment dated June 2, 1965, dismissed without reasons an appeal from the judgment of Milvain J. made on May 11, 1964. In the latter judgment, Milvain J. awarded damages in the amount of $25,000 to both respondents.

The action was one for libel alleged by the plaintiffs to have been uttered in a letter dated January 21, 1964, and in a document entitled "To whom it may concern" which accompanied the said letter.

The defendant, the present appellant, filed no statement of defence. The plaintiffs noted the pleadings closed and applied for a *praecipe* for entry for trial for the assessment of damages. The plaintiffs' solicitor served notice of such entry for trial personally upon the defendant. When the matter came up for trial, the defendant neither appeared nor was represented by counsel, and the Court proceeded under those circumstances to hear the action.

Counsel for the appellant took the position in this Court that according to the practice in the Supreme Court of Alberta, such a default of defence by a defendant did not amount to an admission of the allegations of fact made in

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the statement of claim. However, counsel for the respondents has cited *Sulef v. Parkin and Breno*[1], where the Appellate Division of the Supreme Court of Alberta, *per* Smith C.J.A., at p. 239, held that in the Province of Alberta upon default in defence the defendant is to be taken to have admitted the facts set out in the statement of claim. This is a decision of the highest Court in Alberta on a point of practice in the province, and this Court will not interfere under such circumstances. Therefore, the respondents, as plaintiffs at trial, were not required to prove publication of the alleged libel. This Court does not deem it necessary to determine whether publication was admitted in other correspondence of the defendant produced at trial.

Counsel for the appellant also objected to the admission of exs. 3, 4 and 7, and to the reception of the evidence of one Alexander Sandy Chibree. Counsel for the appellant took the position that no publication had been proved of exs. 3, 4 and 7.

Exhibit 3 was a letter addressed to the solicitors for the plaintiffs dated February 17, 1964. The statement of claim by which the action was commenced was issued on February 10, 1964. In evidence, the plaintiff David Cowper-Smith identified the signature of the defendant to such letter and also to the letter (ex. 4) which was addressed to the Honourable Premier E. C. Manning and dated February 28, 1964, and to ex. 7, another document, which was entitled "To whom it may concern as an Assembly of Christian Believers" and dated May 5, 1964. These documents were produced at trial, not to prove the libel or the publication thereof, as they were all committed after the issuance of the statement of claim, but to prove the state of mind of the defendant in uttering the libel on January 21, 1964, and his motive in doing so.

Gatley on Libel and Slander, in the fifth edition, at p. 556, says:

> *Other defamatory words.* The plaintiff may urge in aggravation of damages that the defendant has published other defamatory words about him not set out on the record, whether such words were or were not connected with the subject-matter of the action, whether they were prior or subsequent to such publication, or writ issued, and whether they are actionable or not.

[1] (1966), 57 W.W.R. 236.

The authority cited for such proposition is *Pearson v. Lemaitre*[1], in the Court of Common Pleas, where Tindal C.J. said at pp. 719-20:

> And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it.

I see no reason in principle why the publication of these subsequent defamatory words need be proved. In fact, they would be admissible if they were merely spoken to the plaintiff after the writ had been issued and had not been heard by any other person. They are not admissible for the purpose of proving the libel but in aggravation of damages. I am of the opinion, therefore, that these three exhibits were admissible apart from whatever evidence of publication may be obtained from the record, upon which I need not express any opinion.

The witness Alexander Sandy Chibree gave evidence that in the late fall of 1964, *i.e.*, after the statement of claim had been issued, he had been invited to a meeting at which were present the defendant Hector McElroy, his brother Morton McElroy, and other persons. The witness gave it as his opinion that the meeting was called to gather evidence, if possible, that would have helped the McElroys, and particularly Hector McElroy the appellant, to regain certain farm property, such relief being claimed in an action against the plaintiffs and others. Chibree, in his evidence, said:

> I was rather astounded in that the meeting was opened up by a remark by Mr. Morton McElroy that they would make sure—they would take action against the men of Melba Ranches which would cause them no longer to be able to do business in this city or make it difficult for them to live within this City and beyond that, of course, there was various discussions that followed.

On the evidence of Chibree, this statement by Morton McElroy took place in the appellant Hector McElroy's presence, and there was no dissent from him at all. The witness continued:

> In fact, there was several statements followed that where the two—Hector and Morton, signified that they had always worked as a team and that they would continue to do so in the future.

[1] (1843), 5 Man. & G. 700.

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The statement made by Morton McElroy would certainly have been admitted in evidence had it been made by Hector McElroy. Again, this evidence goes to show his motive in uttering the libels which are the subject of the evidence. Although the statements were not made by the appellant but by his brother, they were made at a meeting called for the purpose of helping the appellant in his action for recovery of possession of the farm property.

Phipson on Evidence, in the eighth edition, at p. 240, gives the principle in these words:

> Statements made in the presence and hearing of a party, and documents in his possession, or to which he has access, are evidence against him of the truth of the matters stated, if by his answers, conduct, or silence he has acquiesced in their contents.

And at p. 241, the author states:

> So, a party's silence will render statements made in his presence (or hearing only) evidence against him of their truth, provided he is reasonably called on to reply thereto: *Wiedemann v. Walpole* [1891] 2 Q.B. 534 at 539, and *Richards v. Gellatly,* L.R. 7 C.P. 127 at 131.

Certainly the appellant Hector McElroy was called upon to dissent from such a statement made by his brother at a meeting called for the purpose of assisting the appellant in his action for possession. If he did not agree with the statement, his failure to dissent is, therefore, in my view, admissible with the statement to which he gave his assent by silence, again to explain the motive of the appellant in uttering the alleged libel.

Counsel for the appellant submitted that the learned trial judge permitted counsel for the respondents to give evidence although, of course, not sworn, and cites this statement by the said counsel:

> Mr. McGillivray: But, unfortunately...if you had an opportunity of seeing this gentleman in the witness box your Lordship might well see that he is not so insane at all. This is just planned and deliberate and calculated to try and drive these people out of this lawsuit, which is our statement which, of course, makes this a very, very vicious thing. (The word "statement" is probably a misprint for "submission".)

I am in agreement with counsel for the respondent that that statement was not the giving of evidence by counsel but was argument and was argument particularly in view of the testimony of Chibree which was supported by the evidence adduced.

One of the main contentions made by the appellant is that the learned trial judge in making his award of damages included in his award an allowance for punitive or exemplary damages and that such damages are not allowed in a libel action. Counsel cites *Rookes v. Barnard*[1], a decision of the House of Lords.

Before considering that decision, it is important to consider the actual words in which the learned trial judge expressed himself. Giving judgment at the close of the argument Milvain J., in the opening paragraph, said:

> I have no hesitation on the evidence before me in reaching the conclusion that the defamation in this instance is of the nature and proportions that justify a Court in awarding heavy damages in which there is involved an element of punitive damages.

Then he continued:

> In my view Courts should take a very serious view of defamation that affects the character of men in professional life and of men in walks of life where they occupy a position of trust as does a lawyer and as does the manager of an insurance company. There is nothing more valuable to members of the human race than their reputation and a vile and deliberate attack on reputation that is designed as is the case before me to reach other ends through ulterior purposes, that in my view makes the action all the worse.

In the first part of the second paragraph which I have quoted above, the learned trial judge was emphasizing the serious nature of the libel to the persons libelled and not dealing with the punitive element.

In *Paffard v. Cavotti*[2], the Appellate Division (as it was then known) of the Supreme Court of Ontario considered a case where the trial judge had estimated the actual damages which naturally flowed from the defendant's wrong doing, deliberate and flagrant trespass by cutting down trees and depositing sand and silt on the plaintiff's lands, at $3,500 and then, taking into account the defendant's whole course of conduct and persistence in the wrong doing, fixed the total damages under the circumstances at $4,500. Masten J. said at p. 176:

> Mr. Cartwright's argument in the present case is that the trial judge was entirely unwarranted in law in his finding that $1,000 should be added to the $3,500 on account of the arrogant and improper conduct of the defendant towards this plaintiff.
>
> In my opinion, every intendment is to be made in favour of this judgment. No valid objection could be made to the judgment if the Judge

[1] [1964] 1 All E.R. 367.
[2] (1928), 63 O.L.R. 171.

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had simply said in his reasons that, taking all the facts into consideration, he fixed the damages at $4,500. The circumstance that the trial Judge, in giving his reasons, thought aloud and expressed in words his method of arriving at the $4,500 cannot in my opinion prejudice the validity of the resulting judgment.

So in this case, certainly if the trial judge had confined himself to a recital of the seriousness of the damages to the persons libelled then, in my view, the use of the one word "punitive" would not have been sufficient reason to vary the quantum of the damages. The learned trial judge, however, continued with reference to "...a vile and deliberate attack on reputation that is designed as is the case before me to reach other ends through ulterior purposes . . ." and I am ready, therefore, to consider this a case in which the trial judge did award punitive damages.

If the law in effect in Alberta is that set forth in the judgment of Lord Devlin in *Rookes v. Barnard,* then he at p. 410 outlined the two cases where an award of punitive damages in a tort action would be justified. The first category is the oppressive, arbitrary or unconstitutional action by the servants of the government. That category is not applicable in the present case. Dealing with the second class, Lord Devlin continued:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. ...This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,—perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down.

In the present case, the evidence given by Chibree, as I have said, tends to show that the purpose of the appellant in uttering these libels, which are the basis of the action, was to affect the respondent's defence to the appellant's action for possession of the farm land. In short, it was a case "in which the defendant is seeking to gain at the expense of the plaintiff some object—some property..." and even if the award of punitive damages in tort actions is as limited as outlined by Lord Devlin then the present case would fall within the second class which he sets out.

Moreover, I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes v. Barnard.*

In *Knott v. Telegram Printing Co.*[1], this Court was considering an appeal in an action for libel. Anglin J., giving judgment for himself and the Chief Justice, said at p. 341:

> The damages are large and were, no doubt, awarded upon a punitive or exemplary rather than on a purely compensatory basis. It was, however, within the province of the jury so to deal with this case.

Davies J., although of the opinion that the damages were so excessive that a new trial was required, said at p. 336:

> I have not failed in reaching this conclusion to consider all the facts and circumstances in this case which would justify exemplary damages being given...

And Duff J., although he also would have directed a new trial, said at p. 339:

> It is emphatically a case for the exercise of the punitive jurisdiction with which the primary tribunal is endowed in cases of defamation.

In Ontario, in two cases in recent years, exemplary damages for trespass have been allowed without evidence that the trespasser intended any profit for himself but only on the basis that he was acting in a high-handed fashion with open disregard for the plaintiffs' rights: *Carr-Harris v. Schacter and Seaton*[2] and *Pretu et al. v. Donald Tidey Co. Ltd.*[3] In the latter case, an appeal from the decision of Brooke J. was dismissed without written reasons and an application for leave to appeal to this Court was also dismissed. It is worthy of note that the latter application was made after the decision of the House of Lords in *Rookes v. Barnard* had been reported.

I am, therefore, of the view that if the trial judge did include amounts for exemplary and punitive damages in the awards in favour of the two plaintiffs then he was entitled in law to do so.

The problem still remains whether the damages are so excessive that this Court should direct a new trial on the question of damages. The awards were in the sum of $25,000 in favour of each plaintiff which were the exact amounts claimed in the statement of claim. It is certainly not a valid ground for interfering with an award of damages in such an action that none of the members of this Court, had they been sitting at the trial, would have al-

[1] (1917), 55 S.C.R. 631, [1917] 3 W.W.R. 335.
[2] [1956] O.R. 994.
[3] (1966), 55 D.L.R. (2d) 504.

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lowed such a sum: *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*[1]; *Knott v. Telegram Printing Co., supra,* at p. 341.

If, however, this Court is of the opinion that the damages are so large that it must be considered that the trial judge applied a wrong principle of law, or that the verdict is a wholly erroneous estimate, the Court is justified in interfering.

I have dealt with the only question of principle which appeared in the reasons of the learned trial judge.

I turn now to whether the award was so inordinately large as to be a wholly erroneous estimate.

The plaintiff Cowper-Smith was a solicitor practising in Calgary in a small firm. He had no partner but retained one junior solicitor. The plaintiff Woodman was the manager, in Calgary, of the Excelsior Life Insurance Company. The libels alleged and, in my view, proved were:

> My charge, made by my lawyer...is to the effect that these men have committed an act (or acts) whereby they are legally charged with conspiracy to defraud.
>
> In an examination by a psychiatrist to determine why I would trust these men, I would ask my Elders if men of Gideons, namely Mr. Jespersen and Woodman, who used our pulpit and who claimed to love the same Lord and Saviour as I do, cannot be trusted...
>
> It was brought to my attention that at a recent meeting of the Gideons, Mr. Cowper-Smith was present, and one of the Gideons rebuked a member for allowing Mr. Cowper-Smith to attend, knowing this individual's Christian testimony left much to be desired...
>
> I have been informed by Mr. Claude Cameron, a member of the local Alliance Church, who was very disturbed by their lack of Christian ethics in their business dealings, through personal experience, that one of their speakers at their C.B.M.C. campaign in the fall of 1962, left the city prematurely because he discovered the reputation of one or two of these men. Rev. Smith, you have mentioned to me your feelings regarding the spiritual deficiency of C.B.M.C. here in Calgary.

As well in the document enclosed with that letter there was set out in some detail an alleged transaction between the plaintiff Cowper-Smith and the defendant in which it was said that he agreed to make certain charges for carrying out a transfer of property and then attempted to deduct more from the proceeds of the sale which he had improperly directed should be paid to himself. I am in agreement with the view expressed by the learned trial judge that these are very serious accusations to make

[1] (1934), 50 T.L.R. 581.

against men who are in the position of trust of solicitor and local manager of an insurance company. It is true that the evidence reveals that the appellant was, to put it quite conservatively, of a somewhat fanatical view in matters with reference to religion and it is true that the ordinary hard-headed businessman might be little affected by these statements coming from someone he knew to be of an unstable character. The letter, however, purported to be addressed to a Rev. Herman L. G. Smith, District Superintendent of the Church of the Nazarene, and copies were directed to the Rev. Harold Griffin of the North Hill Church of the Nazarene, the Rev. Charles Muxworthy, First Church of the Nazarene, and to all organizations mentioned in the letter. The latter organizations included the Pastor's Gospel Fellowship, the Gideons, C.B.M.C. (said to be Christian Business Men's Club), the Youth for Christ, and the Inter-Varsity Christian Fellowship. Those persons and those organizations were those who knew well both the appellant and the respondents. The respondent Cowper-Smith could expect people such as these as being those with whom he dealt either as clients or for clients. Those persons and the members of those organizations could well be amongst those whom the respondent Woodman would wish to solicit as policyholders in the company which he represented. There is nothing to indicate that the damages which they would suffer would be lessened by any recognition of the extreme religious beliefs of the appellant. The persons to whom he addressed the libels might well be persons with similar extreme religious beliefs.

In *Ley v. Hamilton*[1], Lord Atkin said at p. 386:

> It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation...

It is, of course, well nigh impossible to give any evidence of either special damages or evidence which will allow an exact calculation of general damages. The plaintiff Cowper-Smith was very moderate in dealing with this matter in his evidence. I quote a few questions of such evidence:

> Q. Now, first of all, Mr. Cowper-Smith, can you tell his lordship whether—of what effect that you are aware of as to the publication

[1] (1935), 153 L.T. 384.

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of the matters alleged in the statement of claim, what effect that has had on you if you have any knowledge?

A. Well, I only have one or two concrete examples of business lost because of it and that has come to me sort of as a chain event. Aside from that it received such wide publication amongst the people that I associated with that it was extremely embarrassing and when you met someone you didn't sort of feel like being friendly because you didn't know what they had heard.

Q. You did mention something about you have a couple of instances of business loss, would you give—

A. Well, these are—there is one in particular small but I got the details on it just recently, this McElroy—this, as I say, it is sort of a chain event, it is semi-hearsay—

Q. Well, if it was—

A. Yes, I know it has affected business but it is impossible to say how much.

It is interesting to note that the plaintiff Woodman actually belonged to the Alliance Church and the Gideons International, two of the organizations which received copies of the libel.

Under these circumstances, I have come to the conclusion that I cannot say that the award was so inordinately high that it represented an altogether erroneous estimate of the damages which the plaintiffs have suffered, even apart from the jurisdiction to award punitive damages which, as I have said, I believe the trial Court did possess.

As to the latter, there would seem to be sound reason for awarding punitive damages. Firstly, there is the evidence as to the purpose which the defendant had in uttering the libels, and secondly, exs. 3, 4 and 7, which demonstrated that after the action had been commenced the defendant continued to utter defamatory statements and if anything increased the venemous nature thereof.

I would dismiss the appeal with costs.

Appeal allowed with costs, SPENCE J. *dissenting.*

Solicitors for the defendant, appellant: Prothroe, Gibbs, McCruden and Hilland, Calgary.

Solicitors for the plaintiffs, respondents: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan and Fraser, Calgary.

THE FORD MOTOR COMPANY OF CANADA LIMITED ..... APPELLANT;

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*Mar. 3, 7
May 23

AND

STEVE HALEY ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Sale of goods—Warranty by manufacturer—Sale through intermediary—Failure of equipment in respect of fulfilment of warranty—Measure of damages—Onus to establish remaining value.

Three trucks manufactured by the appellant company were purchased by the respondent to haul gravel on a construction job. To conform with the appellant's agency arrangements, the deal was put through in the name of an intermediary as vendor although the latter had no actual part or interest in the transaction. The deal was made directly with the appellant by its local truck and fleet sales manager. A finance company financed the purchase and subsequently sued the respondent on the contract and recovered judgment. In that action the respondent joined the appellant as a defendant by way of counterclaim, alleging breach of warranty and claiming damages.

Both the trial judge and the Court of Appeal found that the appellant had warranted that the trucks "would be satisfactory for hauling gravel". The trial judge found that although the respondent experienced difficulty with the trucks, the evidence did not establish that the trouble was due to defects in the trucks except as to one item for which he awarded the respondent damages in the sum of $1,500.

The Appellate Division reversed the trial judge as to two of the trucks and awarded the respondent damages in the sum of $23,177.52 being the price paid by the respondent for these two trucks. On appeal to this Court, the appellant argued that the onus was on the respondent to prove his damages as being the difference between the purchase price and the actual value of the trucks he got, there being some evidence that the two trucks in question, although unfit for the purposes for which they were purchased, had some merchantable value, and the appellant contended that it was incumbent on the respondent to establish that value in order to determine the amount of damages to which he was entitled.

Held: The appeal should be dismissed.

The Court agreed with the holding by the Court of Appeal that there was a complete failure of the trucks in respect of the fulfilment of the warranty that they "would be satisfactory for hauling gravel". The Court also agreed that the onus was on the appellant to establish the value, if any, remaining in the two trucks and that it had failed to do so. *Massey Harris Co. Ltd. v. Skelding,* [1934] S.C.R. 431, applied.

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*PRESENT: Abbott, Martland, Judson, Hall and Spence JJ.

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FORD MOTOR CO. OF CANADA LTD. v. HALEY

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Manning J. Appeal dismissed.

D. O. Sabey and *C. D. O'Brien*, for the appellant.

D. H. Bowen, Q.C., and *D. J. Horne*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—The facts relative to this appeal are fully set out in the reasons for judgment of Johnson J.A. for the Appellate Division of the Supreme Court of Alberta[1]. To summarize, the respondent purchased three new Ford T850 Tandem Trucks manufactured by the appellant and in storage at Edmonton for a total of $39,566.87. To conform with the appellant's agency arrangements, the deal was put through in the name of Universal Garage as vendor although Universal Garage had no actual part or interest in the transaction. The deal was made directly with the appellant company by Mervyn Charles Noltie, its truck and fleet sales manager at Edmonton. The purchase was financed through Traders Finance Corporation Limited whose finance charge was $5,568.13, making the total payable by the respondent the sum of $45,135. Traders Finance subsequently sued the respondent on this contract and recovered judgment against him for $48,944.29 on July 10, 1962. In that action the respondent joined the appellant as a defendant by way of counterclaim, alleging breach of warranty and claiming damages in the sum of $21,000 and other relief. The trucks were purchased to haul gravel on the Cold Lake Airport construction job.

Both the learned trial judge and Johnson J.A. in the Appellate Division found that the appellant had warranted that the trucks "would be satisfactory for hauling gravel". The learned trial judge found that although the respondent experienced difficulty with the trucks, the evidence did not establish that the trouble was due to defects in the trucks except as to one item for which he awarded the respondent damages in the sum of $1,500.

[1] (1966), 57 D.L.R. (2d) 15 (*sub nom. Traders Finance Corp. Ltd. v. Haley*).

The Appellate Division, after a full review of the evidence, reversed the learned trial judge as to two of the trucks and awarded the respondent damages in the sum of $23,177.52 being the price paid by the respondent for the red and green trucks. I am satisfied that on the evidence which was not dependent on findings of credibility, the Appellate Division was fully justified in drawing inferences and arriving at conclusions differing from those arrived at by the learned trial judge.

There is now no dispute as to the warranty. The substantial question is as to the quantum of damages to be awarded the respondent. The Appellate Division, following the decision of this Court in *Massey Harris Co. Ltd. v. Skelding*[1], said:

> The onus being on the respondent to establish the value, if any, remaining in these two trucks, and having failed to establish this, the damage that the appellant is entitled to recover is the purchase price to the appellant of the red and green trucks. These trucks no doubt earned money for the appellant; there is no evidence as to how much this was. Having regard to the amount of repairs paid by the appellant, the money lost while these trucks were laid up due to breakdowns, and the trouble and expense that the appellant was put to because of them, it is doubtful if the net earnings exceeded the amount of the losses. If the onus is on the respondent to establish any value remaining in the trucks, it should follow that the onus was also upon the respondent to show that the trucks' earnings were greater than the loss caused by the numerous breakdowns. No such evidence was adduced.
>
> The appeal is allowed and the amount of the damages is increased to the amount of the price paid for the red and green trucks. The appellant is entitled to his costs on the appropriate scale both here and in the Court below.

The appellant contends that the Appellate Division erred in awarding the full purchase price as damages and argues that the onus was on the respondent to prove his damages as being the difference between the purchase price and the actual value of the trucks he got, there being some evidence that the two trucks in question, although unfit for the purposes for which they were purchased, had some merchantable value, and the appellant contends that it was incumbent on the respondent to establish that value in order to determine the amount of the damages to which he was entitled.

This same argument was made in the *Massey Harris v. Skelding* case relied on by the Appellate Division.

[1] [1934] S.C.R. 431, [1934] 3 D.L.R. 193.

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Hall J.

Duff C.J., in delivering judgment for the Court, said:

We cannot accept this view. Having regard to the nature of the warranties and the complete failure of the tractor in respect of the fulfilment of the warranties, which the evidence, accepted by the learned trial judge, discloses, we think that, *prima facie,* the loss incurred by the respondent amounted to the full purchase price; and that it was incumbent upon the appellants to adduce evidence in support of their contention that the damages so measured should be reduced by reason of the possession of the tractor of some merchantable value.

We cannot agree with the interpretation by the Appellate Division of the decision in this Court in *Nolan v. Emerson-Brantingham Implement Co.*, [1921] 2 W.W.R. 416; 60 Can. S.C.R. 662. There the trial judge held that in respect of the tractors (model "L") which he found had no value for the purposes for which they were bought, and had also no merchantable value, no diminution of damages could be allowed. A critical examination of the judgments shews that a majority of this Court accepted the view that on this ground the learned trial judge was right in assessing the damages in respect of these tractors at the amounts paid for them. This was really the basis of the decision in this Court.

Was there in the instant case the complete failure of the trucks in respect of the fulfilment of the warranty that the trucks "would be satisfactory for hauling gravel"? The Appellate Division held that there was this complete failure and that the onus was on the appellant to establish the value, if any, remaining in these two trucks and that it had failed to do so.

Mr. William Alton Reid, parts and service manager at Maclin Motors, a Ford dealership in Calgary where most of the repairs were made while the respondent was using the trucks in question and who knew the trucks, testified for the appellant. He told of the trucks being repaired in May 1960 and held by Maclin Motors pending payment of the repair bill for some 15 to 17 months, and that some months later he went to Olds where he saw the trucks and at that time they "were completely run down". There was no other evidence as to the value of the trucks then or at any other time. The onus in this regard was on the appellant; *Massey Harris v. Skelding, supra.* It is to be noted that the counterclaim against the appellant was commenced on October 5, 1960, which was while the trucks were being held by Maclin Motors.

The respondent did do considerable hauling with the two trucks and as to having made some profit therefrom he says all the moneys he received were paid on the conditional sales contract as shown in the statement of claim. The amount there credited is $6,636.80. In addition it was

shown by a summary of exhibits in the appellant's factum that the respondent expended $2,206.69 on repairs to the red truck and $1,540.43 on the green truck while in the same period the appellant company paid $1,851.86 for repairs to the red truck and $1,170.83 on the green truck.

The appellant argued that these repairs were necessitated principally by the fact that the trucks were overloaded. In this connection it is significant that when Noltie was selling the trucks to the respondent he was told by the respondent that "we were mainly interested in tandem trucks, that we, that had the capacity of hauling twelve yards of gravel or sand and that they were going off highway, dusty off highway conditions" and it was following this that Noltie gave the warranty found by the learned trial judge. The conditional sales contract shows that the trucks were to be used on the Cold Lake Airport job and to work 20 hours a day.

The learned trial judge in his judgment said, referring to the difficulties the respondent was having with the trucks:

> Subject to the exception I will deal with below, I do not think that there is evidence that establishes that the trouble was due to defects in the trucks; more likely the trouble was due to improper use of the trucks; as, for example, setting the governor of at least one of the trucks at 2,750 revolutions per minute which was too low a speed for this motor and would cause a good deal of "lugging" in the motor and thereby put an undue strain upon it.

Johnson J.A. for the Appellate Division deals with this statement as follows:

> With the exception which I will later refer to, there is no direct evidence that the two trucks, the red and the green, were abused or improperly handled by the crews who operated them. The evidence is all to the contrary. All the appellant's trucks were operated along with Bilida's under Bilida's foreman Nelson. He supervised the maintenance of these trucks as well as the ones owned by his employer and his evidence is that the Ford trucks were maintained in the same manner as were the International trucks which required only normal repairs. Several of the operators were called and gave evidence. Subject to the exception which I have already mentioned, there is nothing to indicate that these trucks were abused or improperly handled.
>
> The exception to which I have referred is the evidence of a driver of the green truck who said that in the three to three and a half months that he drove this truck after the Cold Lake job had finished, the governor was set so as to permit not more than 2,750 r.p.m.'s. I think it is not unfair to say that most of the evidence of the defence tending to show that these trucks were improperly operated was built upon this statement,—the assumption being that not only this truck but the other trucks were operated in a similar manner. Bearing in mind the evidence of several witnesses that the vibration on these trucks was so great that the

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tachometer which measures the revolutions per minute was frequently out-of-order, this evidence should, I think, have been examined more carefully than it was. But when the evidence of the witness Sharp is considered, this evidence becomes incredible. Mr. Sharp, a highly trained motor expert and an employee of the respondent at the time trouble was experienced with these trucks, examined by the Court, said:

> "Q. As I understand it you feel that the proper revolutions per minute, proper number of revolutions per minute at which this motor should be driven is 3,400 to 3,600?
>
> A. To be driven it would be 3,400 r.p.m.
>
> Q. When it was driven?
>
> A. Yes.
>
> Q. And if it should have been driven at around 2,750 you have doubt as to whether the motor would run at all?
>
> A. Not that the motor would run at all, however if the governor was set at 2,750 r.p.m. I don't believe you would have any power, in fact I know you would not have enough power to get that load moving, or any load moving."

Assuming that there is some probative value in the statement that this motor was driven at 2,750 r.p.m.'s, there is no evidence that any other motor was driven at this low rate or that this motor was driven at a similar r.p.m. at any other time. As I have said, failure of the transmission of these trucks was attributed to this cause even when, as in the case I have previously referred to, the respondent's Service Adjustment Claim showed the cause to be a faulty pump shaft.

Considerable evidence was led to show the effect that overloading these trucks would have on the motor and transmission. The evidence of what proper loading would be is not too satisfactory. If these trucks were overloaded, the fact remains that they were supposed to be equal to or better than the International trucks that the appellant had considered buying. Bilida operated similar International trucks alongside the appellant's trucks and carried similar loads without difficulty or trouble.

Elgin Ewing, a former mechanic of the respondent and a witness for the company at the trial, in an undated letter to the appellant but written when the Edmonton Airport work was being done, said:

> "I stopped at the Nisku project and picked up duplicate figures on your load weights which were completely in accordance with good truck operation."

At the trial he explained that he misinterpreted the information he had received but there can be no doubt that at the time he considered the appellant was not being treated fairly by the respondent.

The evidence fully supports this statement.

The appeal should accordingly be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

Solicitors for the respondent: Duncan, Bowen, Craig, Smith, Brosseau and Horne, Edmonton.

THE IMPERIAL LIFE ASSURANCE COMPANY OF CANADA (*Defendant*) APPELLANT;

AND

SEGUNDO CASTELEIRO Y COLMENARES (*Plaintiff*) ..... RESPONDENT.

1966
*Oct. 14, 17, 18
1967
May 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Contract—Insurance—Proper law of contract—Factors considered in determination thereof.

Two policies of insurance on the life of the plaintiff were issued through the defendant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the plaintiff was resident and domiciled in that country. The plaintiff had applied for the policies in Cuba and in his applications he agreed, *inter alia,* that the policies should take effect upon delivery. The offers in the applications were irrevocable and the plaintiff specifically agreed to accept the policies if any when they were issued. The applications were addressed to the head office of the company at Toronto and were prepared at that office, where the policies were also prepared. The policies, although written in Spanish, were in the standard Ontario form. Their cash surrender value was payable in American dollars and it was required that the request for such payment be made in writing to the head office.

The plaintiff later became a resident of the United States and in 1961 he applied for payment of the cash surrender value of his policies. Payment of the cash surrender value in dollars to a person resident in the United States was an offence contrary to the Foreign Exchange Contraband Law of Cuba, unless permission was given by the National Bank of Cuba. The question at issue was whether the proper law of the insurance contracts was the law of Ontario or the law of Cuba. The claim was allowed by the trial judge and an appeal by the defendant was dismissed by the Court of Appeal, one member of the Court dissenting. The defendant, with leave, further appealed to this Court.

Held: The appeal should be dismissed.

The contracts were made when the initial irrevocable offers contained in the plaintiff's applications were accepted by the mailing of the policies from the defendant's head office in Toronto. The fact that the parties agreed that the policies were not to become effective until certain conditions were fulfilled in Cuba did not alter the place where that agreement was made. However, the place where the contract was made was not decisive in determining the proper law of a contract. That problem was to be solved by considering the contract as a whole in light of all the circumstances which surrounded it and applying the law with which it appeared to have the closest and most substantial connection.

While it was doubtful as to whether the proper law of a contract of life insurance is necessarily the country in which the head office of the

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Spence JJ.

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insurer is situated, in the present case it was significant that the actual decision to "go on the risk" was made at the head office in Toronto and could not have been made in Havana.

The fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, was of preponderating importance in determining the law governing the contracts. It was a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies would be governed by the law of Ontario. Furthermore, the form of the policies which were issued in the present case evidenced the fact that the insurer intended to be governed by that law.

North American Life Assurance Co. v. Elson (1903), 33 S.C.R. 383; *Milinkovich v. Canadian Mercantile Insurance Co.*, [1960] S.C.R. 830; *Household Fire & Carriage Accident Insurance Co. v. Grant* (1879), 4 Ex. D. 216; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; *Tomkinson v. First Pennsylvania Banking and Trust Co.*, [1961] A.C. 1007, applied; *Pick v. Manufacturers' Life Insurance Co.*, [1958] 2 Lloyd's Rep. 93; *Rossano v. Manufacturers' Life Insurance Co.*, [1963] 2 Q.B. 352, considered.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Stewart J. Appeal dismissed.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the defendant, appellant.

Joseph Sedgwick, Q.C., and *G. Langille*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario[1], (Porter C.J., dissenting) dismissing an appeal from a judgment of Mr. Justice Stewart whereby he awarded the respondent the sum of $8,744.22, being the equivalent in Canadian currency of the cash surrender value, payable in American dollars, of two policies of insurance on the life of the respondent which were issued through the appellant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the respondent was resident and domiciled in that country.

The sole question at issue in this appeal is whether the proper law of the contracts of life insurance is the law of Ontario or the law of Cuba. In this regard the parties are

[1] [1966] 1 O.R. 553, 54 D.L.R. (2d) 386.

agreed that if the proper law of the contracts is found to be that of Ontario, the respondent is entitled to succeed, but that if the law of Cuba applies, unless permission has been granted by the National Bank of Cuba, the payment of the cash surrender value in dollars to a person resident in the United States, as the respondent is and was in September 1961 when he surrendered the policies, would be an offence contrary to the Foreign Exchange Contraband Law of Cuba.

The circumstances giving rise to this litigation have been thoroughly reviewed in the Courts below and they are not in dispute, but a brief résumé of the essential facts is, in my opinion, necessary to any intelligible discussion of the law applicable thereto.

The two policies here in question were in identical terms and they were both written in Spanish, which is the language of Cuba, for delivery by the appellant's Cuban agent to the respondent who was then a Cuban national and who had made application for the policies in Cuba pursuant to an application form by which he agreed, *inter alia:*

> That any policy granted pursuant hereto shall take effect only upon its delivery and upon payment of the first premium thereon in full, to be vouched for by the Company's printed official receipt duly countersigned and provided that upon such delivery and payment there shall have been no material change in my health or insurability since the completion of part 2 of my application.

The respondent's offers as contained in his applications for these policies were by their terms irrevocable and he specifically agreed to accept the policies if any when they were issued. Before delivery the policies were duly authenticated before a Notary in accordance with the law of Cuba.

It is contended on behalf of the appellant, on the basis of these facts, that the contracts were made in Cuba and are governed by the law of that country.

On the other hand, it is pointed out by the respondent that the applications were addressed to "The Imperial Life Assurance Company of Canada, Head Office, Toronto, Canada" and were prepared at that office, where the policies were also prepared and that, although these policies were written in Spanish, they were drawn in the common, standard form as used in the Province of Ontario and in conformity with the laws of that Province. These policies stipulated that they could not be varied except by writing

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thereon signed at the head office of the company by two of its executive officers and that any interlineations, additions or alterations had to be attested by two of the said officers. It is also to be noted that all payments under the policies, whether to or by the company, were required to be made "by bank draft drawn on New York payable in legal currency of the United States of America" and although it is true that many of the premiums were paid in pesos in Cuba, I think it to be apparent that at the time when the contracts were made it was contemplated that the cash surrender value would be payable in American dollars and it is made clear in the policies themselves that the request for such payment was required to be made in writing to the head office of the company at Toronto.

It is submitted on behalf of the appellant that the determination of the proper law applicable to these contracts is governed by the fact that they were made in Cuba, but I am by no means satisfied that they were so made. I am, on the other hand, of opinion that the time of the making of the contracts was when the initial irrevocable offers contained in the respondent's applications were accepted by the mailing of the policies from the appellant's head office in Toronto. (*See North American Life Assurance Co. v. Elson*[1], *per* Davies J. at p. 392 and *Milinkovich v. Canadian Mercantile Insurance Co.*[2], *per* Fauteux J. at pp. 835 and 836).

The respondent's applications by their terms provided that they were not to be effective until fulfilment of certain conditions which I have set out above and which are almost identical with those required of all contracts of life insurance in Ontario unless the application otherwise expressly provides to the contrary. This appears from the provisions of s. 139(1) of *The Insurance Act*, R.S.O. 1937, c. 256, which reads as follows:

> 139. (1) Unless the contract or the application otherwise expressly provides, the contract shall not take effect or be binding on either party until the policy is delivered to the insured, his assign, or agent, or the beneficiary named therein and payment of the first premium is made to the insurer or its duly authorized agent, no change having taken place in the insurability of the life about to be insured subsequent to the completion of the application.

[1] (1903), 33 S.C.R. 383.

[2] [1960] S.C.R. 830.

The policies here in question both contain the following provision:

> This policy and the applications herefor, a copy of which is attached hereto, taken together shall constitute the entire contract between the parties.

It is thus apparent that although the policies did not become effective until the conditions above referred to were fulfilled, which in fact occurred in Cuba, these conditions were themselves a part of "the entire contract between the parties" which in my opinion was concluded when the policies were mailed in Toronto. The fact that the parties agreed that the policies were not to become effective until conditions were fulfilled in Cuba did not alter the place where that agreement was made. It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. As was said by Thesiger L.J. in *Household Fire & Carriage Accident Insurance Company v. Grant*[1]:

> ... as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

In the course of his dissenting reasons for judgment in the Court of Appeal, the Chief Justice of Ontario advanced the view that because the policies themselves contained certain restrictive provisions relating to war and air travel which were not mentioned in the applications, it followed that the contracts were not concluded by the mailing of these policies. This ground was not relied on by the appellant and with the greatest respect I do not think that under the circumstances the additions to the policies to which the learned Chief Justice refers have the effect of changing the place where the contract was made from the place of acceptance to that of delivery.

I am, however, in agreement with Mr. Justice MacKay who observed in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal that:

> The place where the contract was made is not by any means decisive in determining the question of what law is applicable to the contract.

[1] (1879), 4 Ex. D. 216 at 221.

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It now appears to have been accepted by the highest Courts in England that the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

This test was adopted by the Privy Council in *Bonython v. Commonwealth of Australia*[1], where Lord Simonds said at p. 219:

> ... the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connexion.

This approach to the problem was restated in the House of Lords in *Tomkinson v. First Pennsylvania Banking and Trust Co.*[2], *per* Lord Denning at p. 1068 and Lord Morris of Borth-y-Gest at p. 1081.

The many factors which have been taken into consideration in various decided cases in determining the proper law to be applied, are described in the following passage from Cheshire on Private International Law, 7th ed., p. 190:

> The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; ...the economic connexion of the contract with some other transaction; ... the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

In referring to the location of the "head office of an insurance company whose activities range over many countries" as a factor to be taken into account in determining the proper law of a life insurance contract, the learned author cites as his authority the cases of *Pick v. Manufacturers' Life Insurance Company*[3], and *Rossano v. Manufacturers' Life Insurance Company*[4], both of which have been extensively reviewed in the Courts below, but he expresses doubts, which I share, as to whether they afford

[1] [1951] A.C. 201.
[2] [1961] A.C. 1007.
[3] [1958] 2 Lloyd's Rep. 93.
[4] [1963] 2 Q.B. 352.

justification for the general proposition that the proper law of a contract of life insurance is necessarily the country in which the head office of the insurer is situated.

In the present case, however, in my view, the significance of the location of the head office of the appellant company is underscored by the fact that the evidence makes it quite plain that the actual decision to "go on the risk" was made there and could not have been made in Havana. In this regard, in the course of his cross-examination, the appellant's general manager gave the following answers:

> Q. We are clear that when the application was made in Havana it was a head office decision whether it could go on the risk?
> A. Yes.
> Q. And that decision could not be made in Havana?
> A. No.

While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as of preponderating importance in determining the law governing the contracts.

I think it to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.

For these reasons, as well as for those which have been so fully stated in the reasons for judgment of Mr. Justice MacKay, I am of opinion that the proper law of these contracts is the law of Ontario.

It would not be proper to leave this matter without making reference to the alternative argument advanced by Mr. Sedgwick on behalf of the respondent which was based on the case of *Varas v. Crown Life Insurance Company* (Superior Court of Pennsylvania, October term 1964) and which was to the effect that even if other parts of the policy were governed by Cuban law the option to take the

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Ritchie J.

cash surrender value of the policy was an irrevocable offer which was accepted in Ontario and that, treating this phase of the contract separately, it was to be regarded as governed by the law of that Province. It is true that the *Varas* case affords some authority for this proposition, but it appears to me that there is nothing in the circumstances of the present case to support the unprecedented proposition that the proper law of a continuing contract can shift from time to time. The proper law of these contracts is to be determined as of the date when they were made.

Mr. Sedgwick also advanced the argument that as the appellant has always admitted the validity of the contract and its liability thereunder and the sole question at issue is whether the law of Ontario or the law of Cuba applies, the appellant should not have appealed from the judgment of Stewart J. and he points out that no appeal was taken from the judgments at trial in the cases of *Pick* and *Rossano*, *supra*. In this regard, Mr. Sedgwick submitted that a judgment of the Court of Appeal or of this Court is of no more protection to the insurance company in the Republic of Cuba than the judgment of Mr. Justice Stewart and he contended that once the latter judgment was rendered, the *lis*, in so far as the insurance company was concerned, disappeared. This argument appears to me to disregard the realities of the situation. The finding that the law of Ontario applies might well result in steps being taken by the Cuban authorities which would be prejudicial to the appellant and I think that it had a very real interest in pursuing the matter. Under these circumstances, I am of opinion that the appellant clearly had a right to appeal to the Court of Appeal and to this Court.

In view of all the above, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Payton, Biggs & Graham, Toronto.

Solicitors for the plaintiff, respondent: Haines & Thomson, Toronto.

FREDERICK GINTER (*Defendant*) .....APPELLANT;

1967
*May 18
June 26

AND

SAWLEY AGENCY LTD. and STAN STAGG and CENTRE CITY DEVELOPMENT LTD. (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Construction—Option agreement patently ambiguous—Two time periods provided within which option could be exercised—Whether acceptance within time limited in agreement.

On January 24, 1964, the defendant signed a document granting an option on certain property in Prince George, B.C. The document was prepared by one S on behalf of an undisclosed principal. The option read in part: "The term of the option is to be for *176* days from the date hereof expiring at the hour of 11:59 P.M. on the *24* day of *July 1964*."

S purported to exercise the option on July 23, 1964, by mailing an acceptance to the defendant. The following day, July 24th, a deed was presented to the defendant for signature. He refused to sign the deed. S assigned his rights to the plaintiffs who brought action for specific performance and for damages. The trial judge ordered specific performance but made no award of damages. The defendant took an appeal to the Court of Appeal for British Columbia which Court, by a majority judgment, dismissed the appeal and upheld the order for specific performance. On appeal to this Court, the only ground advanced was that the option was not accepted within the time limited in the option agreement.

Held: The appeal should be dismissed.

The reasoning of the majority in the Court of Appeal was adopted. The ambiguity in the option agreement was patent since it provided two time periods within which the option could be exercised. Taking 176 days as the term of the option the time for acceptance would have expired on July 19, 1964. But the contract fixed the exact minute, hour and day that the period of 176 days, and therefore the option, was to end. That circumstance dominated the clause and controlled its meaning. The erroneous description of the term as one of 176 days must therefore be rejected as being inconsistent with the declared intention.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Branca J. Appeal dismissed.

John Laxton, for the defendant, appellant.

G. A. Armstrong, for the plaintiffs, respondents.

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

[1] (1966), 57 W.W.R. 561, 58 D.L.R. (2d) 757.

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GINTER v. SAWLEY AGENCY LTD. et al.

The judgment of the Court was delivered by

HALL J.:—On January 24, 1964, the appellant signed a document granting an option on certain property in Prince George, British Columbia. The document was prepared by one Dudley Sawley on behalf of an undisclosed principal. Sawley purported to exercise the option on July 23, 1964, by mailing an acceptance to the appellant. The following day, July 24th, a deed was presented to the appellant for signature. He refused to sign the deed. His reasons for refusing to complete on that date were:

(i) That the sale price was too low;

(ii) That title deeds to the lands were in the possession of his bank;

(iii) That he may have difficulty relocating the buildings;

(iv) That he did not have sufficient time in which to give notice to his tenants;

(v) That he objected to certain alterations made on the document, *viz.* "20,000 net to the Vendor" which he had refused to initial and therefore thought it would vitiate the option.

Sawley assigned his rights to the respondents who brought action for specific performance and for damages.

The appellant defended the action on a number of grounds, including the following:

13. In answer to the whole of the Statement of Claim herein the Defendant says that on or about January 24th, 1964, one Dudley Sawley representing the Plaintiff, Sawley Agency Ltd., called upon the Defendant and requested him to employ the said Plaintiff as agent to list and sell the Defendant's property situate at the South East corner of the intersection of 7th Avenue and Brunswick Street in the City of Prince George, Province of British Columbia, and secured the Defendant's signature to a document which the said Dudley Sawley represented to the Defendant to be an agreement to list the said property for sale. The Defendant further says that if his signature was obtained by the Plaintiff, Sawley Agency Ltd., to any other document in relation to the said lands then it was obtained fraudulently.

14. Alternatively and in answer to the whole of the Statement of Claim herein the Defendant says if he signed the agreement in writing referred to in Paragraph 5 of the Statement of Claim herein, he did so upon the fraudulent misrepresentation by the said Dudley Sawley on behalf of the Defendant, Sawley Agency Ltd., that the said

document was an agreement to list the property described therein with the said Sawley Agency Ltd. for sale as agent on the Defendant's behalf.

15. Alternatively and in answer to the whole of the Statement of Claim herein the Defendant says that if he signed the alleged agreement of January 24th, 1964, which is not admitted but specifically denied, the said agreement at the time of signature was not in the same condition as it now is and that additions were made to the said agreement after his signature thereto and without his knowledge or consent.

The action came on for trial before Mr. Justice Branca in the Supreme Court of British Columbia who, in a judgment dated August 23, 1965, dealt with these defences as follows:

In reference to the plea of *non est factum,* I do not consider this allegation to be made out at all. I accept Sawley's evidence as to what occurred at the initial meeting when exhibit 1 was signed. I find Sawley to be perfectly trustworthy and that he did as stated read over the option word for word to Ginter and that there were no additions or alterations to the document after Ginter had signed, except as stated by Sawley. Wherever Sawley's evidence is in conflict with that given by Ginter, I without hesitation accept the evidence given by Sawley in preference to and reject the evidence given by Ginter.

I consequently find that there was a complete and full understanding of the contents of exhibit 1 on the part of Ginter when he signed the same.

I also reject the plea that Ginter thought the document exhibit 1 was a listing and, on the contrary, I find that Ginter was fully aware of the contents of exhibit 1, that he knew it was an option and that he knew of all the terms therein set forth and their true meaning and effect before he signed the document.

I find against the allegation that the plaintiff Sawley concealed from the defendant Ginter the fact that he was acting for another person or persons and, on the contrary, I find it clear that Sawley did tell Ginter that he was acting for an undisclosed principal whom he was not at liberty to disclose and also that he, Sawley, could not disclose to Ginter what the property was wanted for.

He concluded by ordering specific performance but made no award of damages. The appellant took an appeal to the Court of Appeal for British Columbia which Court, by a majority judgment, dismissed the appeal and upheld the order for specific performance. In the Court of Appeal Norris J.A. dissented.

The only ground now advanced is that the option was not accepted within the time limited in the option agreement. In this regard the option ex. 1 read:

2. The term of the option is to be for *176* days from the date hereof expiring at the hour of 11:59 P.M. on the *24* day of *July 1964.*

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Hall J.

As stated, Sawley purported to exercise the option to purchase on July 23, 1964. The real difficulty is that if 176 days is taken as the term of the option the time for acceptance would have expired on July 19, 1964, and on that basis Sawley's acceptance on July 23rd was not in time. The respondents contend that the option continued in force until 11:59 P.M. July 24, 1964.

The ambiguity in the option agreement is patent since it provides two time periods within which the option could be exercised.

Faced with this ambiguity, Davey C.J.B.C., with whom McFarlane J.A. concurred, said:

> It is impossible to say from the document itself whether the term of the option was intended to be 176 days and the terminal date of July 24, 1964, was fixed by miscalculating their number, or whether it was intended to end on that date, and the number of intervening days was miscalculated. But the contract does fix the exact minute, hour, and day that the period of 176 days, and therefore the option, is to end. About that there can be no doubt. That circumstance, in my opinion, dominates the clause and controls its meaning. The erroneous description of the term as one of 176 days must therefore be rejected as being inconsistent with the declared intention. This approach leads to a result that in my opinion makes good sense, and has the advantage of construing this business document in the way that businessmen would understand it.
>
> In concluding I should note the fact that no claim for rectification was advanced at the trial.

I agree with this reasoning and with the conclusion arrived at by the majority of the Court of Appeal.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Thomas R. Berger, Vancouver.

Solicitor for the plaintiffs, respondents: K. L. Brawner, Vancouver.

SAMUEL D. CAHOON (*Defendant*) .....APPELLANT;

AND

ARTHUR H. FRANKS (*Plaintiff*) .....RESPONDENT.

1967

*May 23
June 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Actions—Motor vehicle collision—Action claiming damage to property—Statutory limitation period—Amendments including claim for personal injuries made after limitation period—Whether amendments set up new cause of action—The Vehicles and Highway Traffic Act, 1955 R.S.A., c. 356, s. 131(1).

As alleged by the respondent, on January 8, 1965, he was sitting in a motor vehicle lawfully and properly parked in a parking lane when a motor vehicle owned and operated by the appellant collided with the respondent's motor vehicle. The respondent alleged that the collision was caused by the negligence of the appellant. On December 29, 1965, the respondent commenced an action against the appellant in the District Court, claiming damages in the sum of $305, being the value of his automobile destroyed beyond repair in the collision. This was the only item of damage claimed in the action.

On January 18, 1966, the respondent obtained an order giving him leave to amend his statement of claim to include a claim for personal injuries, and transferring the action to the Supreme Court. On February 8, 1966, an order was obtained permitting the statement of claim to be amended to allege that as a result of the appellant's negligence the respondent sustained a cervical cord lesion and cervical cord, concussion which have left him totally disabled and unable to work. The appellant appealed to the Appellate Division against the above orders and the said appeal was dismissed. The appellant then appealed to this Court.

The amended statement of claim asked for special damages for medical and hospital expenses and for loss of wages and also for general damages. The amendments sought to be included were made after the twelve-month period provided in s. 131(1) of *The Vehicles and Highway Traffic Act*, 1955 R.S.A., c. 356, had expired and the appellant contended that the amendments raised a new cause of action which was barred by s. 131(1). The respondent argued that there was only one cause of action for a single wrongful or negligent act and damages resulting from the single tort must be assessed in the one proceeding.

Held: The appeal should be dismissed.

The amendments did not set up a new cause of action. *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141, in which the Court of Appeal in England held that different rights were infringed in the two actions brought and that a tort causing both injury to the person and injury to property gave rise to two distinct causes of action, is not now good law in Canada and should not be followed.

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

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APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from orders made by Haddad D.C.J. and Dechene J. Appeal dismissed.

J. C. Cavanagh, Q.C., for the defendant, appellant.

Derek Spitz, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—On January 8, 1965, the respondent who alleges he was sitting in a motor vehicle lawfully and properly parked in the parking lane on the north side of Highway No. 16 in the Province of Alberta near the area known as Manly Corner when a motor vehicle owned and operated by the appellant collided with the respondent's motor vehicle. The respondent alleges that the collision was caused by the negligence of the appellant. On December 29, 1965, the respondent commenced an action against the appellant in the District Court of the District of Northern Alberta, Judicial District of Edmonton, claiming damages in the sum of $305, being the value of his automobile destroyed beyond repair in the collision. This was the only item of damage claimed in the action.

On January 18, 1966, the respondent obtained an order from His Honour Judge Haddad giving him leave to amend his statement of claim to include a claim for personal injuries, and the order also transferred the action to the Supreme Court. On February 8, 1966, an order was obtained from Dechene J. permitting the statement of claim to be amended to allege that as a result of the appellant's negligence as aforesaid the respondent sustained a cervical cord lesion and cervical cord concussion which have left him totally disabled and unable to work. The amended statement of claim asked for special damages of $452 for medical and hospital expenses and $3,575 for loss of wages and $150,000 for general damages. It is these orders which are in issue in this appeal.

Section 131(1) of *The Vehicles and Highway Traffic Act,* 1955 R.S.A., c. 356, provides as follows:

> 131(1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle, after the expiration of twelve months from the time when the damages were sustained.

[1] (1967), 58 W.W.R. 513.

The amendments sought to be made were made after the twelve-month period provided in s. 131(1) had expired and the appellant's position is that the amendments raised a new cause of action which was barred by s. 131(1) and he cites the well-known passage in *Weldon v. Neal*[1], which reads:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

Did the amendments set up a new cause of action? The appellant says they did and relies on *Brunsden v. Humphrey*[2]. In that case the plaintiff had sued in the County Court and recovered damages caused to his cab by a collision of his cab with defendant's van. Later he commenced an action in the Queen's Bench Division for personal injuries he had suffered in the same collision. This action was held to be barred by the earlier action and was dismissed. The Court of Appeal (Brett M.R. and Bowen L.J. with Coleridge C.J. dissenting) allowed the appeal, holding that different rights were infringed in the two actions; that a tort causing both injury to the person and injury to property gave rise to two distinct causes of action.

The respondent says that *Brunsden v. Humphrey, supra,* is no longer good law; that there is only one cause of action for a single wrongful or negligent act and damages resulting from the single tort must be assessed in the one proceeding; that the distinction between the old causes of action for injury to the person and damage to goods has been swept away.

Porter J.A. in his reasons for judgment in the Appellate Division said:

> An examination of the record in *Brunsden v. Humphrey* discloses that it was first dealt with (1883) 11 Q.B.D. 712, by two judges of the Queen's Bench Division, Pollock, B. and Lopes, J. They disposed of it by denying

[1] (1887), 19 Q.B.D. 394 at 395. [2] (1884), 14 Q.B.D. 141.

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the plaintiff the right to assert a claim for personal injury caused by the very accident in which he had obtained judgment for injury to his property. Pollock, B. says at p. 714:

> "The fact that damages for the injury to the plaintiff could have been laid and recovered in the former action shews conclusively that the present action cannot be maintained."

Lopes, J. says at the same page:

> "It is quite true that in the action in the county court the plaintiff claimed and recovered nothing in respect of personal injury to himself. But the cause of action in the county court, and the matter to be determined there, was the negligence of the defendant in driving his van. The plaintiff made no claim in the county court for damages in respect of his personal injuries, but he might have done so, for the injury was caused by the same matter which was tried and determined in the county court, that is, the defendant's negligence. He is now bringing his action, not for a new wrong, but for a consequence of the same wrongful act which was the subject of the former suit."

On appeal, three judgments were delivered, one dissenting and agreeing with the court below. Brett, M.R. and Bowen, L.J. based their judgments on the ground that two rights of action exist: (1) injury to the person, and (2) injury to the property. In reaching the conclusion which he did, Bowen, L.J. said at p. 150:

> "This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England."

Lord Coleridge, C.J. dissented, saying at p. 152:

> "It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i.e., his person and his goods I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coatsleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it."

It is important to bear in mind that it was the "forms of action" that were abolished by the *Supreme Court of Judicature Act, 1873*. To apply *Brunsden v. Humphrey* to the facts here would be to revive one of the very forms of action which that Act abolished. The cause of action or, to

use the expression of Diplock, L.J., "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

Of the five judges involved in *Brunsden v. Humphrey*, three disagreed with the judgment we are considering and one of the two that supported it declared himself in doubt. Actually, the majority judicial opinion expressed in the case disagreed in the result and one other doubted. Such a conflict of reasoning cannot be accepted as making the principle of the decision persuasive to this Court as far as I am concerned.

To deny this plaintiff the opportunity to have a court adjudicate on the relief which he claims merely because it lacks ancient form would be to return to those evils of practice which led to judicial amendment and the ultimate legislative abolition of "forms of action". As Lord Denning, M.R. said in *Letang v. Cooper*, [1965] 1 Q.B. 232 at p. 239:

> "I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century Maitland said 'the forms of action we have buried, but they still rule us from their graves' (see Maitland, Forms of Action, 1909, p. 296), but we have in this century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin, in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29, told us what to do about them:
>
> > 'When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.'"

I make reference again to the abstracts quoted by Johnson, J.A. from the judgment of Lord Denning in *Letang v. Cooper* at p. 240, and the judgment of Diplock, L.J. in *Fowler v. Lanning* [1959] 1 Q.B. 426. "The factual situation" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action.

Since the foregoing was written, this matter has been re-argued and counsel for the respondent has brought to our attention the cases in the United States of America where this subject and *Brunsden v. Humphrey* have been dealt with. What Fleming in "The Law of Torts", 3rd ed., describes as the "dominant American practice" rejects *Brunsden v. Humphrey*. (See *Dearden v. Hey*, 24 N.E. 2d 644, and annotations therein refered to.)

The decision in *Brunsden v. Humphrey* may well have persisted in Great Britain largely because the courts were bound by it. Free as we are to apply reason unhampered by precedent, I am of the opinion that the principle of *Brunsden v. Humphrey* ought not to be adopted.

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I agree with Porter J.A. I think that *Brunsden v. Humphrey* is not now good law in Canada and it ought not to be followed. The amendments did not set up a new cause of action and the passage from *Weldon v. Neal* previously quoted has no application in the instant case.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Cavanagh, Henning, Buchanan, Kerr & Witten, Edmonton.

Solicitors for the plaintiff, respondent: Macdonald, Spitz & Lavallee, Edmonton.

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*Feb. 13
June 26

TED ALLEN HARRIS, an infant, by his next friends, ARMAND HALL and LILLIAN HARRIS (*Plaintiffs*) ..... APPELLANTS;

AND

TORONTO TRANSIT COMMISSION and ALBERT MILLER (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Bus driver negligent in pulling away from curb with result that bus brushed against steel pole—Passenger putting arm out of window in contravention of by-law and in disregard of notice—Passenger suffering physical injury—Parties at fault in equal degrees and damages apportioned accordingly.

The infant appellant sustained injuries when he was a passenger in a bus owned by the respondent Transit Commission and operated by its servant, the second respondent. As the bus in question pulled away from a bus stop, it brushed against a steel pole which was set in the sidewalk some 5½ inches from the curb with the result that the infant appellant's arm, which he had extended through a window in order to point out some object to his companion, was crushed and broken. In an action for damages brought on behalf of the infant appellant, the trial judge found that the negligence of the bus operator was a proximate cause of the collision but that the appellant was also guilty of negligence in putting his arm out of the window of the bus, having regard to the fact that a by-law of the respondent Commission, of which the appellant was aware, prohibited passengers from doing this and was posted in the bus together with a sign below the window

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

reading: "Keep arm in". The trial judge assessed the damages at $7,500 and would have divided the fault equally between the parties. On appeal, the Court of Appeal found that on the facts of the case there could be no recovery. With leave, an appeal was brought to this Court from the judgment of the Court of Appeal.

Held (Judson J. *dissenting*): The appeal should be allowed.

Per Cartwright, Martland, Ritchie and Spence JJ.: There may be circumstances in which a public carrier can discharge its duty to its passengers in relation to a specific danger by passing a prohibitory by-law and otherwise giving notice of the danger, but when, as in this case, the respondent's negligence was an effective cause of the accident and its driver should have foreseen the likelihood of children passengers extending their arms through the window notwithstanding the warning, different considerations apply and it becomes a case where the damages should be apportioned in proportion to the degree of fault found against the parties respectively.

As indicated, the negligence of the respondent's driver was an effective cause of the accident, but the appellant was also at fault in that he did not, in his own interest, take the care of himself which was prescribed by the by-law and he contributed by this want of care to his injury. There was no reason to disturb the conclusion of the trial judge that the parties were at fault in equal degrees and that the damages should be apportioned accordingly.

Per Judson J., *dissenting*: As held by the Court of Appeal, the cause, and the only cause, of this accident was that the boy deliberately put his arm out of the window. He was thirteen years of age at the time. He knew that what he was doing was both dangerous to his own safety and forbidden. He would not have been injured if he had kept his arm within the bus.

[*Hill v. The Grand Trunk Railway Co.* (1922), 52 O.L.R. 508, not followed; *National Coal Board v. England*, [1954] A.C. 403; *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; *McMath v. Rimmer Brothers (Liverpool), Ltd.*, [1961] 3 All E.R. 1154, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Parker J. Appeal allowed, Judson J. dissenting.

G. F. Henderson, Q.C., and *B. A. Crane*, for the plaintiffs, appellants.

T. A. King, Q.C., and *J. W. Brown*, for the defendants, respondents.

The judgment of Cartwright, Martland, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Mr. Justice

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Ritchie J.

Parker and dismissing a claim made on behalf of the infant appellant for damages sustained by him when he was a passenger in a bus owned by the respondent Toronto Transit Commission and operated by its servant Albert Miller, who is the other respondent. As the bus in question pulled away from the bus stop at the corner of Bay and Dundas Streets in the City of Toronto, it brushed against a steel pole which was set in the sidewalk some 5½ inches from the curb with the result that the infant appellant's arm, which he had extended through a window in order to point out some object to his companion, was crushed and broken. The collision also had the effect of breaking the right clearance light and denting the side of the bus behind the rear window.

In a carefully prepared opinion, Mr. Justice Parker found that the negligence of the bus operator was a proximate cause of the collision but that the infant appellant was also guilty of negligence in putting his arm out of the window of the bus, having regard to the fact that a by-law of the Toronto Transit Commission, of which the appellant was aware, prohibited passengers from doing this and was posted in the bus together with a sign below the window reading: "Keep arm in". The trial judge would have divided the fault equally between the parties.

The decision of the Court of Appeal was rendered orally by Laskin J.A. at the conclusion of the argument. The learned judge did not refer to any authorities but reached his conclusion on the following grounds:

> We are of the opinion that there was no negligence in this case attributable to the defendants which, as a matter of law, operated in favour of the infant plaintiff. On the facts, he was the author of his own misfortune. We do not think that the bus operator could reasonably be expected to foresee that the infant plaintiff would have his arm in the position in which it was outside the window when he pulled away from the curb. The evidence is clear that the infant plaintiff knew of the warning which was posted on the window ledge to keep his arm in, and it was his carelessness for his own safety and not any carelessness that may have existed in the way in which the driver pulled away from the curb that was the operative cause of the accident.

In the present respondent's notice of appeal to the Court of Appeal the only two grounds taken which made express reference to the negligence of the infant appellant were:

> (4) the learned judge erred in holding that the plaintiffs were entitled to recover notwithstanding the breach by the infant plaintiff of the

statutory prohibition against putting his arm out of the window of the bus contrary to the bylaw in that behalf of the defendant company and section 167 of The Railway Act, R.S.O. 1950, Chapter 331;

(5) the learned judge ought to have found that the injuries sustained by the infant plaintiff were solely due to his own negligence and breach of the said statutory prohibition; . . .

The only finding of negligence on the part of the appellant which the Court of Appeal had before it was the trial judge's finding that the appellant "knew and appreciated the danger and voluntarily accepted the risk".

If by using the phrase "he was the author of his own misfortune" the Court of Appeal intended to convey the opinion that the breach of the statutory prohibition by the infant appellant disentitled him to recover against the Commission for the damage which he suffered through the negligence of the Commission's servant then, as will hereafter appear, I am in respectful disagreement with this finding. If, on the other hand, the phrase is used to indicate that the boy voluntarily accepted the risk of his injury and cannot recover on this ground, then it is perhaps well to mention the decision in *Lehnert v. Stein*[1], where Mr. Justice Cartwright, speaking for the majority of this Court, at p. 44, adopted the following comments on the defence of *volenti non fit injuria,* which were made by Mr. Glanville Williams in his work on Joint Torts and Contributory Negligence (1951) at p. 308:

> It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.
>
> * * *
>
> To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

I do not think that the circumstances in the present case justify the conclusion that the injured boy entered into a bargain express or implied whereby he gave up his right of action for negligence against the respondents.

[1] [1963] S.C.R. 38.

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Ritchie J.

It will also be observed that Mr. Justice Laskin did not consider that the bus driver could reasonably be expected to foresee that the little boy's arm would have been out of the window.

In my opinion we are relieved from the task of speculating on whether the bus driver could reasonably have foreseen such a thing by reason of the fact that he indicates in his own evidence that he was aware of the propensity of children on his own bus to put their arms and indeed their heads out of the window, notwithstanding the warning which the Commission had posted.

In the course of his cross-examination, the respondent, Albert Miller, who was driving the bus, made the following answers:

> Q. Did you ever remind any passenger not to put his arm or her arm out of the window?
> A. Yes—if I see them put their arm out—or children with their heads out or anything, I always go back and tell them not to.
> Q. Do you have instructions to watch for this?
> A. Well, we are supposed to watch for anything unusual on the bus.

And later:

> Q. Did you ever, except perhaps when you had a whole load of children, stop your bus and go back and request them not to have their arm out the window?
> A. Yes, when I have had children—school-work and that.

I have no difficulty in drawing the conclusion from this evidence that the bus driver knew that children had a tendency to put their arms out of the windows and that he could therefore reasonably be expected to foresee that such a thing would happen in the case of the infant plaintiff.

The standard of care required of common carriers is stated in the following terms by Hudson J. in *Day v. Toronto Transportation Commission*[1], at p. 441, where he said:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree.

Substantially the same proposition is stated in slightly different language in the reasons for judgment of Kerwin C.J.,

[1] [1940] S.C.R. 433.

speaking on behalf of himself and Judson J. in *Kauffman v. Toronto Transit Commission*[1], at p. 255, where he said:

> While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end.

There can, in my opinion, be no doubt that in operating the bus in such manner as to bring it into forceful contact with the steel pole, the respondent Miller exhibited a marked departure from the standard of care which the operators of public vehicles owe to their passengers, and I agree with the learned trial judge that his conduct in this regard was an effective cause of the accident.

The relevant by-law of the respondent Commission, which was approved by the Ontario Municipal Board and therefore has the force of law by virtue of s. 167 of *The Railway Act*, R.S.O. 1950, c. 331, provided as follows:

> No person shall ride or stand on any exterior portion of any car or bus operated by the Commission nor lean out of or project any portion of his body through any window of such car or bus nor enter any such bus at other than the designated entries.

It was contended on behalf of the respondent that by passing this by-law and otherwise giving notice to its passengers of the danger of projecting any portion of their body through any window of the bus, the respondent Commission had fully discharged its duty of care in relation to the dangers involved in such conduct and that it owed no further duty to them in this regard. There may be circumstances in which a public carrier can discharge its duty to its passengers in relation to a specific danger by passing such a by-law and giving such notice, but when, as in this case, the respondent's negligence was an effective cause of the accident and its driver should have foreseen the likelihood of children passengers extending their arms through the window notwithstanding the warning, different considerations apply and in my opinion it becomes a case where the damages should be apportioned in proportion to the degree of fault found against the parties respectively.

[1] [1960] S.C.R. 251.

1967

HARRIS v. TORONTO TRANSIT COMMISSION *et al.*

Ritchie J.

As was pointed out by the learned trial judge, the case of *Hill v. The Grand Trunk Railway Company*[1] was one in which the plaintiff stepped off a moving train at her destination and was injured and it was there held that notwithstanding the jury's finding as to the negligence of the defendants and the absence of contributory negligence by the plaintiff, the plaintiff was nevertheless not entitled to recover because her action in leaving the moving train contravened a by-law of the railway company. In that case, Masten J.A. said:

> ...I think that the question is not one of contributory negligence at all, but rather of the contravention by the plaintiff of an absolute statutory prohibition, which precludes her from asserting a claim arising out of the risks with which her act was attended.

In so deciding, Masten J.A. purported to follow the reasoning of the Privy Council in *Grand Trunk Railway Company of Canada v. Barnett*[2], which turned in large measure upon the finding that the injured plaintiff was a trespasser to whom the railway company owed no duty.

These cases were decided at a time when contributory negligence on the part of a plaintiff was a complete defence and before the enactment of the statutory provisions respecting apportionment of damage between parties who are both at fault. I think the reasoning of Mr. Justice Masten is at variance with many of the cases which have been decided in England since the enactment of the *Law Reform (Contributory Negligence) Act, 1945* in which apportionment of the damages has been ordered notwithstanding the fact that the plaintiff was in breach of a statutory duty. In this regard reference can usefully be made to the decision of the House of Lords in *National Coal Board v. England*[3], and to the more recent cases of *Ginty v. Belmont Building Supplies, Ltd.*[4], and *McMath v. Rimmer Brothers (Liverpool), Ltd.*[5]. It is true that "fault" is defined in the English statute as including "breach of statutory duty... which gives rise to a liability in tort or would apart from this Act give rise to the defence of contributory negligence", but I do not think that the absence of such a

[1] (1922), 52 O.L.R. 508.
[2] [1911] A.C. 361.
[3] [1954] A.C. 403.
[4] [1959] 1 All E.R. 414.
[5] [1961] 3 All E.R. 1154.

definition in the Ontario Act justifies the conclusion that the word "fault" was there used in such a restricted sense as to exclude breach of a statutory duty. The relevant statutory provision in Ontario is contained in s. 4 of *The Negligence Act*, R.S.O. 1960, c. 261 which reads:

> 4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

As I have indicated, I am satisfied that the negligence of the respondent's driver was an effective cause of the accident, but the appellant was also at fault in that he did not, in his own interest, take the care of himself which was prescribed by the by-law and he contributed by this want of care to his injury. I see no reason to disturb the conclusion of the learned trial judge that the parties were at fault in equal degrees and that the damages should be apportioned accordingly.

In view of all the above, I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial.

The appellant is entitled to his costs in this Court and in the Court of Appeal.

JUDSON J. (*dissenting*):—The infant plaintiff was thirteen years of age at the date of the accident. He was riding south on Bay Street, Toronto, in a T.T.C. bus, seated at the right hand side of the back seat next to the window. This window could not be raised, but could be pushed forward horizontally some four inches, which was its position at the time. At the bottom of the window there was a warning sign reading "Keep arm in". This warning sign had been placed there pursuant to a by-law of the respondent, approved by the Ontario Municipal Board pursuant to s. 167 of *The Railway Act*, R.S.O. 1950, c. 331.

The bus stopped at the curb on the west side of Bay Street a short distance north of its intersection with Dundas Street, for the purpose of picking up and discharging passengers, and while so stopped the boy put his arm out beyond the elbow through the opening in the window to

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point out some object in a store window to a companion sitting beside him. He had ridden on similar buses on many previous occasions, had seen the warning sign on those occasions and admitted that he knew the sign was there to warn people to keep their arms in so that there would not be any chance of their being injured by any contact with things outside the bus.

After discharging and taking on passengers at the stop, the bus started up and as the front pulled away from the curb its rear swung slightly to the right and the upper right rear corner grazed the top of a steel pole set in the sidewalk near the curb. A small plastic clearance light at the upper rear corner of the bus was broken, and a small window near the top of the bus was cracked.

There was no impact between the bus and the pole in the area of the window through which the boy put his arm, but his arm was crushed between the pole and the side of the bus. The pole was one of a series located on either side of Bay Street for the purpose of suspending the electric trolley wires. The boy was familiar with the existence of these poles close to the curb on both sides of the street, and had seen them on many previous occasions.

On these facts, the trial judge assessed the damages at $7,500 and found that the injury was caused or contributed to in equal degrees by the fault or negligence of both the boy and the bus driver. The Court of Appeal found that there could be no recovery on the undisputed facts of the case.

The Court of Appeal said that the cause, and the only cause, of this accident was that the boy deliberately put his arm out of the window. He was thirteen years of age at the time. He knew that what he was doing was both dangerous to his own safety and forbidden. He would not have been injured if he had kept his arm within the bus.

I disagree with the reasons of Ritchie J. when he says that two possible inferences from the judgment of the Court of Appeal are:

(a) that the Court was saying that when the boy put his arm out of the window in contravention of the regula-

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tions, he effectively extinguished all rights which he might otherwise have had, and

(b) that there was a voluntary acceptance of the risk.

I agree with the reasons delivered in the Court of Appeal and would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiffs, appellants: Chappell, Walsh & Davidson, Toronto.

Solicitor for the defendants, respondents: J. W. H. Day, Toronto.

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*Jan. 31,
*Feb. 1
May 23

LAWRENCE COHEN (*Plaintiff*) .....APPELLANT;

AND

COCA-COLA LIMITED (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Bottle of carbonated beverage exploding—Sales clerk injured—Duty of manufacturer—Whether manufacturer liable—Civil Code, arts. 1053, 1054, 1238.

The plaintiff was injured by a fragment of glass coming from a bottle of carbonated beverage which exploded spontaneously in his hand as he was about to place it in a cooler in the restaurant where he was employed. The defence was that an accident such as that described by the plaintiff was impossible. The trial judge maintained the action, but his decision was reversed by a majority judgment in the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling. Each case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence. The trial judge was entitled to draw the inference that the bottle was not mishandled by the defendant's employees until it was picked up by the plaintiff to be placed in the cooler. The evidence which was accepted by the trial judge created a presumption of fact under art. 1238 of the *Civil Code* that the explosion of the bottle was due to a defect for which the defendant was responsible and that the latter failed to rebut that presumption.

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Spence JJ.

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Négligence—Éclatement d'une bouteille de liqueur gazeuse—Blessures à un œil—Devoir du fabricant—Responsabilité du fabricant—Code Civil, arts. 1053, 1054, 1238.

Le demandeur fut blessé par une parcelle de verre provenant d'une bouteille de liqueur gazeuse ayant éclaté spontanément entre ses mains alors qu'il s'apprêtait à la placer dans un réfrigérateur dans le restaurant où il était employé. La défense fut à l'effet qu'un accident tel que décrit par le demandeur était impossible. Le juge au procès a maintenu l'action, mais sa décision fut renversée par un jugement majoritaire en Cour d'appel. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le jugement de première instance rétabli.

L'embouteilleur de liqueurs gazeuses a le devoir de fournir des récipients ayant une résistance suffisante pour supporter la manipulation normale du distributeur et du consommateur. Chaque cas dépend de la question de savoir si la preuve exclut toute cause probable de dommages, excepté l'inférence admissible de la négligence de la défenderesse. Le juge au procès était justifié de tirer la conclusion que la bouteille n'avait pas été mal manipulée par les employés de la défenderesse jusqu'à ce qu'elle soit ramassée par le demandeur pour être placée dans le réfrigérateur. La preuve qui a été acceptée par le juge au procès créait une présomption de fait en vertu de l'art. 1238 du *Code Civil* à l'effet que l'éclatement de la bouteille était dû à une défectuosité dont la défenderesse était responsable et que cette dernière n'avait pas réussi à repousser cette présomption.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Collins. Appel maintenu.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Collins J. Appeal allowed.

J. J. Spector, Q.C., and *Abraham Cohen*, for the plaintiff, appellant.

A. J. Campbell, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1] reversing a judgment of Collins J. in the Superior Court which had condemned respondent to pay to appellant the sum of $8,600.80 with

[1] [1966] Que. Q.B. 813.

interest and costs as damages for injuries sustained on September 4, 1957, and caused by the explosion of a bottle of Coca-Cola.

The facts are fully reviewed in the judgments below and shortly stated they are these. In September 1957 appellant—then a minor—was employed by his father, one Jack Cohen, who operates a restaurant in the City of Montreal, at which Coca-Cola and other soft drinks were sold. Supplies of Coca-Cola were delivered weekly by respondent and when delivered were placed by respondent's employees in the basement of the restaurant premises. In his restaurant, Cohen had a freezer with a capacity of from four hundred to five hundred bottles. From time to time, as Coca-Cola and other soft drinks were required for the purpose of sale, they were brought up in cases from the cellar by employees of the restaurant, and then placed in the freezer.

As to the circumstances under which the appellant was injured the learned trial judge said:

> As the Coca-Cola was required for the purpose of sale, the cases were brought up from the cellar for the purpose of putting the bottles into the freezer. The cellar had a cement floor and cement walls. It was heated by the landlord of the premises but there was no furnace in that part of the cellar in which Coca-Cola was kept. The plaintiff worked for his father in the restaurant. Sometime after 3.00 o'clock in the afternoon of September 4th, 1957, five or six such cases were brought up from the cellar by one of the employees of Jack Cohen. The plaintiff then started to put the bottles one by one out of the cases into the freezer. The first two sections of the freezer were reserved for Coca-Cola bottles, a third section for Seven-Up and Pepsi bottles and a fourth section for miscellaneous bottles. The plaintiff said that he had emptied most of the cases and had put the bottles in the freezer and there only remained about half a case so to empty. He then reached down and picked up a bottle of Coca-Cola with his right hand and was putting it into the freezer when he said the bottle exploded. The result of the explosion was that glass went into his left eye, causing to it the injuries in respect of which damages are now claimed by this action. The plaintiff said that the glass did not cut his face in any other way and the only damage was to his eye. Upon the explosion, he dropped apparently what remained of the bottle in his hand and covered his two eyes to protect himself. He then looked in the mirror and found that his eye was bleeding. He went alone in a taxicab to the Montreal General Hospital where he remained until September 20th.

Respondent's defence was that an accident such as that described by appellant was impossible and in support of that contention it led evidence which was largely a description of the type of bottle used by it, the procedure followed

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in inspecting and filling bottles as well as expert evidence as to what happened when bottles filled with its product were heated, struck with a hammer or banged together.

As I have said, the learned trial judge maintained the action and in doing so he made certain findings. Dealing with the accident itself, he said this:

> In considering this matter, the Court has only the evidence of the plaintiff to base itself on. There were produced no witnesses to the accident (apart from the plaintiff) which is not unusual in cases of this kind. The Court carefully watched the plaintiff in giving evidence. It has come to the conclusion after a very mature deliberation that he told the truth. His evidence seemed quite honest and it did not appear that he attempted to exaggerate the situation in any way. The only evidence before the Court is that the accident happened in the way that the plaintiff said that it did. The only evidence to the contrary is the evidence of the defendant that such an explosion could not have taken place for the reasons above mentioned. It may have been that the bottle was broken by the careless handling of the plaintiff and that fragments of glass so entered his eye. The evidence of the defendant, based on tests made by its expert was that fragments of glass coming from bottles which were broken deliberately by such expert were thrown up to a radius of 18 inches, so that it would be quite possible for the accident to have happened as suggested by the defendant. However the positive evidence was that the plaintiff was injured in the manner described by him. As the Court is not in a position to say that he was not telling the truth and the Defendant was unable to establish otherwise, it must accept as true his evidence as to the manner in which the accident happened.

Many of the bottles containing Coca-Cola distributed by respondent were used over and over again after being returned to the respondent's plant, where they were cleaned and inspected before being refilled. Referring to the evidence led by respondent as to the method of the filling and inspection of bottles, the learned trial judge said:

> It is obvious that the inspection of the defendant to prevent defective bottles from being filled with Coca-Cola was inefficient and it could not possibly detect all the defects. There is no other conclusion to come to but that it would be quite easy for a defective bottle to pass an inspector. The inspection took place before the bottles were filled, so that the bottles went through the subsequent process of filling and capping without inspection, an automatic process requiring the use of machines.

After stating that it was reasonable to infer that it was a defective bottle which resulted in the injury of the appellant, the learned trial judge reached this conclusion:

> On the evidence as a whole the Court finds that the defendant was negligent in not having an inspection system adequate to prevent defective bottles reaching customers. It was the fault of the defendant that the bottle exploded because the bottle provided by the defendant was not strong enough to withstand the pressure of the gas put into it by the defendant.

He was also of opinion that respondent had "la garde juridique" of the bottle within the meaning of art. 1054 of the Civil Code.

The judgment at trial was reversed by the Court of Queen's Bench, Rinfret J. dissenting. The ratio of the majority decision appears to be that appellant's version of the accident required some form of corroboration and that he had failed to discharge the burden of establishing that the bottle of Coca-Cola was not damaged in some way after delivery to the restaurant. With respect I am unable to agree with those findings.

The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling. Little is to be gained by discussing the numerous decided cases involving the explosion of bottles containing such beverages. Each case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence.

In the present case, boxes each containing twenty-four bottles of Coca-Cola were placed in the basement of the restaurant by employees of the respondent. On the day of the accident, a case containing the bottle which exploded, along with several other cases containing Coca-Cola, was brought up from the basement by a dish-washer employed in the restaurant. The bottles contained in these cases were then placed in the freezer by appellant and were handled only by him. The particular bottle which exploded was taken from the last case to be unloaded. The appellant described the manner in which he took each bottle from the wooden cases and placed it in the freezer. There is no suggestion in his evidence, either in chief or on cross-examination that they were handled in other than the ordinary way. The learned trial judge was entitled to draw the inference that the bottle which exploded was not mishandled from the time it was placed in the basement by respondent's employees until it was picked up by appellant to be placed in the freezer.

In my opinion evidence which was accepted by the learned trial judge created a presumption of fact under art. 1238 of the *Civil Code,* that the explosion of the bottle which caused injury to appellant was due to a defect for which respondent was responsible and that the latter failed

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to rebut that presumption. It follows that I do not find it necessary to express any opinion as to whether appellant was entitled to invoke the presumption of liability under art. 1054 of the *Civil Code*.

As to damages, the amount awarded, while perhaps generous, is not such as to warrant interference by this Court.

I would allow the appeal with costs here and below and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Attorney for the plaintiff, appellant: A. Cohen, Montreal.

Attorneys for the defendant, respondent: Brais, Campbell, Pepper & Durand, Montreal.

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*Feb. 20
Feb. 24

DAVID BEATTIE .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Criminal law—Leave to appeal—Whether question of law—Whether magistrate properly exercised discretion as to sanity of accused—Whether accused deprived of right to counsel—Criminal Code, 1953-54 (Can.), c. 51, ss. 524(1), 597(1)(b)—Canadian Bill of Rights, 1960 (Can.), c. 44.

The applicant was convicted of unlawfully having in his possession an offensive weapon. His appeal was dismissed by the Court of Appeal for British Columbia. On his application for leave to appeal to this Court, two grounds were urged by his counsel: (1) that the magistrate should have directed that an issue be tried to determine whether the accused, because of insanity, was incapable of conducting his defence; (2) that the accused was deprived of his right to counsel and to a fair trial.

Held: The application for leave to appeal should be dismissed.

Under the provisions of s. 597(1)(*b*) of the *Criminal Code*, leave to appeal to this Court may be granted on any question of law alone. No question of law was involved in the determination of whether the magistrate had properly exercised his discretion under s. 524(1) of the Code. In any event, it appeared that the magistrate had carried on an investigation. The sufficiency of that investigation as well as the conclusion to which the magistrate came, are not matters involving a question of law.

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*PRESENT: Cartwright, Ritchie and Spence JJ.

There was no evidence that the applicant was deprived of the right to retain and instruct counsel without delay or was deprived of the right to a fair hearing.

Droit criminel—Permission d'appeler—Question de droit—Le magistrat a-t-il exercé proprement sa discrétion concernant l'état mental de l'accusé—L'accusé a-t-il été privé de son droit de retenir un avocat —Code Criminel, 1953-54 (Can.), c. 51, arts. 524(1), 597(1)(b)—Déclaration canadienne des Droits, 1960 (Can.), c. 44.

Le requérant a été trouvé coupable d'avoir eu illégalement en sa possession une arme offensive. Son appel fut rejeté par la Cour d'appel de la Colombie-Britannique. Lors de sa requête pour permission d'appeler devant cette Cour, deux motifs ont été soulevés par son avocat: (1) le magistrat aurait dû ordonner que soit examinée la question de savoir si l'accusé était, pour cause d'aliénation mentale, incapable de subir son procès; (2) l'accusé a été privé de son droit de retenir un avocat et d'avoir un procès équitable.

Arrêt: La requête pour permission d'appeler doit être rejetée.

En vertu des dispositions de l'art. 597(1)(*b*) du *Code Criminel*, la permission d'appeler devant cette Cour peut être accordée sur toute question de droit strict. Aucune question de droit ne se soulève dans la détermination de la question à savoir si le magistrat a exercé proprement sa discrétion en vertu de l'art. 524(1) du Code. A tout événement, il appert que le magistrat a fait une enquête. La suffisance de cette enquête ainsi que la conclusion à laquelle le magistrat en est arrivé, ne sont pas des sujets soulevant une question de droit.

Il n'y a aucune preuve que le requérant a été privé de son droit de retenir et de constituer un avocat sans délai ou qu'il a été privé de son droit à une audition équitable.

REQUÊTE pour permission d'appeler devant cette Cour d'un jugement de la Cour d'appel de la Colombie-Britannique. Requête rejetée.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for British Columbia. Application dismissed.

F. A. Brewin, Q.C., for the applicant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an application for leave to appeal from the Order of the Court of Appeal for British Columbia made on November 18, 1966. By that Order the said

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Spence J.

Court dismissed an appeal by this applicant from a conviction by Magistrate D. Hume at Vancouver, on July 8, 1966, on the charge that the accused unlawfully did have in his possession an offensive weapon, to wit, a knife, for a purpose dangerous to the public peace, contrary to the form of the statute in such case made and provided, and from his sentence upon such conviction.

In this Court, the accused was represented by counsel who urged two grounds of appeal:

Firstly, that the Magistrate ought to have directed that an issue be tried to determine whether the accused, because of insanity, was incapable of conducting his defence. Such an issue is provided for in s. 524(1) of the *Criminal Code.*

Secondly, that the accused was deprived of his right to counsel and his right to a fair trial, contrary to the provisions of the *Canadian Bill of Rights,* Statutes of Canada 1960, c. 44.

As to the first ground of the application, after consideration of the matter, I have come to the conclusion that the only question involved is whether the magistrate properly exercised his discretion to determine whether there was, in the words of the section, "sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence". Under the provisions of s. 597(1)(*b*) of the *Criminal Code,* if leave is granted, an appeal to this Court may be taken on any question of law alone. I am of the opinion that there is no question of law involved in the determination of whether the magistrate had properly exercised his discretion. It would appear that the magistrate did in fact carry on an investigation to determine whether an issue should be directed. The sufficiency of that investigation, and the conclusion to which the magistrate came, are not matters involving a question of law.

As to the second ground, there is no evidence that the applicant was deprived of the right to retain and instruct counsel without delay or was deprived of the right to a fair hearing in accordance with the principles of fundamental justice.

I would dismiss the application for leave to appeal.

Application dismissed.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

ATLANTIC ENGINE REBUILDERS LIMITED ..... RESPONDENT.

1966
*Dec. 9
1967
May 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Whether unredeemed refundable deposits received from customers part of business income—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), 85B.

The respondent company was in the business of rebuilding automobile engines for sale to car dealers. The company required the car dealers, on purchasing a rebuilt engine, to supply it with another rebuildable engine as well as paying the invoice price. A dealer who did not supply a rebuildable engine was required to pay a cash deposit, about three times the market value of the used engine. This deposit was refundable when the dealer supplied a rebuildable engine, which happened 96 per cent of the time. The unredeemed deposits held by the respondent company at the end of 1958 were added by the Minister to the respondent's declared income for that year. The Exchequer Court allowed the respondent's appeal, and the Minister appealed to this Court.

Held (Abbott and Judson JJ. *dissenting*): The appeal by the Minister should be dismissed.

Per Cartwright, Martland and Ritchie JJ.: In stating what its profit was for the year in question, the respondent could not truthfully have included these unredeemed deposits. It knew that it might not be able to retain any part of that sum and that the probabilities were that 96 per cent of it would be returned to the depositors in the near future. The circumstance that the company became the legal owner of the moneys deposited and that they did not constitute a trust fund in its hands was irrelevant. There was no basis, having regard to the realities of the situation, on which these deposits could properly be treated as ordinary trading receipts of the respondent which it was entitled to include in calculating its profits for the year. There was nothing in the *Income Tax Act* requiring these deposits to be treated as profits of the respondent.

Per Abbott and Judson JJ., *dissenting*: The deposits were of an income nature arising in the ordinary course of the respondent's trading transactions. There was no liability to refund until the rebuildable engine was actually delivered. The probability that the taxpayer would be required to refund the greater portion of the deposits does not permit their deduction. They would be deductible in the year in which they were refunded. Furthermore the amount, shown as a liability, was an amount transferred or credited to a reserve within the provisions of s. 12(1)(e) of the *Income Tax Act*.

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

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MINISTER OF NATIONAL REVENUE v. ATLANTIC ENGINE REBUILDERS LTD.

Revenu—Impôt sur le revenu—Dépôts reçus de clients remboursables mais non rachetés font-ils partie du revenu de l'entreprise—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 12(1)(a), 85B.

Le commerce de la compagnie intimée consistait dans la reconstruction de moteurs d'automobiles et leur vente à des commerçants d'automobiles. La compagnie exigeait que les commerçants fournissent, lorsqu'ils achetaient un moteur reconstruit, un autre moteur apte à être reconstruit en plus de payer le prix de la facture. Un commerçant qui ne pouvait pas fournir un moteur apte à être reconstruit était obligé de payer un dépôt en argent, représentant à peu près trois fois la valeur marchande d'un moteur usagé. Ce dépôt était remboursable lorsque le commerçant fournissait un moteur apte à être reconstruit, ce qui se présentait dans 96 pour cent des cas. Le Ministre a ajouté au revenu de la compagnie pour l'année 1958 le montant des dépôts non rachetés qu'elle avait en mains à la fin de cette année. La Cour de l'Échiquier a maintenu l'appel de la compagnie et le Ministre en appela devant cette Cour.

Arrêt: L'appel du Ministre doit être rejeté, les Juges Abbott et Judson étant dissidents.

Les Juges Cartwright, Martland et Ritchie: En déclarant quel était son profit pour l'année en question, la compagnie intimée ne pouvait pas véridiquement inclure ces dépôts non rachetés. Elle savait qu'elle pourrait ne pas être en mesure de retenir aucune partie de cette somme et que les probabilités étaient que 96 pour cent de cette somme serait remis aux déposants. Le fait que la compagnie était devenue le propriétaire légal des argents déposés et que ces argents ne constituaient pas un fonds en fiducie entre ses mains n'avait aucune pertinence. En face de la réalité de la situation, il n'y avait aucune base sur laquelle ces dépôts pouvaient être considérés comme étant des reçus provenant du commerce ordinaire de l'intimée et qu'elle avait droit d'inclure dans le calcul de son profit pour l'année. Aucune disposition de la *Loi de l'Impôt sur le Revenu* exige que ces dépôts soient traités comme étant des profits entre les mains de l'intimée.

Les Juges Abbott et Judson, *dissidents*: Les dépôts étaient de la nature d'un revenu survenant dans le cours ordinaire des transactions commerciales de l'intimée. Il n'y a aucune obligation de les retourner tant qu'un moteur apte à être reconstruit ne soit actuellement délivré. La probabilité que le contribuable serait obligé de retourner la majeure portion de ces dépôts ne permet pas leur déduction. Ils étaient déductibles dans l'année où ils avaient été retournés. De plus, le montant, tel qu'entré comme étant un passif, était un montant transféré ou crédité à une réserve dans le sens de dispositions de l'art. 12(1)(*e*) de la *Loi de l'Impôt sur le Revenu*.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté, les Juges Abbott et Judson étant dissidents.

[1] [1965] 1 Ex. C.R. 647, [1964] C.T.C. 268, 64 D.T.C. 5178.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed, Abbott and Judson JJ. dissenting.

G. W. Ainslie, for the appellant.

George B. Cooper, for the respondent.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Thurlow J. pronounced on August 17, 1964, allowing the appeal of the respondent from a re-assessment of income tax for the year 1958 in respect of a sum of $38,213, representing the balance of amounts known in the respondent's business as "core deposits", which the appellant in making the re-assessments included in the computation of the respondent's income.

The relevant facts are fully set out in the reasons of Thurlow J. and are sufficiently summarized in those of my brother Judson; it is unnecessary to repeat them.

I have reached the conclusion that the appeal fails.

Section 4 of the *Income Tax Act* provides that, subject to the other provisions of Part I of the Act, income for a taxation year from a business is the profit therefrom for the year.

In *Sun Insurance Office v. Clark*[2], a case in which the question for decision was the amount of the profits arising from the appellant's business, Earl Loreburn L.C. spoke at page 454 of "the only rule of law that I know of, namely, that the true gains are to be ascertained as nearly as it can be done".

In *Dominion Taxicab Association v. Minister of National Revenue*[3], it was said in the judgment of the majority of the Court:

> It is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Act* its substance rather than its form is to be regarded.

The question of substance in this case appears to me to be whether in stating what its profit was for the year the

[1] [1965] 1 Ex. C.R. 647, [1964] C.T.C. 268, 64 D.T.C. 5178.
[2] [1912] A.C. 443.
[3] [1954] S.C.R. 82 at 85, 2 D.L.R. 273.

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respondent could truthfully have included the sum in question. To me there seems to be only one answer, that it could not. It knew that it might not be able to retain any part of that sum and that the probabilities were that 96 per cent of it must be returned to the depositors in the near future. The circumstance that the respondent became the legal owner of the moneys deposited with it and that they did not constitute a trust fund in its hands appears to me to be irrelevant; the same may be said of moneys deposited by a customer in a Bank which form part of the Bank's assets but not of its profits. To treat these deposits as if they were ordinary trading receipts of the respondent would be to disregard all the realities of the situation.

The grounds upon which Thurlow J. based his decision appear to me to be supported by the reasoning of the majority in this Court in *Dominion Taxicab Association v. Minister of National Revenue, supra,* at p. 85, where it is stated that as each deposit was received by the Association and became a part of its assets there arose a corresponding contingent liability equal in amount. This was one of the grounds on which it was held that the deposits formed no part of the profits of the Association. Since that decision there has been no substantial change in the wording of the sections of the *Income Tax Act* on which the appellant relies.

What appears to me to be decisive is the fact that there is no basis, having regard to the realities of the situation, on which these deposits can properly be treated as ordinary trading receipts of the respondent which it was entitled to include in calculating its profits for the year.

Of course it would be within the power of Parliament to enact that a receipt which could not on any principle of sound accounting be regarded as forming part of a company's profit should none the less be treated as profit for the purposes of taxation; but to bring about such a result clear and intractable words would be necessary. In my opinion, nothing in the *Income Tax Act* requires these deposits to be treated as profits of the respondent.

The result brought about by the judgment of Thurlow J. is that in the year in question the respondent will be taxed on its true profit for that year. If in the following year, as seems probable, as to a small portion of the said sum of $38,213, the respondent ceases to be under liability to

return it to the depositor or depositors, such portion will form part of the profit in that year and once again the respondent will be taxed on its true profit. I do not think that such a result should be disturbed.

I would dismiss the appeal with costs.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The Minister, in assessing the respondent's income for its 1958 taxation year, included in income the sum of $38,213 shown on its balance sheet as a current liability entitled "Customers' Deposits". The Exchequer Court[1] allowed an appeal from this assessment and the Minister appeals now to this Court.

The company was in the business of rebuilding Ford engines. It sold these to Ford dealers, but in order to stay in business, it needed a regular supply of rebuildable engines. Therefore, when it sold an engine to a dealer, it required that dealer to supply it with another rebuildable engine of the same model. If the dealer did not supply the rebuildable engine, he had to pay a deposit to be held by the company until he did supply such an engine. When he did, he got his deposit back. It is these unredeemed deposits held by the company to the amount of $38,213 which the Minister has assessed for income. The amount of the deposit was usually about three times the market value of the old used engine. It was deliberately set at this high figure in order to ensure that an old engine would be delivered as soon as possible.

Other details of the arrangement between the company and its customers were that the engine on a visual inspection had to be rebuildable. If parts of the engine were missing or if there were defects which were visual or apparent on inspection, the deposit was not refunded in full but was reduced. If the engine on a visual inspection was not rebuildable, the dealer only got the scrap value of the engine as a credit.

The company did not keep these deposits separate from other monies received by it from its sale of rebuilt engines. There is no question here of any trust attaching to the deposit monies. It was argued before the Tax Appeal Board

[1] [1965] 1 Ex. C.R. 647, [1964] C.T.C. 268, 64 D.T.C. 5178.

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in another case that there was such a trust. This was rejected and no appeal was ever taken from this decision. *Western Engine Works Limited v. Minister of National Revenue*[1]. In my opinion, this case was correctly decided.

The learned trial judge in setting aside the assessment held that the company was entitled to a deduction in respect of its liability to refund the deposits, that this liability was not a contingent liability, and that the amount necessary to provide for their retirement was not a reserve, contingent amount, or sinking fund within the prohibition of s. 12(1)(*e*) of the *Income Tax Act*. The liability, he said, was not one that arose on delivery of the engine but existed from the time of receipt of the deposit. It became due and payable when the engine was actually delivered.

The evidence seems to show that in most cases only a short time elapsed between the payment of the deposit and its redemption by the delivery of a rebuildable engine. It also shows that about 96 per cent of the deposits were redeemed.

The judgment of the Exchequer Court is obviously founded upon the finding that the deposits were of an income nature arising in the ordinary course of the company's trading transactions. With this, I agree.

In this Court, the Crown has two points in its appeal based on ss. 12(1)(*a*) and 12(1)(*e*) of the Act,

(1) that the amounts necessary to provide for the retirement of these liabilities which at the end of the year had "not become due or recoverable by the dealer" were neither outlays or expenses made or incurred during the year (s. 12(1)(*a*)), and

(2) that such amounts would be in respect of a reserve or contingent account and, as such, prohibited by s. 12(1)(*e*).

Sections 12(1)(*a*) and 12(1)(*e*) read:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> * * *
>
> (*e*) an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part.

[1] (1959), 13 D.T.C. 472.

The Minister's position is that unless there is an express provision in the Act, the taxpayer is prohibited by these paragraphs from making these deductions. He says there are no such other provisions.

It is obvious that there was no outlay or expense made until the deposit was refunded. But the judgment under appeal holds that the outlay or expense was incurred when the deposit was made because the liability to refund was immediate and not contingent. In this I think there is error. There was no liability to refund until the rebuildable engine was actually delivered. The taxpayer was not definitely committed in the year of income to make this disbursement or outlay or expense until the rebuildable engine was delivered. And even then, as I have pointed out above, there were several potential adjustments to be made depending on the state of the rebuildable engine as disclosed by a visual inspection.

The probability, in this case 96 per cent, that the taxpayer would be required to refund the greater portion of the deposits does not permit their deduction. They are deductible in the year in which they are made.

I also think that the company fails under s. 12(1)(*e*). This amount, shown as a liability, is an amount transferred or credited to a reserve. It may be good commercial or accountancy practice to make provision for these liabilities but this is subject to the express provisions of the Act and the Act does make an express provision here.

The main argument of the taxpayer in this case was directed to the nature of the receipt. He argued that the consideration for the sale of a rebuilt engine is the catalogue price plus the delivery of a rebuildable engine of the same model, and that the deposit is a refundable deposit which at the time of its receipt is not the absolute property of the respondent. I cannot accept this submission. No one else had any property interest in the deposit except the taxpayer. It became part of his funds. It was not a trust. Its receipt merely gave rise to an obligation to repay when something further was done by the person who made the deposit. There was no immediate liability to repay. These deposits are chargeable against income for the year when they are refunded.

I do not think that s. 85B requires any consideration for the determination of this appeal.

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Nor do I think that *Dominion Taxicab Association v. Minister of National Revenue*[1] governs this case. The word "deposit" is one of highly variable meaning. Its mere use in a contract determines nothing without an analysis of the rights and obligations created. In the *Taxicab* case it was the price of membership in the Association. It was transferable and interest bearing under certain conditions. The conclusion in this Court was that it did not become the absolute property of the Association. Rand J. held that it was a contribution to the capital of the Association and not an income receipt. On both grounds the present case is distinguishable.

The appeal should be allowed with costs and the assessment of the Minister for the 1958 taxation year restored.

Appeal dismissed with costs, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Friel & Cooper, Moncton.

ROBERT M. RANDALL ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

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*Mar. 1, 2
May 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income Tax—Managing out-of-town business—Whether living and travelling expenses deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), (h), 139(1).

The appellant was engaged in the business of managing horse racing activities at a number of race tracks in British Columbia where he resided. In 1958, the appellant was also managing under a contract the business of a company carrying on horse race meetings in Portland, Oregon, in return for a share of profits. The appellant sought to deduct from his income from this source a sum of $5,241 as his expenses in travelling from Vancouver to Portland and his living expenses at Portland during the racing season. The Minister allowed a

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

[1] [1954] S.C.R. 82, 2 D.L.R. 273.

deduction of $1,200 and disallowed the rest. The Exchequer Court maintained the Minister's assessment. The taxpayer appealed to this Court.

Held (Judson J. *dissenting*): The appeal should be allowed.

Per Martland, Ritchie, Hall and Spence JJ.: The expenses were deductible. The appellant's expenses of travelling to Portland and his expenses of living there were in the performance of his agreement and were not purely personal to him and outside the agreement. If the appellant was going to fulfil the obligations he undertook to fulfil under the agreement, it was necessary for him to travel to and from Portland. On the evidence, it was clear that the whole operation, whether at Vancouver or at Portland, was in fact one business being conducted by the appellant and the income of that business from the various geographic bases was income from the business as a whole.

Per Judson J., *dissenting*: Section 12(1)(*a*) of the *Income Tax Act* prohibits the deduction of these expenses because they were not incurred in the course of carrying on the Portland business but were personal or living expenses.

Revenu—Impôt sur le revenu—Gérant d'une entreprise hors de la ville où il réside—Déduction des frais de subsistance et de déplacement—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 12(1)(a), (h), 139(1).

L'appelant s'occupait de gérer les activités d'un certain nombre de champs de courses de chevaux en Colombie-Britannique où il avait son domicile. En 1958, l'appelant avait aussi la gérance, en vertu d'un contrat, de l'entreprise d'une compagnie qui s'occupait de concours de courses de chevaux à Portland, Oregon, moyennant une part des profits. L'appelant a tenté de déduire de son revenu lui provenant de cette source une somme de $5,241 comme étant ses frais de déplacement entre Vancouver et Portland ainsi que ses frais de subsistance à Portland durant la saison des courses. Le Ministre a permis la déduction de $1,200 seulement. La Cour de l'Échiquier a maintenu la cotisation du Ministre. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Judson étant dissident.

Les Juges Martland, Ritchie, Hall et Spence: Les dépenses en question étaient déductibles. Les frais de voyage à Portland et les frais de subsistance à cet endroit ont été encourus dans l'exécution de son contrat et n'étaient pas purement personnels et en dehors du contrat. Pour que l'appelant puisse remplir les obligations qu'il s'était engagé à remplir par son contrat, il lui était nécessaire d'aller à Portland et d'en revenir. En se basant sur la preuve, il est clair que toute l'opération, soit à Vancouver ou à Portland, était en fait une seule entreprise dirigée par l'appelant et le revenu de cette entreprise provenant de différents endroits géographiques était un revenu d'une entreprise prise comme un tout.

Le Juge Judson, *dissident:* L'article 12(1)(*a*) de la *Loi de l'Impôt sur le Revenu* ne permet pas la déduction de ces frais parce qu'ils n'ont pas été encourus dans l'exercice des affaires de l'appelant à Portland, mais étaient des dépenses personnelles ou de subsistance.

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APPEL d'un jugement du Juge adjoint Sheppard de la Cour de l'Échiquier du Canada[1], dans une matière d'impôt sur le revenu. Appel maintenu, le Juge Judson étant dissident.

APPEAL from a judgment of Sheppard, Deputy Judge of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed, Judson J. dissenting.

David A. Freeman, for the appellant.

G. W. Ainslie and *B. Verchere,* for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—The appellant and his brothers William and John for many years prior to 1957 were engaged in the business of managing horse racing activities at a number of race tracks in British Columbia at which pari-mutuel wagering was authorized. They conducted the business as managers of horse racing operations through the medium of a company incorporated in British Columbia as a private company named "Ascot Jockey Club Ltd.". The appellant and his brothers, while using the Ascot Company as their parent instrument, controlled a number of other companies which leased different race tracks in British Columbia. This procedure was followed to meet the requirements of British Columbia legislation limiting the racing each season to 14 days per track. In 1958 which is the year in question in this appeal, the racing season at the several tracks in which he was interested was 56 days in the Vancouver area and 14 days at Sandown on Vancouver Island. The functions of the appellant and his brothers included control of finances, selection of horses and personnel, arrangements for current and capital expenditure on plant and negotiations with horse owners. The appellant and his brothers were in full control at that level of management and they each received a salary of $12,000 for the year 1958. The appellant and his two brothers were also engaged along with two others called Geohegan in the management of a catering business, the partnership being responsible for all the catering at both Exhibition Park, Vancouver and Sandown on Van-

[1] [1966] Ex. C.R. 966, [1966] C.T.C. 249, 66 D.T.C. 5202.

couver Island. From this partnership the appellant earned the sum of $7,904.58 in 1958 and included this income in his 1958 return.

In 1957 the appellant and his brother John entered into an agreement with the Portland Turf Association, an incorporated company in the State of Oregon to manage the business affairs and transactions of the association arising out of the horse race meetings at Portland, Oregon, for a share of the profits and reasonable expenses. The agreement contained the following provisions:

1. The Randalls covenant and agree that they will faithfully, honestly and diligently manage the business affairs and transactions of the Association arising out of the conducting and holding of horse race meetings for a term of ten (10) years from this date and will devote such time, labour, skill and attention to such employment as may be necessary.

2. All horse race meetings shall be conducted and held in the name of the Association.

3. All the business affairs and transactions arising out of the conducting and holding of the said horse race meetings shall be managed and taken care of by the Randalls, subject always to the control and direction of the Association so far as financial matters are concerned.

4. The Association shall pay and bear all expenses arising out of the conducting and holding of the said horse race meetings and the Randalls shall not be required to assist in any way in the financing of the race meetings. Arrangements shall be made so that all cheques shall be signed by one of the Randalls and a person appointed by the Association.

5. Each year, ninety (90) days prior to the opening of the racing season of the Association, the Randalls shall submit a budget to the Association and on approval thereof adequate funds shall be supplied by the Association.

6. The Association covenants and agrees with the Randalls to conduct races on as many days as it is reasonably possible to do so and not in any event on less than forty (40) days each year.

7. It is the intention of both the Association and the Randalls that the said race meetings shall be conducted in a similar manner to race meetings conducted by the companies in which the Randalls are associated at Hastings Park, in the City of Vancouver, in the Province of British Columbia, and the Randalls shall be allowed by the Association to manage the said race meetings in such a manner.

8. The Randalls shall be entitled to receive and be paid for their services as Managers one-half of one per cent (1/2 of 1%) of all horse racing pools on races conducted at the race track owned or controlled by the Association, the said sum to be payable at the end of each week, and in addition thereto, the Randalls shall be allowed reasonable expenses, not to exceed Five Thousand ($5,000.00) Dollars per year.

The $5,000 expense allowance provided for in para. 8 above was not dealt with as a separate item in the courts below nor was it referred to in this Court. It apparently is not relevant in these proceedings. In 1958 the appellant reported an income of $17,626.71 under this agreement and

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he claimed to deduct the sum of $5,241.53 as his expenses in travelling to and from Portland and his living expenses at Portland while there to manage the race track meetings and the business of the Portland Turf Association as called for in the agreement. The Minister of National Revenue allowed him $1,200 but disallowed the remainder. No details of how the $5,241.53 were made up were given nor were any details given showing how the $1,200 so allowed was computed. The appellant filed his income tax return for the year 1958 and by Notice of Re-Assessment dated August 4, 1964, the net amount of $4,011.63 of the expenses claimed by the appellant in connection with the Portland racing operation was disallowed. The appellant gave Notice of Objection to this re-assessment. The assessment was confirmed by the Minister and on September 15, 1965, his appeal was dismissed. The appellant then appealed to the Tax Appeal Board. His appeal was heard by Mr. Cecil L. Snyder, Q.C., who dismissed the appeal. An appeal was then taken to the Exchequer Court[1] and the case was heard by the Honourable F. A. Sheppard, Deputy Judge of the Exchequer Court of Canada at Vancouver who upheld the Tax Appeal Board. As appears from the judgment of the Tax Appeal Board, the amount of the expenses claimed as a deduction is not in dispute.

The appeal involves (1) whether the allowance of the expenses in question were excluded by s. 12(1)(*a*) of the *Income Tax Act* and (2) if not so excluded, whether the deduction of the expenses is allowable elsewhere.

Mr. Justice Sheppard found that the appellant was engaged in a business within the meaning of ss. 12(1)(*a*) and 12(1)(*h*) of the *Income Tax Act*. That finding was a correct one and was not disputed by counsel for the Minister in this Court. Section 12(1)(*a*) reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

and s. 12(1)(*h*) reads:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*h*) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business,

[1] [1966] Ex. C.R. 966, [1966] C.T.C. 249, 66 D.T.C. 5202.

"Income" is defined by s. 4 which reads:

> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The evidence was that the appellant made some 30 trips from Vancouver to Portland and back in 1958, and while at Portland lived part of the time at an hotel and part of the time in an apartment which the brothers had rented and which they occupied and used as an office when one or the other was in Portland looking after the operation there. The Portland race season in 1958 was 50 days and overlapped in part the British Columbia season.

The Minister contended that the appellant's expenses of travelling to Portland and his expenses of living there were not in the performance of any undertaking in the agreement but, on the contrary, were purely personal to him and outside the agreement. I am unable to accept that contention. It seems to me that if the appellant was going to fulfil the obligations he undertook to fulfil under the agreement in question, it was necessary for him to travel to and from Portland as the exigencies of the business there required him to do. The Minister relied on *Bahamas General Trust Company et al v. Provincial Treasurer of Alberta*[1], in which it was held that the expenses of a member of the Board of Directors of Canadian National Railways who being in Shanghai, China, on his own business and for pleasure when a meeting of the Canadian National Railways Board of Directors was called travelled from Shanghai to Montreal and back to Shanghai and claimed those expenses as deductible from his income. There is, in my view, no similarity between the two cases. The Minister also relied on *Mahaffy v. The Minister of National Revenue*[2], in which the question was whether a member of the Legislative Assembly of Alberta was entitled to his travelling and living expenses in attending a session of the Legislature under s. 5(1)(*f*) of the *Income War Tax Act* which was the same section as was dealt with in the *Bahamas General Trust* case, *supra*. Again I can see no similarity between the *Mahaffy* case and the present one. Rinfret C.J. in the *Mahaffy* case said in part: "The occupation of Members of Provincial Legislative Councils and Assemblies is neither a trade nor a business."

[1] [1942] 1 W.W.R. 46, 1 D.L.R. 169.
[2] [1946] S.C.R. 450, [1946] C.T.C. 135, 3 D.L.R. 417.

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On the hearing of this appeal, counsel for the Minister took a further objection that neither the income nor the expenses arising out of the Portland operation could be considered in arriving at the appellant's income, relying on the wording of s. 139(1)(*az*) which reads:

> (*az*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources;

Counsel argued that the Portland operation had to be considered separate and apart from the British Columbia operations. I do not think that this follows because on the evidence that was before the Tax Appeal Board and before the learned Deputy Judge of the Exchequer Court of Canada it becomes clear that the whole operation, whether at Vancouver or Sandown or at Portland, was in fact one business being conducted by the appellant and his brothers and that the income of that business from the various geographic bases was income from the business as a whole just as the business of a bank or any other enterprise which has branches in many areas remains one business and not many separate businesses, each to be dealt with separately.

Locke J. in *Interprovincial Pipe Line Company v. Minister of National Revenue*[1] said at pp. 772-3:

> Paragraphs (*av*) of s. 127(1) and (*az*) of s. 139(1) were intended, in my opinion, to prevent a taxpayer who might be engaged in two separate businesses not related to each other by reason of their nature from taking into account losses or expenses incurred in one in computing the taxable income of the other. By way of illustration, if a person engages in business as a hardware merchant in a country town and, at the same time, engages in farming or ranching, losses sustained or expenditures incurred in operations of the latter nature may not be taken into account in computing the taxable income from the hardware business, and vice-versa. The reason is that these operations are not related one to the other in the sense intended. The taxpayer's income from the hardware business is to be reckoned as if he had during the taxation year no income except from that source, according to the subsection. If, on the other hand, the merchant's business was that of the sale of produce and he should operate a truck farm for the purposes of obtaining supplies for his business, presumably these businesses would be considered to be related, within the meaning of the subsection.

I accept this statement as the correct interpretation to be given to the subsection in question. The subsection has no

[1] [1959] S.C.R. 763, [1959] C.T.C. 339, 59 D.T.C. 1229, 20 D.L.R. (2d) 97.

application where businesses are so related even if carried on at different locations.

I would allow the appeal and direct that the income tax assessment of the appellant for the 1958 taxation year be remitted to the Minister of National Revenue for re-assessment by allowing as a deduction from income of the appellant the sum of $4,011.63. The appellant is entitled to his costs in this Court and in the Exchequer Court.

JUDSON J. (*dissenting*):—Both the Tax Appeal Board and the Exchequer Court have held that the appellant, Robert M. Randall, along with his brother, was carrying on business under the Portland agreement. Both tribunals, for identical reasons, have upheld the Minister's ruling that the travelling and hotel expenses were not deductible because they came within the prohibitions in ss. 12(1)(*a*) and 12(1)(*h*) of the *Income Tax Act*. These sections read:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> * * *
>
> (*h*) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business.

Section 12(1)(*a*) prohibits the deduction of these expenses because they were not incurred in the course of carrying on the Portland business. The Chairman of the Board correctly states the principle in the following conclusion taken from his reasons:

> There was no evidence that, when in Vancouver, the appellant did anything to benefit the Portland business nor did he carry on the business of either company while travelling between the two cities. It is not enough that expenses were incurred while the taxpayer was away from his home. They must also have been incurred in the course of carrying on his business. If a deduction could be granted the expense must have been incurred in the course of carrying on the business of horse racing at the Portland track. It cannot be found that, in travelling from Vancouver to Portland and return or in eating and sleeping at a Portland hotel or in an apartment rented in that city, the appellant was carrying on the business from which he seeks to deduct these expenses. He commenced carrying on that business when he arrived in Portland and ceased to do so when he left the city. Expenses of board and lodging are common to all taxpayers and the appellant incurred expenses "away from home" for these purposes only because he maintained his residence in Vancouver rather than in Portland.

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Section 12(1)(*h*) prohibits the deduction because these are personal or living expenses and do not come within the exception in s. 12(1)(*h*) because, for the reasons stated above, they were not incurred in the course of carrying on business. These expenses were obviously incurred while away from home. But that is not enough. To qualify for deduction, they must also have been incurred in the course of carrying on business.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the appellant: Freeman, Freeman, Silvers & Koffman, Vancouver.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

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*Feb. 23

May 23

FLORIAN LEMIEUX .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Breaking and entering—Trap laid by police—Accused solicited by police informer—Whether offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 292(1)(a), 597(1)(b).

The accused and another man were solicited by a police informer to undertake to break and enter a dwelling house in Ottawa where the police were waiting for them. The police, in order to lay the trap, had secured the key from the owner of the house, who was willing to cooperate in this scheme. The accused had no thought of breaking and entering this house until approached by the informer. The accused was convicted of breaking and entering, and his appeal was dismissed by the Court of Appeal. He was granted leave to appeal to this Court on the following question of law: Did the trial judge err in law in not charging the jury as to whether there was a consent to the breaking and entering?

Held: The appeal should be allowed, the conviction quashed and a verdict of acquittal entered.

On the evidence, it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to the informer breaking into it with the assistance of the accused and others, but had urged him to do so. To break into a house in these circumstances is not an offence. On the assumption on which this appeal was argued, *mens rea* was clearly established but

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Spence JJ.

it was open to the jury to find that, notwithstanding the guilty intention of the appellant, the *actus* which was in fact committed was no crime at all.

Droit criminel—Introduction par effraction—Piège tendu par la police—Accusé sollicité par un mouchard—Y a-t-il eu offense—Code Criminel, 1953-54 (Can.), c. 51, arts. 292(1)(a), 597(1)(b).

L'accusé et un autre homme ont été sollicités par un mouchard d'entreprendre de s'introduire par effraction dans une résidence à Ottawa où des policiers les attendaient. Dans le but de tendre le piège, les policiers avaient obtenu la clef du propriétaire de la maison, qui avait consenti à coopérer dans le projet. L'accusé n'avait pas eu l'intention de s'introduire par effraction dans cette maison jusqu'à ce que le mouchard le lui eut proposé. L'accusé a été trouvé coupable de s'être introduit par effraction, et son appel a été rejeté par la Cour d'Appel. Il a obtenu permission d'appeler devant cette Cour sur la question de droit suivante: Le Juge au procès a-t-il erré en droit en n'adressant pas le jury sur la question de savoir s'il y avait eu consentement à l'introduction par effraction?

Arrêt: L'appel doit être maintenu, le verdict de culpabilité annulé et remplacé par un verdict d'acquittement.

Sur la preuve, le jury était libre de trouver que le propriétaire de la maison avait mis les policiers en la possession d'icelle, les autorisant d'en faire ce qui leur plairait et que non seulement les policiers avaient consenti à ce que le mouchard s'y introduise par effraction avec l'aide de l'accusé et d'autres, mais qu'ils avaient incité ce dernier à le faire. Dans ces circonstances, l'introduction par effraction dans une maison n'est pas une offense. Selon l'hypothèse en vertu de laquelle cette affaire a été plaidée, la *mens rea* a été clairement établie mais le jury était libre de trouver que, en dépit de l'intention fautive de l'accusé, l'*actus* qui a été en fait commis n'était pas un crime.

APPEL d'un jugement de la Cour d'Appel de l'Ontario confirmant un verdict de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the accused's conviction. Appeal allowed.

John F. Hamilton, for the appellant.

C. M. Powell, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—In October of 1964, the appellant, Florian Lemieux, was tried before a judge and jury on an indictment charging that he did

on the 17th day of November, A.D. 1963, at the City of Ottawa in the County of Carleton, unlawfully break and enter the dwelling house of Benjamin Achbar situated at premises numbered 905 Killeen Avenue in the said City of Ottawa, with intent to commit an indictable offence therein, contrary to Section 292(1)(*a*) of the Criminal Code.

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He was found guilty and sentenced to three years' imprisonment. His appeal to the Court of Appeal was dismissed on February 24, 1965. His appeal to this Court, pursuant to leave granted under s. 597(1)(*b*) of the *Criminal Code* is on the following question of law:

> Did the learned Trial Judge err in law in not charging the jury as to whether there was a consent to the breaking and entering?

The facts of the case which give rise to this suggested defence are very unusual. In November of 1963, the Ottawa Police were very anxious to arrest the members of a gang which was known as the "hooded gang" and which was engaged in a series of break-ins in the Ottawa area. On November 16, 1963, one R. D. Bard telephoned an officer of the Ottawa Police Department to inform him that he had information about this gang. The officer immediately visited Bard at his house and Bard told him that he wanted money for his information. The officer then summoned another officer, who came to Bard's house. Then all three went to see an inspector of the Ottawa Police Department.

Bard and the first two mentioned officers next drove to the west end of the City of Ottawa to look for a house where a feigned break-in could be staged. They went to the neighbourhood of Killeen Avenue and Lenester Street where Bard pointed out a house at 905 Killeen Avenue belonging to Mr. Benjamin Achbar. Bard knew this house because some time before he had paved the laneway. The Police obtained the key to Achbar's house from Achbar himself and then staked out the premises.

On November 17, 1963, at 7.30 p.m., a car owned by Florian Lemieux drove past the house. There were three men in the car. Lemieux was driving under the direction of Bard. The third man was Jean Guindon. The car circled the block and was then parked near the house. Guindon and Bard got out of the car. Lemieux remained behind the wheel. Guindon and Bard went to the side door and Guindon did the actual breaking with a screwdriver. The Police were waiting inside. Bard was arrested on the spot. Lemieux was arrested in the car. Guindon escaped and was arrested a short time later.

Bard was called at trial as a witness for the Crown. On cross-examination he did not remember what was discussed with the police on November 16, 1963; did not remember if

he agreed to take part in the break-in; did not remember if the matter of a reward was discussed and did not remember that he had picked out the Achbar house for the purpose of breaking and entering.

Guindon was also called as a Crown witness and testified that Lemieux knew nothing about the break-in and that he thought that he was driving Bard to the house for the purpose of enabling Bard to collect money owing to him. Guindon was declared a hostile witness and a previous inconsistent statement was put to him in which he had said that he had asked Lemieux to drive him to the house because he and Bard were going to break in. Guindon sought to minimize the effect of this statement by pleading lack of understanding of the contents because of language difficulties, but the two police officers who took the statement both said that Guindon had spoken to them in English that night.

Both Guindon and Lemieux were convicted by the jury. Their appeals to the Court of Appeal were also dismissed. Bard, the informer, pleaded guilty and received a heavy sentence. His appeal to the Court of Appeal was allowed and he was acquitted.

Lemieux's appeal to this Court was argued on the basis that he knew that he was acting as a driver to take Bard and Guindon to a house that he had never seen and that these two were going to break in. What he did not know, however, was that he, along with Guindon, was being led into a trap. It is quite clear that he and Guindon were solicited by Bard, the informer, to undertake this break-in. The police had secured the key from the owner of the house, who was willing to co-operate in this scheme. In the present case Lemieux had no thought of breaking and entering this house until he was approached by Bard, who was acting under police instruction. The police had obtained the consent of the owner to use the premises in the hope that they would be able to arrest certain criminals.

The case is very different from *Rex v. Chandler*[1], where an accused who intended to break into a shop sought a key from the servant of the owner of the shop. This servant informed his master. The key was supplied and the police were waiting for the shop-breaker when he arrived. The key

[1] [1913] 1 K.B. 125 at 127, 8 Cr. App. Rep. 82.

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in this case was supplied by the servant only for the purpose that the criminal might be detected in the commission of the offence. The criminal was guilty of shop-breaking.

But in Lemieux's case, the facts are not at all similar. The police set the whole scheme in motion through Bard. He was to lead a man who at first had no intention of breaking and entering, who went to the scene of the crime at Bard's instigation and who was led into the trap by Bard.

On the evidence it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to Bard breaking into it with the assistance of others, but had urged him to do so. To break into a house in these circumstances is not an offence.

For Lemieux to be guilty of the offence with which he was charged, it was necessary that two elements should co-exist, (i) that he had committed the forbidden act, and (ii) that he had the wrongful intention of so doing. On the assumption on which the appeal was argued *mens rea* was clearly established but it was open to the jury to find that, notwithstanding the guilty intention of the appellant, the *actus* which was in fact committed, was no crime at all.

In my opinion, if the jury had been properly charged on this aspect of the matter and had taken the view of the facts which it has been pointed out above it was open to them to take, they would have acquitted the appellant.

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence. The reason that this conviction cannot stand is that the jury were not properly instructed on a question vital to the issue whether any offence had been committed.

I would allow the appeal, quash the conviction and direct that a verdict of acquittal be entered.

Appeal allowed and conviction quashed.

Solicitor for the appellant: John F. Hamilton, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

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*May 1
June 1

KENT STEEL PRODUCTS LTD., MANITOBA ROLLING MILLS division of Dominion Bridge Co. Ltd., SUTHERLAND SUPPLY LTD., ACKLANDS LTD., MAURICE FIELDS, AUBREY J. HALTER and NAT FROOMKIN (*Plaintiffs*) .....APPELLANTS;

AND

ARLINGTON MANAGEMENT CONSULTANTS LTD. and PRAIRIE FOUNDRY LTD. (*Defendants*) .... RESPONDENTS.

MOTION TO QUASH

Appeals—Application to quash—Leave to appeal—Bankruptcy—Order granting creditor leave to take proceedings in own name—Appeal to Supreme Court of Canada—Whether s. 151 of the Bankruptcy Act, R.S.C. 1952, c. 14, applies—Rule 53 of the Bankruptcy Rules.

Having obtained leave to take proceedings in their own names under s. 16 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, the appellants, as creditors in a bankruptcy, instituted proceedings in the ordinary civil law courts to determine questions of priority and security. In due course, a notice of appeal to this Court from the judgment of the Court of Appeal was served by the plaintiffs, as appellants, without leave having been obtained under s. 151 of the *Bankruptcy Act*. The respondents applied to quash the appeal on the ground, *inter alia*, that the appeal was barred by s. 151 of the Act. An application for leave to appeal was made orally by the appellants during the hearing of the application to quash.

Held: The application to quash should be granted and the application for leave to appeal should be dismissed.

Section 151 of the *Bankruptcy Act* applies to this appeal, and the appeal to this Court could only be taken by leave of a judge of this Court.

Apart from the fact that no notice of an application for leave to appeal was served on the other party at least 14 days before the hearing, as required by rule 53 of the Bankruptcy Rules, the application for leave to appeal could not be granted as no "special reasons", as required by that rule, existed.

Appels—Requête pour rejet—Permission d'appeler—Faillite—Ordonnance permettant à un créancier d'intenter des procédures en son propre nom—Appel à la Cour Suprême du Canada—Application de l'art. 151 de la Loi sur la Faillite, S.R.C. 1952, c. 14—Règle 53 des Règles de la Faillite.

Ayant obtenu une ordonnance les autorisant à intenter des procédures en leur propre nom en vertu de l'art. 16 de la *Loi sur la Faillite*, S.R.C. 1952, c. 14, les appelants, comme créanciers de la faillite, ont

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

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intenté des procédures devant les cours civiles ordinaires pour faire déterminer des questions de priorité et de garantie. Éventuellement, un avis d'appel à cette Cour du jugement de la Cour d'Appel a été signifié par les demandeurs, comme appelants, sans avoir obtenu l'autorisation requise par l'art. 151 de la *Loi sur la Faillite*. Les intimés ont présenté une requête pour faire rejeter l'appel pour le motif, *inter alia*, que l'appel était prohibé par l'art. 151 de la Loi. Une requête pour permission d'appeler a été présentée oralement par les appelants durant l'audition de la requête pour rejet.

Arrêt: La requête en rejet d'appel doit être accordée et la requête pour permission d'appeler doit être rejetée.

L'article 151 de la *Loi sur la Faillite* s'applique à cet appel, et l'appel à cette Cour ne peut avoir lieu sans l'autorisation d'un juge de cette Cour.

Outre le fait qu'avis d'une requête pour permission d'appeler n'a pas été signifié à l'autre partie au moins 14 jours avant l'audition, tel que requis par la règle 53 des Règles de Faillite, la requête pour permission d'appeler ne peut pas être accordée parce qu'il n'existait aucune «raison spéciale», tel que requis par cette règle.

REQUÊTES en rejet d'appel[1] et pour obtenir permission d'appeler en matière de faillite. Requête en rejet d'appel accordée et requête pour permission d'appeler rejetée.

MOTIONS TO QUASH an appeal[1] and for leave to appeal in a bankruptcy matter. Motion to quash granted and motion for leave to appeal dismissed.

W. C. Newman, Q.C., for the plaintiffs, appellants.

R. Penner, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an application to quash the appeal, made by the respondents Arlington Management Consultants Ltd. and Prairie Foundry Ltd.

D. Smith & Sons Ltd. were the subject of a Receiving Order in Bankruptcy on January 29, 1965. The appellants and others as creditors requested the trustee in bankruptcy to take proceedings to determine what amount, if any, was due to the Industrial Development Bank or its assignee on account of a certain property mortgage given by the bankrupt to the bank and to take proceedings to determine the

[1] (1967), 59 W.W.R. 382, 62 D.L.R. (2d) 502.

force and effect, if any, of an assignment in writing by the bankrupt to Lipman Holdings Ltd. of which the respondents in this appeal are the successors. The trustee, under the direction of the inspectors, refused by reason of lack of funds in the bankrupt estate to take such proceedings. The said creditors therefore applied to the Court in Bankruptcy for an order under s. 16 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, and on March 13, 1965, Smith J., as a judge in Bankruptcy, made an order permitting the applicants to commence and prosecute proceedings in their own name and at their own expense and risk for the said purpose.

Proceedings were commenced in the Court of Queen's Bench for the Province of Manitoba by statement of claim dated November 19, 1965. The proceedings purported to be those authorized by the said order although the statement of claim was very much broader in scope than that authorized by the order of Smith J.

After consultation by counsel it was agreed that certain questions of law should be stated in the form of a special case for the opinion of the court, *i.e.*, the Court of Queen's Bench. By reasons for judgment dated October 17, 1966, Hall J. answered those questions. An appeal therefrom was taken to the Court of Appeal of Manitoba[1], and by the judgment of that Court pronounced on February 21, 1967, such appeal was dismissed. The plaintiffs as appellants served notice of appeal to this Court. No application for leave to take the said appeal to this Court was made by the appellants and no order was made granting such leave. Under these circumstances, the respondents applied to quash the appeal on the ground, inter alia, that the same is barred by s. 151 of the *Bankruptcy Act*. Other grounds for the application were urged but they need not be considered in these reasons.

It is the position taken by the appellants that s. 151 of the *Bankruptcy Act* has no application to this appeal as the proceedings were carried on in the ordinary courts of the Province of Manitoba.

Section 151 of the *Bankruptcy Act* provides:

151. The decision of the Court of Appeal upon any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that Court.

[1] (1967), 59 W.W.R. 382, 62 D.L.R. (2d) 502.

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The issues raised by the appellants in the appeal are as follows:

1. Whether or not the title of the trustee in bankruptcy by virtue of the receiving order made on January 20, 1965 against D. Smith & Sons Ltd. takes priority over an assignment of choses in action by the bankrupt made on June 4, 1963.

2. Whether or not the respondent Arlington Management Consultants Ltd. loses its right to claim both as a secured creditor and as an unsecured creditor against the assets and estate of D. Smith & Sons Ltd. because it requested a deferment of the valuation of one of the securities held by it and therefore is barred from dividend by the provisions of s. 92 of the *Bankruptcy Act*.

It is to be noted that these proceedings could not have been commenced by the creditors without the leave as granted by Smith J. under the provisions of s. 16 of the *Bankruptcy Act*. Counsel for the appellants has agreed with this proposition. It is true that the proceedings were commenced in the ordinary civil law courts after authorization given by the Judge in Bankruptcy. Counsel for the appellants therefore submits that when the trustee did not assert any claim the provision of the *Bankruptcy Act* had no application, and that under such circumstances the procedure in the Bankruptcy Court was not available to the plaintiffs. It is difficult to understand how that submission can be valid in view of rule 86 of the Rules in Bankruptcy which provides for "a trustee or any other person" applying to the court to set aside or void any settlement. The "court" in that rule is that defined in s. 2(*g*) as "the court having jurisdiction in bankruptcy or a judge thereof..."

Counsel for the appellants, as respondents on this motion to quash, cites *Princeton Tailors Ltd. ex parte the Dominion Bank*[1]. In that case the bank applied for a declaration that it had at the date of the bankruptcy of the debtor a claim upon the goods of the bankrupt superior to that of the landlord's claim for rent as against the same goods. Sedgwick J. held that he was bound by the judgment of the court in *Canadian Carpet and Comforter Mfg. Co.*,

[1] (1931), 12 C.B.R. 208, 39 O.W.N. 531.

ex parte A.G. of Canada[1] and must hold that the Bankruptcy Court had no jurisdiction in the bankruptcy proceedings to hear and determine the rights of the bank and landlord as between themselves. That situation is not the one presented in this application. Here the creditors take their action as creditors of the estate of the bankrupt, and any fruits of the litigation would flow to them as such creditors. Moreover, if the said fruits of the litigation exceeded their claims and their necessary costs, by the provisions of s. 16(2) of the *Bankruptcy Act* such excess, if any, goes to the estate of the bankrupt. It should be noted that in *Garage Causapscal Ltée., Traders Finance Corpn. v. Levesque*[2], when a trustee in bankruptcy had refused to take proceedings to void a fraudulent preference an order was made under s. 16 enabling an individual creditor to take such proceedings at its own risk. The creditor then proceeded by means of a petition to the Superior Court sitting in Bankruptcy. The decision of the Superior Court was appealed to the Court of Queen's Bench (Appeal Side) in the Province of Quebec and further, upon leave granted, to this Court.

In view of these circumstances, I am of the opinion that s. 151 of the *Bankruptcy Act* applies to this appeal and that as a bankruptcy proceeding, both by virtue of the order made by Smith J. and because of the character of the issues in the appeal, an appeal to this Court may only be taken by leave of a judge of this Court. As I have said, no such leave was applied for until the hearing of this application to quash when the appellants, opposing this application to quash, in the alternative, asked leave to appeal. That application was made on May 1, 1967.

Rule 53 of the Bankruptcy Rules, as amended by P.C. 1962-371, provides:

> 53. An application for special leave to appeal from a decision of a Court of Appeal and to fix the security for costs, if any, may be made to a judge of the Supreme Court of Canada within sixty days after the date of the decision appealed from, or within such extended time as a judge of the Supreme Court of Canada may for special reasons allow, either during or after the said period of sixty days, and notice of the application for leave to appeal or to extend the time in which to apply for such leave shall be served on the other party at least fourteen days before the hearing thereof.

[1] (1924), 4 C.B.R. 423, 25 O.W.N. 514, 1 D.L.R. 639; affirmed, (1924), 5 C.B.R. 54, 26 O.W.N. 345, 4 D.L.R. 1307.

[2] [1961] S.C.R. 83, 2 C.B.R. (N.S.) 52, 26 D.L.R. (2d) 384.

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It is to be noted that such rule now permits the application for special leave to appeal to be made to a judge of this Court after the expiration of sixty days from the date of the judgment of the Court of Appeal if such extended time is allowed for special reasons by a judge of this Court and thereby confers upon the judge of this Court the jurisdiction which Fauteux J. held in *Ferland v. Desjardins et al.*[1] we lacked. However, notice of such application for special leave to appeal must be served on the other party at least fourteen days before the hearing thereof. No such notice was of course served in the present case, the application was simply made orally during the argument.

In *Re Hudson Fashion Shoppe Ltd.*[2], Anglin C.J.C. found there was no power in a judge of the Court to abridge such fourteen-day period and the amendment to rule 53 does not appear to have conferred such jurisdiction.

Even apart from such lack of notice, I am of the opinion that special leave to appeal should not be granted in this case. The judgment of the Court of Appeal of Manitoba was pronounced on February 21, 1967, and on March 20, 1967, the solicitors for the appellants were notified as follows:

> Insofar as your appeal to the Supreme Court is concerned, we respectfully suggest also that it is precluded by Section 151 of The Bankruptcy Act. In the event that leave is required we propose to oppose leave being given.

In view of such clear notification, it is difficult to understand how the "special reasons" required by Bankruptcy Rule 53 in order to confer jurisdiction to extend time for application for special leave could exist.

For these reasons, I am of the opinion that the application to quash the appeal must be granted with costs, and that the appellants' application for leave to appeal must be refused without costs.

Application to quash granted; application for leave to appeal dismissed.

Solicitors for the plaintiffs, appellants: Zuken & Penner, Winnipeg.

Solicitors for the defendants, respondents: Newman, MacLean & Associates, Winnipeg.

[1] [1961] S.C.R. 306, 2 C.B.R. (N.S.) 121, 27 D.L.R. (2d) 482.
[2] [1926] S.C.R. 26, 10 C.B.R. 173.

SA MAJESTÉ LA REINE ..... APPELANTE;

ET

MARIE-BLANCHE BRETON ..... INTIMÉE.

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*Fév. 2; 3
Mai 23

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Couronne—Pétition de droit—Chute sur trottoir—La Couronne est-elle responsable de l'entretien—Loi sur la Responsabilité de la Couronne, 1952-53 (Can.), c. 30, art. 3(1)(b)—Charte de la Cité de Québec, 1929 (Qué.), c. 95, art. 417—Acte de l'Amérique du Nord britannique, 1867, art. 125.

La demanderesse a été blessée lorsqu'elle fut victime d'une chute sur un trottoir longeant une propriété dans la cité de Québec appartenant au gouvernement du Canada. Elle poursuivit la Couronne par voie de pétition de droit, et les parties ont convenu de poser à la Cour de l'Échiquier la question de droit suivante: Sa Majesté au droit du Canada est-elle assujettie aux dispositions de l'art. 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation d'entretenir et de réparer ledit trottoir? Une réponse négative fut donnée à cette question par la Cour de l'Échiquier. La Couronne en appela devant cette Cour. La demanderesse soutient que l'art. 3(1)(*b*) de la *Loi sur la Responsabilité de la Couronne*, 1952-53 (Can.), c. 30, qui impose une responsabilité à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens, manifeste l'intention du Parlement de soumettre la Couronne à l'art. 417 de la Charte.

Arrêt: L'appel doit être maintenu, et la réponse à la question doit être négative.

L'article 3(1)(*b*) de la *Loi sur la Responsabilité de la Couronne* ne s'applique pas. Le devoir dont parle l'article est celui établi par la loi générale et qui est commun à toute personne qui a la propriété, l'occupation, la possession ou le contrôle d'un bien. L'article ne vise pas tous les devoirs qu'une législature peut imposer à une catégorie particulière de propriétaires d'immeubles ou de terrains, à l'égard de certains autres biens—en l'espèce un trottoir—dont ils n'ont, au sens de l'art. 3(1)(*b*) de la Loi, ni la propriété, l'occupation, la possession ou le contrôle.

De plus, puisque l'art. 417 de la Charte grève l'immeuble riverain d'une charge d'ordre pécuniaire dont l'acquittement est éventuellement garanti par l'imposition virtuelle d'une taxe foncière, l'article est incompatible avec les dispositions de l'art. 125 de l'*Acte de l'Amérique du Nord britannique* qui prescrit que nulle terre ou propriété appartenant au Canada ou à une province en particulier ne sera sujette à la taxation.

Crown—Petition of right—Fall on sidewalk—Whether Crown liable for its maintenance—Crown Liability Act, 1952-53 (Can.), c. 30, s. 3(1)(b)—Quebec City Charter, 1929 (Que.), c. 95, s. 417—B.N.A. Act, 1867, s. 125.

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*CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Martland et Ritchie.

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LA REINE v. BRETON

The plaintiff sustained injuries when she fell on the sidewalk adjoining a property in Quebec City belonging to the government of Canada. She brought a petition of right against the Crown, and the parties agreed to submit to the Exchequer Court the following question of law: Is the Crown in right of Canada subject to the provisions of s. 417 of the Quebec City Charter which imposes on the proprietor of each immovable or property fronting on such sidewalk the obligation to maintain and repair the same? The question was answered in the affirmative by the Exchequer Court. The Crown appealed to this Court. It is argued for the plaintiff that s. 3(1)(*b*) of the *Crown Liability Act*, 1952-53 (Can.), c. 30, which imposes a liability for a breach of duty attaching to the ownership, occupation, possession or control of property, shows the intention of Parliament to submit the Crown to s. 417 of the Charter.

Held: The appeal should be allowed, and the question answered in the negative.

Section 3(1)(*b*) of the *Crown Liability Act* does not apply. That section contemplates only the general duty arising out of the ownership, occupation, possession or control of property. It does not contemplate all duties which a legislature could impose on the owners of properties with respect to other properties—such as in this case a sidewalk—of which these have neither the ownership, nor the occupation, nor the possession, nor the control within the meaning of s. 3(1)(*b*).

Furthermore, since s. 417 of the Charter imposes a tax on the owner of the premises adjoining the sidewalk for the cost of its maintenance and repair, it is incompatible with the provisions of s. 125 of the *B.N.A. Act* which enacts that no lands or property belonging to Canada or any province shall be liable to taxation.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], on a petition of right. Appeal allowed.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada [1], sur une pétition de droit. Appel maintenu.

Paul Ollivier, C.R. et *Gaspard Côté,* pour l'appelante.

André Desmeules, pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Dans une Pétition de droit amendée, dirigée contre Sa Majesté la Reine aux droits du Canada, dame Marie-Blanche Breton allègue que le 9 août 1962, elle s'est blessée en faisant une chute sur un trottoir de la cité de Québec, que cette chute est attribuable au mauvais état et

[1] [1965] 2 R.C. de l'É. 30.

au défaut d'entretien de ce trottoir qui présentait un large trou à l'endroit où elle est tombée et que *la Couronne aux droits du Canada* doit être tenue responsable des dommages occasionnés par cette chute, au motif qu'elle était tenue de voir, à cet endroit, à l'entretien ainsi qu'à la réfection de ce trottoir situé vis-à-vis un immeuble lui appartenant. La requérante réclame de *la Couronne aux droits du Canada* une somme de $3,659 à titre de dommages.

En défense, la Couronne a nié les diverses allégations de la Pétition de droit et plaidé, particulièrement, qu'elle n'a aucune obligation, légale ou contractuelle, de voir à l'entretien ou à la réfection de ce trottoir et qu'il n'y a, conséquemment, aucun lien de droit entre elle et la requérante.

Préalablement à l'instruction de ce litige, les parties se sont prévalues des dispositions de la règle 149 des *Règles et Ordonnances générales* de la Cour de l'Échiquier du Canada. C'est ainsi que, admettant pour les fins de l'argumentation que le trottoir en question longeait cette propriété du Gouvernement du Canada où est situé le Manège militaire, elles ont demandé à la Cour de décider la question de droit suivante:

> L'intimée, dans la présente cause, à savoir Sa Majesté aux droits du Canada, est-elle assujettie aux dispositions de l'article 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation d'entretenir et de réparer ledit trottoir?

Dans des raisons de jugement claires et concises, le juge de première instance[1] a référé d'abord à la *Loi sur la responsabilité de la Couronne,* S.C. (1952-53), 1-2 Elizabeth II, ch. 30, et, plus précisément, aux dispositions de l'art. 3(1)(*b*) de cette loi:

> 3. (1) La Couronne est responsable «in tort» des dommages dont elle serait responsable si elle était un particulier en état de majorité et de capacité,
>
> (*a*) à l'égard d'un acte préjudiciable commis par un préposé de la Couronne, ou
>
> (*b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.

S'appuyant dès lors sur les dispositions de l'art. 3(1)(*b*), il a posé la question et en a disposé comme suit:

> Puisque l'application pratique de la Loi sur la responsabilité de la Couronne en matière d'actes préjudiciables consiste à imposer à l'État les

[1] [1965] 2 R.C. de l'É. 30.

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mêmes obligations qu'à tout «particulier en état de majorité et de capacité», demandons-nous ce que serait en pareille occurrence l'obligation incombant au propriétaire québecois.

La Charte de la Cité de Québec forme une partie intégrante de la législation provinciale étant le statut 19 George V, chapitre 95, sanctionné le 4 avril 1929. L'art. 417 de cette loi de la Province de Québec, édicte que:

> 417. Dans toutes les rues de la cité, les trottoirs doivent être faits, entretenus et réparés par le propriétaire de chaque immeuble ou terrain vis-à-vis duquel ils doivent être. Si tel propriétaire néglige de faire, refaire, entretenir ou réparer, selon le cas, les trottoirs, le chef de police lui donnera avis, par écrit, de faire ce qui est prescrit au sujet de ces trottoirs. . . . Si, dans les huit jours suivant l'avis, les travaux requis auxdits trottoirs n'ont pas été faits, alors ces travaux seront faits par la corporation, qui peut s'en faire rembourser le coût par le propriétaire. . . .

L'intention qui ressort de cette rédaction assez fruste est que, dans le territoire municipal de Québec, l'entretien des trottoirs est une charge de la propriété riveraine. Corollairement, la conclusion non moins nette découlant du texte plus limpide de l'art. 3(1)(*b*) de la Loi fédérale précitée, est que la Couronne assume en tout point cette responsabilité du propriétaire québecois dans les limites de la Cité.

La Cour doit donc répondre affirmativement à la question posée et décider que Sa Majesté la Reine aux droits du Canada est assujettie aux dispositions de l'art. 417 de la Charte de la Cité de Québec qui impose au propriétaire de chaque immeuble ou terrain vis-à-vis un trottoir, l'obligation de l'entretenir et de le réparer.

Et le savant juge d'ajouter en terminant:

> Cette loi, assez récente, sur la responsabilité de la Couronne (S.C. 1952-53, 1-2 Elizabeth II, c. 30) dont le contexte élimine toute disparité légale entre la Couronne et le sujet, a été savamment étudiée par l'honorable juge Noël de notre Cour dans la cause Thérèse Deslauriers-Drago et Sa Majesté la Reine (1963) Ex. C.R. 289 à la page 290, où il fut écrit, inter alia, que:
>
> > 3. L'article 3(1)(*b*) de la Loi sur la responsabilité de la Couronne prévoit, par contre, une responsabilité directe «à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession, ou le contrôle des biens». Une réclamation non recevable contre la Couronne sous l'article 3(1)(*a*) pourrait l'être sous l'article 3(1)(*b*) par suite d'une responsabilité directe du maître représenté par son préposé. . .

De là le pourvoi à cette Cour.

Il est admis évidemment que les dispositions de l'art. 417 ne peuvent, *proprio vigore*, atteindre *la Couronne aux droits du Canada*. A la vérité, la prétention contraire viendrait en conflit avec des principes reconnus, tel celui qui, fondé sur le caractère fédératif de notre système de gouvernement, veut que *la Couronne aux droits du Canada* ne peut être liée par une loi émanant d'une législature provinciale et tel aussi ce principe d'interprétation qui, gouver-

nant dans toute juridiction législative, veut qu'aucune loi n'affecte les droits ou prérogatives de la Couronne, que ce soit *la Couronne aux droits du Canada* ou *la Couronne aux droits d'une province,* à moins qu'elle ne contienne une disposition expresse à cet effet, ce qui n'est pas le cas de l'art. 417 de la Charte de la Cité de Québec.

Aussi bien invoque-t-on, de la part de l'intimée, ce statut fédéral: *La Loi sur la responsabilité de la Couronne,* où apparaît, dit-on, dans les termes suivants de l'art. 3(1)(*b*), la manifestation d'une intention du Parlement de soumettre *la Couronne aux droits du Canada* aux dispositions de l'art. 417 de la Charte de la Cité de Québec:

> 3. (1) La Couronne est responsable «in tort» des dommages dont elle serait responsable si elle était un particulier en état de majorité et de capacité,
>
> (*a*) . . .
>
> (*b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.

Dans la considération de cette prétention de l'intimée, il importe, d'une part, de préciser le sens strict qu'il convient de donner à ces dispositions particulières de la Loi fédérale en raison du fait qu'elles affectent les droits et prérogatives de la Couronne et de déterminer, d'autre part, la nature exacte des prescriptions de l'art. 417 de la Charte de la Cité de Québec.

La responsabilité dont parle l'art. 3(1)(*b*) est la responsabilité *à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.* Le texte, notons-le, dit *au devoir* et non *aux devoirs.* A mon avis, il s'agit là d'un devoir bien identifié, de ce devoir connu, établi par la loi générale et commun, en toutes juridictions territoriales, à toute personne qui a la propriété, l'occupation, la possession ou le contrôle d'un bien. C'est un manquement à *ce* devoir qui donna lieu au maintien de la pétition de droit dans la cause de *Thérèse Deslauriers-Drago et Sa Majesté la Reine*[1], décidée par M. le Juge Noël et citée au jugement *a quo.* Je ne crois pas que ce texte de l'art. 3(1)(*b*) vise tous devoirs que, présentement ou à l'avenir, par disposition spéciale et dérogation à la loi générale, toute législature provinciale peut imposer, dans certaines localités, à une catégorie particulière de propriétaires d'immeubles ou de terrains, à

[1] [1963] R.C. de l'É. 289.

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l'égard de certains autres biens—en l'espèce, à l'égard d'un trottoir—dont ils n'ont, au sens de l'art. 3(1)(*b*) de la Loi fédérale, ni la propriété, l'occupation, la possession ou le contrôle. Aussi bien, si cette interprétation est valide, cela suffit pour disposer de la question soumise et y répondre négativement.

Assumant, par ailleurs, le mal fondé de cette interprétation, je suis d'opinion qu'il nous faut quand même arriver à la même conclusion en raison des immunités afférentes au statut réel des biens de la Couronne et de la nature particulière des prescriptions de l'art. 417 dont il convient de reproduire le texte en entier:

> 417. Dans toutes les rues de la cité, les trottoirs doivent être faits, entretenus et réparés par le propriétaire de chaque immeuble ou terrain vis-à-vis duquel ils doivent être. Si tel propriétaire néglige de faire, refaire, entretenir ou réparer, selon le cas, les trottoirs, le chef de police lui donne avis, par écrit, de faire ce qui est requis au sujet de ces trottoirs. Cet avis doit être adressé ou laissé au domicile du propriétaire, s'il est résident dans la cité, ou chez l'occupant de l'immeuble, si tel propriétaire ne réside pas dans la cité; et si cet immeuble n'a pas d'occupant, l'avis n'est pas nécessaire.
>
> Si, dans les huit jours suivant l'avis, les travaux requis auxdits trottoirs n'ont pas été faits, alors ces travaux seront faits par la corporation, qui peut s'en faire rembourser le coût par le propriétaire. Cette somme est recouvrable comme une taxe, de la même manière et avec les mêmes privilèges que toute autre taxe imposée sur la propriété foncière dans la cité; mais, le propriétaire, à moins de convention expresse contraire, n'a pas le droit de s'en faire rembourser une partie quelconque par son locataire.

Ces prescriptions imposent, comme il est indiqué au jugement *a quo*, une charge à l'immeuble riverain. Elles autorisent la Cité, qui doit satisfaire à cette charge à défaut du propriétaire de s'en acquitter, à recouvrer toute somme, alors déboursée par elle à ces fins, *comme une taxe, de la même manière et avec les mêmes privilèges que toute autre taxe imposée sur la propriété foncière dans la cité.* En somme, paraphrasant le langage de Sir François Lemieux dans la cause de *Dame Coleman v. Cité de Québec*[1], ou bien le propriétaire riverain fera volontairement, à même ses deniers, les travaux prescrits, ce qui équivaut à un impôt, ou bien, refusant ou négligeant d'y procéder, la Cité le fera à ses frais et dépens et prélèvera le montant par exécution, ce qui constitue encore un impôt. Grevant l'immeuble riverain d'une charge d'ordre pécunier dont l'ac-

[1] (1930), 68 C.S. 255 à 259.

quittement est éventuellement garanti par l'imposition virtuelle d'une taxe foncière, les dispositions de l'art. 417 de la Charte de la Cité de Québec sont incompatibles avec les immunités afférentes au statut réel des biens de la Couronne. Impuissantes, comme déjà indiqué, à atteindre, *proprio vigore, la Couronne aux droits du Canada*, ces dispositions de la législature provinciale ne sauraient s'y appliquer que par l'intervention d'une autre législature dont la législation, à cet effet, serait explicite ou nécessairement implicite et apte à validement déroger aux dispositions de l'art. 125 du statut impérial, *l'Acte de l'Amérique du Nord Britannique*, 1867, prescrivant que:

> 125. No Lands, or Property belonging to Canada, or any Province shall be liable to Taxation.

La législation fédérale, invoquée, en l'espèce, par l'intimée, n'a pas ce caractère. On peut noter particulièrement que si les dispositions de l'art. 3(1)(*b*) affectent, dans les cas et la mesure indiqués, les immunités afférentes au statut personnel de la Couronne, elles ne touchent aucunement les immunités afférentes au statut réel de ses biens et ne suggèrent aucune intention ou volonté du Parlement d'assujettir *la Couronne aux droits du Canada* à des prescriptions ou impositions de la nature de celles édictées par l'art. 417 de la Charte de la Cité de Québec.

Aussi bien, je dirais, avec le plus grand respect pour l'opinion du savant juge de première instance, que je ne puis, pour les raisons ci-dessus, adopter la façon dont il a posé et solutionné le problème et donnerais à la question soumise par les parties, une réponse négative.

Je maintiendrais l'appel, infirmerais le jugement de première instance et réserverais l'adjudication quant aux frais à la discrétion du juge de l'instance principale, auquel le dossier sera retourné.

Appel maintenu.

Procureur de l'appelante: E. A. Driedger, Ottawa.

Procureurs de l'intimée: St-Laurent, Monast, Desmeules & Walters, Québec.

1967

*May 11
June 26

WESTOWN PLAZA LIMITED (*Plaintiff*) ..APPELLANT;

AND

STEINBERG'S LIMITED (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Lease—Lessor's covenant to pay taxes on real property—Lessee's covenant to pay taxes on personal property—Trade fixtures property of lessee—Whether lessee liable to pay that part of municipal taxes levied in respect of demised premises attributable to value of fixtures—The Assessment Act, R.S.O. 1960, c. 23, ss. 1(i)(iv), *4.*

The appellant was the owner of a parcel of land on which it constructed a shopping centre including a store built to the respondent's specifications and leased to the respondent by a lease executed under seal by both parties. Under the terms of the lease, the respondent as lessee covenanted to pay all taxes imposed in respect of the personal property, business or income of the lessee pertaining to the demised premises, and the appellant as lessor covenanted to pay all real property taxes assessed thereon. The lease also provided that trade or tenant's fixtures installed by the lessee should remain the property of the lessee and might be removed by it at any time during its occupancy of the demised premises.

The appellant brought action for a declaration that the respondent was liable to pay that part of the municipal taxes levied in respect of the demised premises which was attributable to the value of the fixtures installed by the lessee in the said premises and asked for a reference to determine the amounts payable and for consequential relief. The action failed at trial, and, on appeal, the judgment of the trial judge was affirmed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be dismissed.

The assessment on which the taxes in question were based was made on land and both by statute and the common law the buildings and the fixtures placed upon the assessed land were a part thereof. Until the lessee exercised its rights to remove the fixtures they were, even as between it and the lessor, a part of the realty rather than personalty; but the real question was not as to the type of the individual items of property making up the total assessment but as to the type of tax. It was impossible to say that these were other than "real property taxes".

Bain v. Brand (1876), 1 App. Cas. 762, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Schatz J. Appeal dismissed.

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

[1] [1964] 1 O.R. 167, 41 D.L.R. (2d) 450.

1967

WESTOWN PLAZA LTD. v. STEINBERG'S LTD.

Mayer Lerner, Q.C., and *B. T. Granger*, for the plaintiff, appellant.

Douglas K. Laidlaw, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal[1] affirming a judgment of Schatz J.

The appellant is the owner of a parcel of land in London, Ontario, on which it has constructed a shopping centre including a store built to the respondent's specifications and leased to the respondent by a lease dated December 28, 1959, and executed under seal by both parties.

The appellant brought action for a declaration that the respondent was liable to pay that part of the municipal taxes levied in respect of the demised premises which was attributable to the value of the fixtures installed by the lessee in the demised premises and asked for a reference to determine the amounts payable and for consequential relief.

The term commenced on July 1, 1960, and was for a period of 20 years, ending June 30, 1980. It provided for a minimum annual rent of $32,500 with additional rent equal to the amount, if any, by which one per cent of gross sales during each lease year exceeded the minimum rent, but not to exceed $45,000.

The lease contains the following terms which are relevant to the determination of this appeal:

> 8. THE LESSEE COVENANTS WITH THE LESSOR:
>
> (*c*) To pay all taxes, charges, rates and licence fees assessed, rated or imposed in respect of the personal property, business or income of the Lessee pertaining to the demised premises, as and when the same become due and payable, subject to any proceedings which may be taken by the Lessee by way of appeal of or from any such taxes, charges, rates, or fees or the assessment thereof;
>
> If the real property taxes, including local improvement rates, upon the demised premises shall be increased after the "base tax year", during the term of this lease, the Lessee shall pay each and every such increase of taxes that may be levied, rated, charged or assessed against the demised premises or any part thereof and if

[1] [1964] 1 O.R. 167, 41 D.L.R. (2d) 450.

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WESTOWN PLAZA LTD. v. STEINBERG'S LTD.

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such property taxes including local improvement rates shall be increased during any renewal term of this lease, the Lessee shall pay fifty percent (50%) of each and every such increase; for the purposes of this paragraph (c) and during the original term of this lease and each renewal term thereof, the third full calendar year of the term of this lease shall be the "base tax year"; the taxes payable for the base tax year shall be the "base taxes" for the term of this lease and each renewal term hereof.

* * *

The term "real property taxes" as used in this lease shall include all real estate taxes, rates, duties and assessments whatsoever, whether Municipal, Provincial or Dominion, or imposed by any other competent taxing authority; provided, however, that nothing in this lease contained shall require the Lessee to pay any franchise, corporate, estate, inheritance, succession, capital levy or transfer tax of the Lessor or any income or profits tax upon the rent payable by the Lessee under this lease or any levy or tax of a similar kind and nature whatsoever;

10. Provided that any trade or tenants fixtures installed in or attached to the demised premises by and at the expense of the Lessee shall remain the property of the Lessee and Lessor agrees that the Lessee shall have the right at any time and from time to time during its occupancy of the demised premises to remove any and all of such fixtures but in the event the Lessee shall in such removal do damage to the demised premises it shall make good any damage which it may occasion thereto;

11. THE LESSOR COVENANTS WITH THE LESSEE:

(c) To pay all real property taxes, rates, levies, duties, charges, assessments and impositions whatsoever whether Municipal, Parliamentary or otherwise that may be levied, rated, charged or assessed upon the demised premises and upon all driveways, parking and loading areas and sidewalks in the Shopping Centre during the original term of this lease or any renewal thereof save and except such taxes, charges, rates and licence fees as the Lessee covenants to pay as hereinbefore provided.

In my view, the relevant words of the lease are free from ambiguity, either patent or latent, and the decision of the appeal must turn upon the true construction of the words which the parties have used.

The taxes which the appellant seeks to have apportioned between the parties are those levied by the municipality in pursuance of *The Assessment Act,* R.S.O. 1960, c. 23. Section 4 of that Act provides that, subject to certain exemptions with which we are not concerned, "all real property in Ontario is liable to assessment and taxation". Section 1(*i*)(iv) defines "real property" as including, *inter alia*:

(iv) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land. . .

Quite apart from this statutory provision it is, I think, settled law that the lessee's fixtures become part of the land although it has, of course, the right to remove them. In *Bain v. Brand*[1], the Lord Chancellor said at p. 770:

> The fixture does become part of the inheritance; it does not remain a moveable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance.

The assessment on which the taxes in question are based is made on land and both by statute and the common law the buildings and the fixtures placed upon the assessed land are a part thereof. Until the lessee exercises its right to remove the fixtures they are, even as between it and the lessor, a part of the realty rather than personalty; but the real question is not as to the type of the individual items of property making up the total assessment but as to the type of tax. I find it impossible to say that these are other than "real property taxes".

The appellant argues that the words "the demised premises" as used in this lease mean only the land and the empty building erected upon it. I am unable to adopt this construction. By paras. 1 and 2 of the lease,

> The Lessor doth hereby demise and lease unto the lessee its successors and assigns:
>
> (a) All and singular that messuage and tenement, situate lying and being in the Township of London, in the County of Middlesex, and being composed of the lands and premises shown outlined in Green in Schedule "B" hereto annexed; (together with a right of way)
>
> to have and to hold the demised premises for and during the said term of 20 years...

The lands outlined in green in Schedule "B" consist of a rectangular parcel of land 144 feet 9 inches by 132 feet 2 inches within which a part is outlined in red and marked "Steinberg's". I can find nothing in the lease or the sketch to support the view that the words "the demised premises" do not include whatever should from time to time become a part of the parcel of land demised.

Had it been the intention of the parties that the lessee should pay a proportion of the municipal taxes in the ratio of the assessed value of its fixtures to the assessed value of the land and building excluding the fixtures it would have

[1] (1876), 1 App. Cas. 762.

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been a simple matter to so provide in the lease, and it would seem probable that some form of procedure would have been provided for determining what proportion of the total assessment was attributable to the value of the fixtures, for the notice of assessment would not place any separate value on fixtures.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Lerner, Lerner, Bradley & Cherniak, London.

Solicitors for the defendant, respondent: Siskind, Taggart & Cromarty, London.

1966

*Oct. 21, 24, 25

1967

May 23

CURL-MASTER MANUFACTURING COMPANY LIMITED (*Plaintiff*) ... APPELLANT;

AND

ATLAS BRUSH LIMITED (*Defendant*) .. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Validity—Curling broom—Reissue patent—Original patent not disclosing essential element of invention—Whether deficiency remediable by reissue patent—Patent Act, R.S.C. 1952, c. 203, s. 50.

In 1955, one F.M. developed a new type of curling broom. In March 1958, a patent was issued to the inventor and was assigned to the plaintiff in January 1959. The latter, in March 1962, petitioned for a reissue of its patent, stating that it was deemed defective because of insufficient description or specification and because, in certain respects, the inventor had claimed more and, in others, less than he had the right to claim as new. On January 1963, a reissue patent was issued to the plaintiff pursuant to s. 50 of the *Patent Act*, R.S.C. 1952, c. 203.

The plaintiff sued the defendant in respect of alleged infringement of these patents and sought a declaration that, as between the parties, the original patent was valid up to the date of the reissuance and that the latter was a valid patent. The defendant counterclaimed for a declaration that both patents were invalid. The action was dismissed by the trial judge and the declaration of invalidity was granted. The trial judge held that the broom in question was the embodiment of an invention of which F.M. was the inventor, but that the inventiveness was neither disclosed nor claimed in the original surrendered patent

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

and that s. 50 of the *Patent Act* did not authorize the grant of a reissue patent for an invention that had not been disclosed or claimed by the original patent. The plaintiff appealed to this Court.

Held: The appeal should be allowed.

The patent was defective by reason of insufficient description, and this resulted from mistake, *i.e.*, a failure by the patent attorney fully to comprehend and to describe the invention for which he had been instructed to seek a patent. This was a proper case for the application of s. 50 of the *Patent Act*, and the Commissioner was entitled to grant a reissue patent.

The contention that s. 50 only permits the granting of a reissue patent to the original patentee and not to an assignee, could not be entertained. The rights provided in the reissue section of the Act are not restricted to the original patentee solely.

The further contention that s. 50 was not applicable because the original patent had not been surrendered within 4 years from its date as required by s. 50(1) could not be entertained. The surrender of the patent required under s. 50(1) refers to the step taken by the applicant for the reissue patent when he makes his application. It is that step which must be taken within the stipulated 4-year period, and this was done in this case.

Brevets—Contrefaçon—Validité—Balai pour le jeu de curling—Redélivrance de brevet—Brevet original ne révélant pas les éléments essentiels de l'invention—Manquement peut-il être remédié par redélivrance d'un nouveau brevet—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 50.

En 1955, un nommé F.M. a développé un nouveau genre de balai pour le jeu de curling. Au mois de mars 1958, un brevet a été accordé à l'inventeur et a été subséquemment cédé à la demanderesse en janvier 1959. Cette dernière, en mars 1962, a présenté une requête pour obtenir la délivrance d'un nouveau brevet, déclarant que son brevet était jugé être défectueux à cause d'une description ou spécification insuffisante et parce que, à certains égards, l'inventeur avait revendiqué plus qu'il n'avait droit de revendiquer à titre d'invention nouvelle et, à d'autres égards, il avait revendiqué moins. En janvier 1963, un nouveau brevet a été délivré à la demanderesse en vertu de l'art. 50 de la *Loi sur les Brevets*, S.R.C. 1952, c. 203.

La demanderesse a poursuivi la défenderesse pour violation de ces deux brevets et a tenté d'obtenir une déclaration à l'effet que, entre les parties, le brevet original était valide jusqu'à la date de redélivrance et que le nouveau brevet était valide. La défenderesse, par contre-demande, a tenté d'obtenir une déclaration à l'effet que les deux brevets étaient invalides. L'action a été rejetée par le juge au procès et la déclaration d'invalidité a été accordée. Le juge au procès a jugé que le balai en question était l'incarnation d'une invention dont F.M. était l'inventeur, mais que le génie inventif n'avait été ni révélé ni revendiqué dans le brevet original et que l'art. 50 de la *Loi sur les Brevets* n'autorise pas la délivrance d'un nouveau brevet pour une invention qui n'a pas été révélée ou revendiquée dans le brevet original. La demanderesse en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

1967

CURL-MASTER MFG. CO. LTD. v. ATLAS BRUSH LTD.

Le brevet était défectueux à cause d'une description insuffisante, et ceci était le résultat d'une méprise, *i.e.*, le défaut de l'avocat des brevets de comprendre et de décrire l'invention pour laquelle il avait reçu instruction d'obtenir un brevet. Ceci est un cas approprié pour l'application de l'art. 50 de la *Loi sur les Brevets*, et le commissaire avait le droit d'accorder un nouveau brevet.

La prétention que l'art. 50 permet d'accorder un nouveau brevet seulement au détenteur original et non pas à celui à qui il a été cédé, ne peut pas être maintenue. Les droits accordés dans la partie de la loi traitant de la redélivrance ne sont pas restreints seulement au détenteur original du brevet.

Une autre prétention à l'effet que l'art. 50 ne s'appliquait pas parce que le brevet original n'avait pas été abandonné dans un délai de 4 ans à compter de la date de son émission, tel que requis par l'art. 50 (1), ne peut pas être maintenue. L'abandon du brevet requis en vertu de l'art. 50(1) réfère à la démarche prise par le requérant pour obtenir un nouveau brevet lorsqu'il présente sa requête. C'est cette démarche qui doit être faite dans la période stipulée de 4 ans, et ceci a été fait dans cette cause.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1] en matière de contrefaçon de brevet. Appel maintenu.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1] in a matter of infringement of a patent. Appeal allowed.

Miss Joan Clark and *Malcolm E. McLeod*, for the plaintiff, appellant.

Walter C. Newman, Q.C., and *Edwin A. Foster*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a patent, numbered 554,826, issued on March 25, 1958, to Fernand Marchessault, in respect of the invention of a new style of curling broom, and a reissue of the patent, numbered 656,934, issued on January 29, 1963, to the appellant company, the assignee of Fernand Marchessault, of which he is the president and principal shareholder. The appellant sued the respondent in the Exchequer Court[1] in respect of alleged infringement of these patents, and seeking a declaration that, as between the parties, the former patent was valid

[1][1966] Ex. C.R. 4, 31 Fox Pat. C. 1, 48 C.P.R. 67.

up to the date of the reissuance and that the latter was a valid patent. The respondent counterclaimed for a declaration that both patents were invalid. The action was dismissed and the declaration sought in the counterclaim was granted. The facts, as outlined in the reasons for judgment at trial, are substantially repeated here:

Prior to 1955, the brooms employed in Canada by participants in the game of curling were normally like ordinary kitchen brooms except that the straws were substantially longer. Such a broom consisted of a cylindrical wooden handle to one end of which was attached a bundle of straws of some suitable kind, the bundle of straws being pressed into a roughly flat broad shape and held in that shape by a number of tight bindings (three or four) near the handle. The opposite sides of these bindings were so stitched together through the straws that they held the bundle of straws in the flat broad shape. These bindings were attached by a machine process and are hereafter referred to as the factory bindings. Such brooms were employed in the game of curling to sweep the ice on which the game is played, in front of the curling stone as it travelled down the ice while in play. Among others, such brooms had the following characteristics:

(a) As the straws were all of approximately the same length, the outside straws tended, under the influence of vigorous sweeping, to break off at the lowest factory binding.

(b) As there was a relatively long distance between the lowest factory binding and the part of the broom that came in contact with the ice, the straws tended to spread out on coming in contact with the ice, thus diminishing the force which would otherwise be applied to the ice at the particular place that the player intended to sweep.

About the end of 1953, Fernand Marchessault became interested in breaking into the business of making and selling curling brooms in Canada. In the course of attempting to do so, he developed a new type of curling broom which differs from the type of curling broom above described in that

(a) it has a "short outer skirt" of straws surrounding the straws that come in contact with the ice (referred to as

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the "sweeping straws")—the outer straws, not being as long as the sweeping straws, are not subject to pressure from the ice and are not as likely to break against the factory binding; they also supply support for the sweeping straws and provide protection to the loose lower binding hereinafter referred to; and

(b) it has a binding around the sweeping straws about half-way between the lower factory binding and the sweeping end of the broom; such binding is applied by hand and not by machine and is loose enough so that the straws can move in relation to it but it is tight enough and it has its opposite sides so stitched together that the sweeping straws are held together and cannot spread appreciably in any direction. This loose lower binding is attached by cords to the lowest factory binding so that it will not slide off the sweeping end of the broom.

This new style broom is narrower and thicker than the old style broom.

In the fall of 1955, Marchessault introduced brooms of this kind to curlers in various parts of Canada and almost immediately they became very popular. Curlers in substantial numbers preferred them to the old style broom because the short outer skirt solved, to a considerable extent, the very troublesome problem of broken straws and because the loose lower binding kept the sweeping straws together in such a way that much greater force could be applied to the ice that it was desired to sweep. In addition, the concentration of straws enabled some curlers to develop a rhythmic beat.

Commercial success followed the introduction of this broom both for Marchessault and the appellant, and for various competitors who imitated his new style broom.

On March 1, 1956, Marchessault filed an application for a Canadian patent and on March 25, 1958, Patent No. 554,826 was issued to him pursuant to that application. The specification reads as follows:

La présente invention se rapporte à un nouveau balai destiné particulièrement pour le jeu de curling.

Le but principal de l'invention est d'obtenir un balai de grande élasticité et de grande souplesse.

Un autre but de l'invention est d'obtenir un balai dont les fibres le composant sont de grande longueur sans risque de se disloquer ni de se briser.

Encore un but de l'invention est d'obtenir un balai qui est souple et bien monté.

Encore un but de l'invention est d'obtenir un balai homogène dont la qualité des fibres ne varie pas.

Encore un but de l'invention est d'obtenir un balai qui est très fort c'est-à-dire en rapport avec le volume de fibres qui le compose de sorte qu'il peut durer longtemps, les bouts ne se fendant pas et ne produisant pas de fentes.

Enfin, encore un but de l'invention est d'obtenir un balai du but et caractère décrits qui est de construction rationnelle et constitue une innovation très précisée dans le monde du curling.

Dans les buts précités, l'invention consiste en un faisceau plat de longues fibres végétales fixées sur un bout d'un manche. Le faisceau est à deux étages c'est-à-dire que les fibres extérieures ne se rendent pas à l'extrémité. Comme tous les balais, à courte distance de la fixation au manche, le faisceau de fibres comporte plusieurs ligatures transversales qui sont cachées par une gaine de toile. Les fibres se rendant à l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

J'obtiens les buts précités au moyen de l'invention illustrée dans les dessins ci-joints et dans lesquels:

La figure 1 est une vue en élévation d'un balai construit selon l'invention;

La figure 2 est une vue semblable à celle de la figure précédente, sauf qu'elle est partiellement en coupe;

La figure 3 est une vue de côté; et

La figure 4 est une autre vue de côté et illustrant l'emploi de l'invention.

Dans la description qui suit et les dessins qui l'accompagnent les chiffres semblables renvoient à des parties identiques dans les diverses figures.

Comme tous les balais, le balai constituant la présente invention comporte un manche 1 à un bout duquel est fixé un faisceau de fibres végétales 2. Ces fibres sont de préférence des fibres simples et résistant à l'eau. Elles peuvent toutefois être de tampico tiré de feuilles d'un agrave du Mexique, de coco provenant de fibres entourant la noix de coco, de paille de sorgho, ou de piassava provenant de palmiers de l'Amérique du Sud. L'invention ne réside cependant pas dans le choix de fibres mais plutôt dans la construction de balai. Celui-ci est relié au manche 1 par une forte ligature de broche 3 et le joint caché par une bague métallique tronconique 4 elle-même fixée par une autre ligature de fil métallique 5.

A courte distance de la fixation au manche, le faisceau 2 comporte plusieurs ligatures transversales et parallèles 6 à l'aide de cordelettes. Dans les dessins, ces ligatures sont au nombre de quatre. Une cinquième ligature 7 est formée un peu plus bas dans un but qui sera expliqué plus loin. Ces ligatures sont cachées par une gaine de toile 8 dont la surface peut recevoir un texte publicitaire ou un écusson d'un club de curling.

Le faisceau 2 est obtenu de fibres végétales très longues qui forment deux groupes d'inégales longueurs. Les fibres intérieures 9 sont les plus longues et les autres 10 formant le tour des premières sont les plus courtes.

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Au point du vue apparence le bout du faisceau est à deux étages. Les fibres le plus longues 9 comportent une ligature transversale 11 sous les fibres 10 de sorte qu'elle est invisible à l'œil. Pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à toute autre partie fixe du balai par des cordelettes 12 ou tout autre lien.

Dans l'emploi de l'invention, particulièrement pour le jeu de curling où le palet lancé par le joueur doit glisser sur la glace, le balayage facilitant le parcours doit s'effectuer rapidement et couvrir beaucoup de surface. Le balai constituant la présente invention permet un emploi rapide sans risque de briser les fibres. Ces dernières qui sont longues conservent leur homogénéité tel que la figure 4 des dessins l'illustre. Les fibres 9 se courbent sous la poussée et ne se mélangent pas avec les fibres 10. Les fibres 10 constituent un arc-boutant pour les fibres et ces dernières conservent cette hommogénéité grâce à la ligature 11. En même temps les fibres 10 protègent la ligature 11 intérieure contre l'usure et servent de garde aux fibres longues pour les empêcher de briser. Le balai peut donc être ployé dans les deux sens sans qu'il ne puisse se briser.

Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se départe pas de son esprit tel que réclamé dans les revendications qui suivent.

Les réalisations de l'invention au sujet desquelles un droit exclusif de propriété ou de privilège est revendiqué, sont définies comme suit:

1. Un balai formé d'un faisceau de fibres fixées à un bout d'un manche, lesdites fibres étant à deux étages c'est-à-dire que les fibres sont en deux groupes d'inégales longueurs, ledit groupe de fibres plus longues que celles de l'autre groupe formant le centre du faisceau tandis que ledit autre groupe l'entoure.

2. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure.

3. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues auxdites ligatures dudit autre groupe.

4. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues par cordelettes auxdites ligatures dudit autre groupe.

The drawings appear on the following page.

On January 28, 1959, Marchessault assigned this patent to the plaintiff.

In connection with the application for Patent No. 554,-826, Marchessault was represented by a patent attorney whose name was Albert Fournier. Fournier, in February 1957, also made an application on behalf of Marchessault for an invention concerning curling brooms under the United States patent legislation.

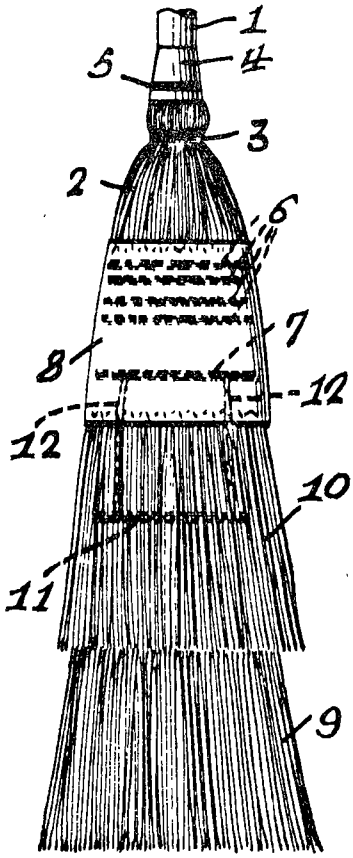

Fig. 1

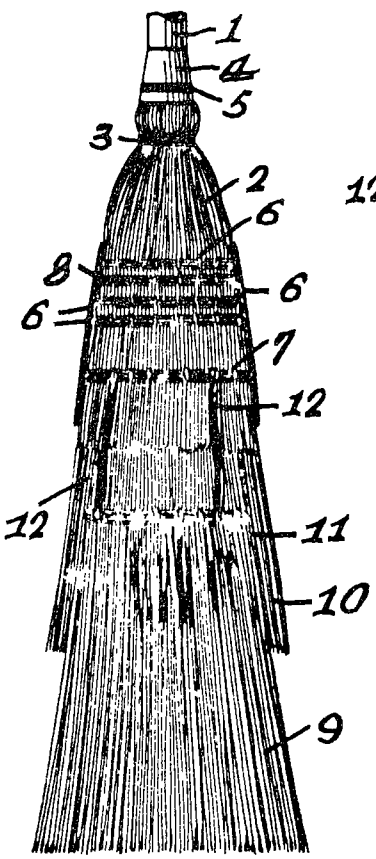

Fig. 2

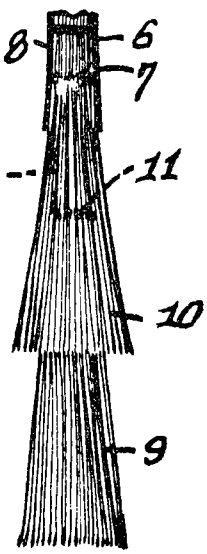

Fig. 3

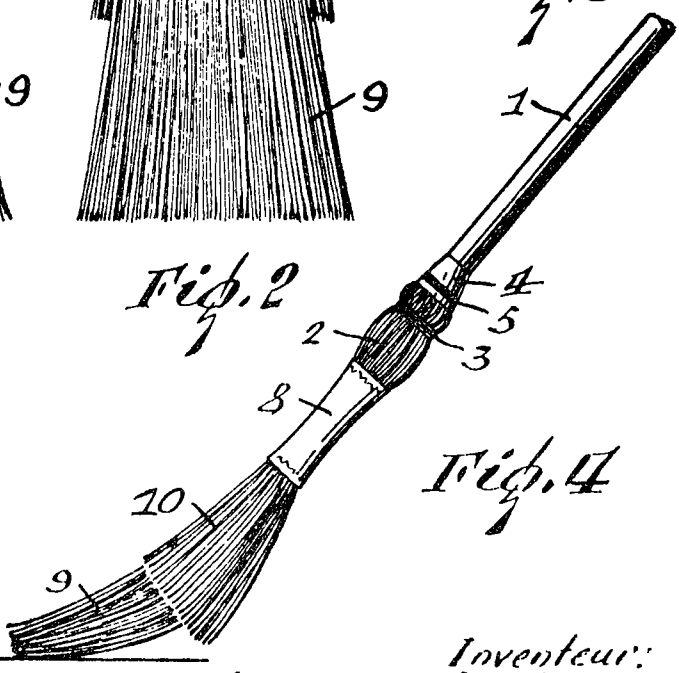

Fig. 4

Inventeur:
Bernard Marchessault
Agent de brevet

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The claims put forward in the original United States application were not in the same terms as the claims subsequently allowed in the Canadian patent, but they followed the same general lines. They were all rejected by the United States Patent Office on the ground that they were anticipated by prior patents. In May 1959, Fournier was replaced by Pierre Lesperance as Marchessault's attorney in connection with this United States application. After some negotiation, a United States patent issued, on May 16, 1961, containing a number of claims, of which the first, second and fifth read as follows:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of long fibers, closely spaced bindings extending around said fibers, an additional flexible binding loosely surrounding and loosely stitched through said fibers and slidable relative to said fibers and spaced from said first named bindings a distance about half way between the sweeping end of the broom and said closely spaced bindings, and flexible ties having one end connected to said additional binding and having their other end fixed with respect to said first named bindings in order to prevent slipping of said additional binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch, and an outer bunch of fibers, substantially closely spaced bindings extending around the two bunches of fibers, and an additional binding surrounding only the central bunch of fibers and covered by the fibers of the outer bunch, said additional binding being spaced from said first named bindings a distance about half way between said first named bindings and the sweeping ends of said fibers.

* * *

5. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of relatively long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, closely spaced cord bindings extending around the two bunches of fibers, and an additional cord binding surrounding only said central bunch of fibers and covered by the free end portions of the fibers of the outer bunch, said additional cord binding being spaced from said first named cord bindings a distance about half way between said first named cord bindings and the sweeping ends of said fibers.

On March 21, 1962, the appellant petitioned for reissue of its patent, stating that it was deemed defective because of insufficient description or specification and because, in certain respects, the appellant had claimed more and, in others, less than he had the right to claim as new.

The petition then went on to state:

That the respects in which the patent is deemed defective are as follows: In the description of the Patent there is insufficient description as to the purpose of the low binding 11 and of the ties 12.

The low binding 11 actually prevents spreading apart of the long fibers during sweeping. In the description of the original Patent this is only mentioned in an inferential way on page 6, line 11, wherein it is stated "et ces dernières conservent cette homogénéité grâce à la ligature 11". (translation, page 3, line 27, "which keep this homogeneity thanks to binding 11".)

Furthermore, the description of the original Patent only mentions in an inferential way that the low binding surrounds and is loosely stitched through the fibers as follows: Page 4, lines 6, 7 and 8: "Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer." (translation, page 1, lines 28, 29 and 30: "This last binding is attached by small strings to the top bindings in order that it cannot move.") Page 5, line 25, "pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à tout autre partie fixe du balai par des cordelettes 12, ou tout autre lien". (translation, page 3, lines 15, 16, 17: "In order that this binding does not move, it is attached to binding 7 or to any stationary part of the broom by small strings 12 or any other tie.")

In accordance with the invention it is important that said low binding 11 be stitched loosely enough in order to slide on the fibers so as to allow flexibility in the bending of the fibers during sweeping.

Claim 1 of the Patent, which claims the broad idea of having a broom head of stepped formation with a central group of long fibers and an outer group of shorter fibers forming a skirt surrounding the central group, is probably somewhat too broad in view of U.S. Patent: Struve—1,115,255—October 27, 1914.

Claim 2 of the Patent which mentions the bindings surrounding the center bunch of fibers and surrounded by the outer bunch of fibers depends on claim 1 and is deemed too restricted because the Patentee's broom could very well be made without the skirt or outer bunch of shorter fibers. Such a broom is certainly operative as a curling broom and the low binding 11 would continue to exert its essential function although it will last a shorter time because of the absence of the protection afforded by the skirt of outer fibers.

Claims 3 and 4 of the Patent are also defective for the reasons given in connection with claim 2.

That the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention in the following manner:

That the patent application which resulted in the above noted Patent was prepared by Albert Fournier in the month of February 1956 at which time Mr. Fournier was suffering from a heart condition which somewhat impaired his work efficiency; Mr. Fournier died in fact in August 1958. Therefore, he did not fully comprehend the purpose of/and working of the low binding 11 and of the importance of ties 12 of the inventor's broom. On the other hand, the inventor himself was not fully conversant with the requirements of a patent application to wit the fact that he delegated to Mr. Fournier the task of preparing a patent application and obtaining a patent for his invention. Moreover, the Canadian Examiner only cited against the original patent application, U.S. Patent 2,043,758—Lay—June 9, 1936. Therefore the Patent issued without knowledge either by the Patentee, his Patent Agent, or the Canadian Office, of a prior Patent teaching that it was known to have a broom with a stepped construction which might render claim 1 of the Patent invalid.

That knowledge of the new facts stated in the amended disclosure and in the light of which the new claims have been framed was obtained by

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Your Petitioner on or about the last days of December 1958, in the following manner: At that time an official action had been received from the U.S. Examiner citing the Struve U.S. Patent mentioned above against the Patentee's corresponding U.S. patent application Serial No. 640,676 dated February 18, 1957. Copy of this Patent was ordered from the Patent Office and it was then discovered that it showed the stepped construction of Applicant's U.S. claim 1 which at that time somewhat corresponded to claim 1 of the Canadian Patent. In December 1958, the Canadian Patent was already issued. In view of the situation of the U.S. patent application at that time, it was decided to await the issue of the U.S. Patent before initiating re-issue procedure in the Canadian Patent. The eventual U.S. Patent claiming the Patentee's invention finally issued on May 16, 1961, under U.S. Patent 2,983,939.

On January 29, 1963, Patent No. 656,934 was issued as a "reissue" patent pursuant to s. 50 of the *Patent Act*, R.S.C. 1952, c. 203. The specification reads in part as follows:

The present invention relates to a new broom specifically adapted for the game of curling.

In the game of curling, brooms are used for sweeping the ice ahead of the stone sliding on the ice. This has the effect of removing dirt or ice particles and temporarily melting the sandy like frost which covers the ice surface thus making it more slippery so that the stone will travel farther.

Prior to the present invention, brooms identical in construction to household brooms were used for curling, except that they had longer fibers than household brooms. Conventional household brooms comprise a wooden handle or staff to the lower end of which a head is attached, said head consisting of fibers usually secured to the staff and held together as a bunch by means of a wire binding and also by several cord bindings spaced from each other, surrounding the fibers and stitched through the fibers in a tight manner. Because these cord bindings are located in the upper part of the broom head and that the fibers of the broom head are long, the fibers had a tendency to spread excessively when the broom was used for sweeping the ice, and to break, especially at the lowermost cord binding, rendering the old time broom ackward (sic) to use.

It is the general object of the present invention to provide a curling broom which obviates the above disadvantages and which more particularly prevents spreading apart of the fibers of the conventional curling brooms when the broom head is pressed on the ice.

Other objects of the present invention reside in the provision of a curling broom which is of light weight construction and is easy to manipulate and efficient for ice sweeping in the game of curling, and which has a long life because the fibers do not break easily.

The broom in accordance with the present invention is essentially characterised by the provision of low binding stitched loosely enough to slide on the fibers and spaced a substantial distance downward towards the outer ends of the fibers from the conventional cord bindings of the broom, said low cord binding preventing the fibers from spreading apart and maintaining the bunch of fibers in flat condition while at the same time allowing the individual fibers to curve freely when the broom is pressed on the ice, due to the fact that the low binding can slide along the fibers. Thus, the flexibility of the fibers is not impaired.

In accordance with the invention, the low binding is prevented from sliding off the outer end of the fibers by being attached by flexible ties.

In accordance with another characteristic of the invention, the main bunch of fibers is surrounded by an outer bunch of shorter fibers defining a skirt and overlying the low cord binding so as to protect the same against wear as it is known that when the broom is manipulated, the low cord binding due to its very low level position strikes the ice during sweeping motions.

(At this point there is a description of how to make an embodiment of the invention.) . . . . .

While a preferred embodiment in accordance with the present invention has been illustrated and described, it is understood that various modifications may be resorted to without departing from the spirit and scope of the appended claims.

THE EMBODIMENTS OF THE INVENTION IN WHICH AN EXCLUSIVE PROPERTY OR PRIVILEGE IS CLAIMED ARE DEFINED AS FOLLOWS:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of fibers and including fiber binding means in the zone of said head attached to said staff, a low flexible binding surrounding and stitched loosely enough through said fibers to be slidable relative to said fibers, and spaced a substantial distance from said fiber binding means and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch and an outer bunch of fibers and including bindings extending around the two bunches of fibers, a low binding surrounding and loosely stitched through the central bunch of fibers only, slidable with respect to said central bunch of fibers and covered by the fibers of the outer bunch, said low binding being spaced a substantial distance from said first named bindings, and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

3. A broom as claimed in claim 2, wherein said outer bunch is constituted by fibers shorter than the fibers of the central bunch, whereby said outer bunch forms a skirt surrounding the upper part of the central bunch, said low binding being disposed underneath and covered by the free end portion of the fibers of the outer bunch.

4. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, said head including bindings extending around the two bunches of fibers, and a low flexible binding surrounding and loosely stitched through said central bunch of fibers only and slidable relative to the fibers of said central bunch and covered by the free end portions of the fibers of the outer bunch, said low binding being spaced about half way between said first named bindings and the sweeping ends of said long fibers, and flexible ties attached to the low binding at one end and having their other end connected to said head in order to prevent slipping of said low binding off the fibers of said central bunch.

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The learned trial judge made findings of fact, which are supported by the evidence, as follows:

I find as a fact that the broom that Marchessault put on the market in the fall of 1955 was the embodiment of an invention of which Marchessault was the inventor. Leaving aside the element of the short outer skirt as a protection against the breaking of the sweeping straws at the bottom factory binding and as a support for the sweeping straws, in my opinion, the loose lower cord around the sweeping straws a substantial distance down the broom from the factory bindings (which I have already described), by virtue of its effect of keeping the sweeping straws in a compact bundle without interfering with their flexibility, created a curling broom that was substantially different from the brooms previously used by curlers and definitely more satisfactory to them. It was not anticipated in my view by any of the earlier patents or by Ken Watson's personal practice of putting a loose string an inch or so below the factory binding (Ken Watson himself admitted that Marchessault deserved the credit for getting the loose string "down there" although he thought that his loose string involved the same principle). The new element was relatively simple, it is true. It resulted, however, in a radically different broom that was so much more useful (judged by the assessment of those who used curling brooms) that it immediately came into great demand. There is no doubt in my mind that it was an "invention" within the meaning of the *Patent Act* in the sense that it was "new" and "useful". It was an inventive step forward. I also find that the combination of the element of the loose lower binding and the element of the short outer skirt as a means of protecting the loose lower binding from wear also constituted an invention for the same reasons.

Section 50 of the *Patent Act*, which governs the reissue of patents, provides as follows:

50. (1) Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for the then unexpired term for which the original patent was granted.

(2) Such surrender takes effect only upon the issue of the new patent, and such new patent and the amended description and specification have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if such amended description and specification had been originally filed in their corrected form before the issue of the original patent, but in so far as the claims of the original and reissued patents are identical such surrender does not affect any action pending at the time of reissue nor abate any cause of action then existing, and the reissued patent to the extent that its claims are identical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent.

(3) The Commissioner may entertain separate applications and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a reissue for each of such reissued patents.

The learned trial judge relied upon the statement of Maclean J., as to the purpose of s. 50, in *Northern Electric Company Ltd. v. Photo Sound Corporation*[1]:

. . . the purpose of a re-issue is to amend an imperfect patent, defects of statement or drawings, and not subject-matter, so that it may disclose and protect the patentable subject-matter which it was the purpose of that patent to secure to its inventor. Therefore the re-issue patent must be confined to the invention which the patentee attempted to describe and claim in his original specification, but which owing to "inadvertence, error or mistake," he failed to do perfectly; he is not to be granted a new patent but an amended patent. An intolerable situation would be created if anything else were permissible. It logically follows of course, that no patent is "defective or inoperative" within the meaning of the Act, by reason of its failure to describe and claim subject-matter outside the limits of that invention, as conceived or perceived by the inventor, at the time of his invention.

He also referred to the reasons of Duff C.J., in the same case[2]:

First of all, the invention described in the amended description or specification and protected by the new patent must be the same invention as that to which the original patent related.

and at page 652:

The statute does not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The tenor of the section decisively negatives any intention to make provision for relief in such a case.

Section 50 of the *Patent Act* was recently considered in this Court in *Farbwerke Hoechst Aktiengesellschaft v. The Commissioner of Patents*[3]. In that case reference was made to the judgment of the Supreme Court of the United States in *Mahn v. Harwood*[4] which defined the purpose of the American provision as to reissue as being "to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments".

Commenting on this statement, this Court went on to say, at p. 614:

Used in this sense, the word "mistake" means that a written instrument does not accord with the true intention of the party who prepared it. A person relying upon a mistake under s. 50 would have to establish that the patent which was issued did not accurately express the inventor's

[1] [1936] Ex. C.R. 75 at 89, 2 D.L.R. 711.
[2] [1936] S.C.R. 649 at 651, 4 D.L.R. 657.
[3] [1966] S.C.R. 604, 33 Fox Pat. C. 99.
[4] (1884), 112 U.S. 354 at 363.

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intention with respect to the description or specification of the invention or with respect to the scope of the claims which he made. This view appears to me to coincide with that expressed by Chief Justice Duff in relation to the word "inadvertence" in *Northern Electric Company Ltd. v. Photo Sound Corporation*, (1936) S.C.R. 649 at 661, 4 D.L.R. 657, cited by the respondent in his reasons for the refusal of the appellant's petition.

In that case, unlike the present, the Commissioner of Patents had refused to reissue the patent. The patent in respect of which reissue was sought was subsequently held to be invalid by another decision of this Court, in respect of the product tolbutamide, because of the absence of a valid process claim as required by s. 41 of the Act. In the light of that situation it was said, at p. 615:

> Section 50 deals only with a patent which is defective or inoperative. In my opinion it contemplates the existence of a valid patent which requires reissue in order to become fully effective and operative. In the present case, in so far as the substance tolbutamide is concerned, the patent for which reissue is sought has been held by this Court to be invalid.

The reason for dismissing the appellant's claim and for allowing the counterclaim is stated by the learned trial judge as follows:

> In my view, a reissue patent under section 50 of the *Patent Act* can replace a defective or inoperative patent with a valid patent by substituting a sufficient description or specification for an insufficient description or specification or by adding or omitting claims but it cannot be for any invention other than an invention disclosed by the original patent. The invention that is embodied in the brooms that Marchessault put on the market in 1955, prior to applying for either patent, and that is disclosed in Patent No. 656,934, the reissue patent, is not disclosed in Patent No. 554,826, and Patent No. 656,934 is therefore invalid.

The main question in issue on this appeal is, therefore, whether there was, in relation to Patent No. 554,826, a complete failure to disclose Marchessault's invention, so as to render that patent invalid, as failing to disclose any invention, or whether there was an imperfect description of the appellant's invention which would render the patent defective, but still capable of correction by reissue, if such imperfection resulted from error or mistake.

The facts in the *Northern Electric Company* case are not comparable to those in the present one. In that case, the inventor, Arnold, an accomplished physicist, a competent radio engineer and inventor, accustomed to framing specifications, had obtained a patent for an invention relating to receiving systems for radio communication, par-

ticularly to devices for limiting the electrical power which might be transmitted to a receiving instrument in such a system. He sought a reissue patent which would have extended its scope so as to include additional claims for certain new and useful improvements in radio communication.

At p. 659, Duff C.J. said:

> Now, I have no hesitation in drawing the inference that Arnold fully understood the scope and effect of the application of May 22nd, 1916, and of the specification in the original Canadian patent. He understood, that is to say, that he was excluding from the invention specified and claimed by him those devices and arrangements which are described and specified and claimed in the amendments in so far as we are presently concerned with such amendments. It is also very clear on the material before us that in the proceedings before the Commissioner leading up to the grant of the reissue patent no evidence was adduced to show that the specifications, the description or the claims of the original patent were insufficient to give effect to the intention of Arnold.

It was held that there was no defect in the original patent, in that there was no reasonable ground for apprehending that it was defective in failing sufficiently to describe the invention in respect of which the applicant intended to claim invention.

In the present case, Marchessault did intend to protect the invention which he had actually made. The patent which he obtained was defective in that it failed sufficiently to describe it. He was not an engineer, and had had no prior experience in relation to patents. He was a broom manufacturer, who had made a useful invention, which he sought to protect through the services of a patent attorney.

The invention which the learned trial judge found that Marchessault had made contained two features. The primary feature was that

> the loose lower cord around the sweeping straws a substantial distance down the broom from the factory bindings, by virtue of its effect of keeping the sweeping straws in a compact bundle without interfering with their flexibility, created a curling broom that was substantially different from the brooms previously used by curlers and definitely more satisfactory to them.

The secondary feature was the protection of the loose lower binding by the short outer skirt.

Does the first patent contain a description, albeit imperfect, of that which he had invented? The secondary feature, i.e., the protective short outer skirt, is adequately described. The question is as to the description of the loose lower

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binding, surrounding the sweeping straws. It is referred to in the description of the invention in the following terms:

Les fibres se rendant à l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

The attachment of this binding to the upper binding is thus made so that it will not get out of place, i.e., shift its position in the course of manipulating the broom.

It is referred to again, in the following manner:

Pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à toute autre partie fixe du balai par des cordelettes 12 ou tout autre lien.

* * *

Les fibres 9 se courbent sous la poussée et ne se mélangent pas avec les fibres 10. Les fibres 10 constituent un arc-boutant pour les fibres et ces dernières conservent cette homogénéité grâce à la ligature 11. En même temps les fibres 10 protègent la ligature 11 intérieure contre l'usure et servent de garde aux fibres longues pour les empêcher de briser.

Claim 4 reads:

4. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues par cordelettes auxdites ligatures dudit autre groupe.

The use of the term "suspendues" is, I think, significant. It is descriptive of a binding which hangs from the upper bindings and, as indicated in the other quoted portions of the description, is attached thereto in order that it will not be displaced. The drawings which formed a part of the specification show the position of the lower binding and illustrate the fact that it is in suspension from the upper binding.

It is, I think, proper to consider the drawings with a view to comprehending the invention which the appellant was seeking to describe. In the case of *In re Leonard*[1] Cassels J., when considering the application of the section governing reissue patents, adopted the reasons of Blatchford J. in *Wilson v. Coon*[2], which he cites. He quoted from those reasons at p. 363:

The new patent must be for the same invention. This does not mean that the claim in the reissue must be the same as the claim in the original. A patentee may, in the description and claim in his original patent, erroneously set forth as his idea of his invention something far short of his

[1] (1913), 14 Ex. C.R. 351, 14 D.L.R. 364.
[2] Vol. 19 U.S. Off. Patent Gaz. 482.

real invention, yet his real invention may be fully described and shown in the drawings and model. Such a case is a proper one for a reissue. A patent may be inoperative from a defective or insufficient description, because it fails to claim as much as was really invented, and yet the claim may be a valid claim, sustainable in law, and there may be a description valid and sufficient to support such claim. In one sense such patent is operative and is not inoperative, yet it is inoperative to extend or to claim the real invention, and the description may be defective or insufficient to support a claim to the real invention, although the drawings and model show the things in respect to which the defect or insufficiency of description exists, and show enough to warrant a new claim to the real invention.

I do not think we are precluded from considering the drawings for assistance in determining the real purpose of the invention because of the statement contained in the patent:

> Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se départe pas de son esprit tel que réclamé dans les revendications qui suivent.

In my view this is a case of a patent which is defective by reason of insufficient description, and this resulted from mistake; i.e., a failure by the first patent attorney fully to comprehend and to describe the invention for which he had been instructed to seek a patent. In my opinion it was a proper case for the application of s. 50, and the Commissioner was entitled to grant a reissue patent.

The respondent raised two matters, in addition to those which are dealt with in the reasons of the Court below. It was contended that s. 50 only permits the granting of a reissue patent to the original patentee and not to an assignee. It was also submitted that the original patent had not been surrendered within four years from its date, as required by s. 50(1), and that, in consequence, the section was inapplicable.

The first argument is based upon the wording of s. 50 providing that the Commissioner may "cause a new patent, in accordance with an amended description and specification made by *such patentee,* to be issued to *him* . . ." It was pointed out that, whereas the predecessor of s. 50, s. 24 of the *Patent Act,* R.S.C. 1906, c. 69, had contained subs. 2 reading: "In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives", this subsection disappeared when the *Patent Act, 1935* (S.C. 1935, c. 32) was enacted. It does not appear in the present Act.

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In the *Patent Act*, as it appeared in the Revised Statutes of Canada, 1906, s. 2, the definition section contained no definition of the word "patentee". In chapter 23 of the Statutes of Canada, 1923, a definition of that word appears as follows: " 'patentee' means the person for the time being entitled to the benefit of a patent". The subsection dealing with the rights of an assignee or legal representatives was retained.

In 1935, chapter 32 retained the definition of a patentee in substantially the same form: " 'patentee' means the person for the time being entitled to the benefit of a patent for an invention", the same definition which appears in the present Act. However, the subsection dealing with the rights of an assignee or legal representatives was eliminated.

The section of the Act dealing with disclaimers contained, in the Revised Statutes of 1906, a subsection providing that: "In case of the death of the original patentee, or of his having assigned the patent, a like right shall vest in his legal representatives, any of whom may make disclaimer."

A similar provision has been carried forward down to and including the present Act.

The issue is as to whether the elimination from the section dealing with reissue of patents of the subsection dealing with the rights of assignees and legal representatives indicated an intention to restrict the rights provided in the reissue section to the original patentee solely.

In the absence of the enactment of the definition of the word "patentee" I would have thought that this would be so. That definition, however, appears to me to enable "the person for the time being entitled to the benefit of a patent for an invention" to exercise any of the rights conferred upon a "patentee" by the Act. Applying the definition in s. 50(1), it would read that:

> ...the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by *such person for the time being entitled to the benefit of* (the patent), to be issued to him...

I cannot see any reason, in principle, why the right of an assignee under the section, which had clearly existed until 1935, should be considered as having been taken away in the light of the existence of the broad terms of the definition of the word "patentee". I do not think the use of the

word "such" in s. 50(1) manifests that intention. It was not introduced for the first time in 1935, but had existed for many years before that.

Section 53 of the Act, which permits the assignment of the *whole interest* of a patentee by an instrument in writing, contemplates the assignment of all the rights of a patentee vested in him under the provisions of the Act.

The second contention is based upon subs. (2) of s. 50, which provides that the surrender of the original patent, which is a necessary requirement of an application for reissue under subs. (1), does not take effect until the issue of the new patent. Under subs. (1) the surrender is to be made within four years from the date of the original patent. In the present case the petition for reissue was dated March 21, 1962, the original patent having been issued on March 25, 1958, and the petition included a surrender of that patent. However, the reissue patent was not granted until January 29, 1963, at which date the surrender took effect. The respondent claims that, because of this, the surrender was not effected within the required four-year period.

I am not in agreement with this argument. The surrender of the patent required under subs. (1) refers to the step taken by the applicant for the reissue patent when he makes his application. It is that step which must be taken within the stipulated four-year period. Subsection (2) refers to "such surrender", i.e., that made by the applicant, and it then provides that that surrender becomes effective when the new patent issues. Subsection (1) is clearly referring to a step to be taken by the applicant within a limited time. He cannot be charged with non-compliance with the provision because of any subsequent delays which are beyond his control.

My conclusion is, therefore, that patent numbered 656,934 is a valid and subsisting patent. The learned trial judge has found as a fact that the respondent did manufacture some brooms, in the period since the issue of that patent, which fall within claim 3 of that patent.

I am not prepared to accede to the appellant's submission that claim 4 of the original patent is identical with claim 3 of the reissue patent so as to enable the appellant to take advantage of the provision in subs. (2) of s. 50 that "the reissued patent to the extent that its claims are iden-

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tical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent" and so that the surrender of the patent does not "abate any cause of action then existing".

In the result, the appellant is entitled to claim in respect of infringements of the reissue patent occurring after it was issued. It was agreed at the trial that, if the appellant had made out a case for one act of infringement of either patent, there would be a reference as to what acts of infringement had been committed and a reference as to the damages flowing from such acts of infringement, or a reference for an accounting of profits depending upon what relief the Court determines that the plaintiff is entitled to.

I would, therefore, allow the appeal, with costs in this Court and in the Exchequer Court. The appellant is entitled to a declaration that reissue Patent No. 656,934 is a valid and subsisting patent. The appellant is also entitled to a reference to determine what acts of infringement of that patent have been committed by the respondent and also to determine, at the election of the appellant, either what damages have flowed from such acts of infringement, or for an accounting of the profits derived therefrom, and judgment for such amount.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the defendant, respondent: Newman, McLean & Associates, Winnipeg.

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*Juin 12
Juin 26

ANTONIO HAMEL ..... APPELANT;

ET

LA CORPORATION DE LA VILLE D'ASBESTOS ..... INTIMÉE.

REQUÊTE POUR REJET D'APPEL

Appels—Requête pour rejet—Juridiction—Avis d'expropriation—Contestation—Irrégularités dans la procédure—Code de Procédure Civile, art. 1066e.

La municipalité a fait signifier à l'appelant un avis d'expropriation. Ce dernier contesta cet avis pour le motif que les formalités prescrites par

*CORAM: Les Juges Fauteux, Abbott, Ritchie, Hall et Spence.

la loi n'avaient pas été observées. La Cour supérieure rejeta cette contestation, et sa décision fut confirmée par la Cour d'Appel. L'appelant en appela devant cette Cour et la municipalité a produit une requête pour faire rejeter l'appel.

Arrêt: La requête pour rejet de l'appel doit être accordée.

Dans un langage clair et précis, l'article 1066e du *Code de Procédure Civile* déclare que l'exproprié peut, à l'encontre de l'avis d'expropriation, plaider que l'expropriant n'a pas le droit statutaire de recourir à l'expropriation, mais il ne peut pas plaider les irrégularités ou illégalités dans la procédure suivie pour exercer le droit à ce recours. Dans le cas présent, le droit de la municipalité au recours de l'expropriation n'est pas et ne saurait être contesté. Si l'appel était actuellement entendu au mérite suivant le cours ordinaire de la procédure, il serait rejeté.

De plus, cette Cour n'a pas juridiction pour entendre l'appel puisqu'il n'y a aucun montant en question et qu'aucune permission d'appeler n'a été demandée.

Appeals—Motion to quash—Jurisdiction—Notice of expropriation—Contestation—Procedural irregularities—Code of Civil Procedure, art. 1066e.

The municipality served a notice of expropriation on the appellant. The latter contested this notice on the ground that the formalities prescribed by the law had not been observed. The Superior Court dismissed this contestation, and its decision was affirmed by the Court of Appeal. The appellant appealed to this Court and the municipality moved to quash the appeal.

Held: The motion to quash the appeal should be granted.

In a clear and precise language, art. 1066e of the *Code of Civil Procedure* provides that the party being expropriated can oppose a notice of expropriation contesting the statutory right of the expropriating party to have recourse to expropriation, but cannot plead the irregularities or illegalities in the procedure followed. The municipality's statutory right was admitted. In view of this, if the appeal came on for hearing in the regular and ordinary way, it would be dismissed.

Furthermore, this Court was without jurisdiction since there was no amount in controversy at this stage and leave to appeal was not asked.

MOTION to quash an appeal from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Desmarais J. Motion granted.

REQUÊTE en rejet de l'appel d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Desmarais. Requête accordée.

[1] [1967] B.R. 483.

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Louis Langlais, c.r., pour la requérante-intimée.

Gilles Geoffroy, pour l'appelant.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Il s'agit d'une motion faite par l'intimée, la Corporation de la ville d'Asbestos, pour obtenir le rejet du présent appel logé par l'appelant sans permission préalable.

Les faits et procédures conduisant à cet appel sont très simples. Au cours du mois de mars 1965, l'intimée fit signifier à l'appelant un avis d'expropriation relativement à une propriété lui appartenant. L'appelant contesta cet avis en Cour supérieure. Il plaida que les formalités prescrites par la loi n'avaient pas été observées par la Corporation de la ville d'Asbestos et, plus particulièrement, que la résolution adoptée le 19 janvier 1965 par son Conseil pour autoriser l'expropriation de l'immeuble en question, était illégale, nulle et de nul effet. En conclusion, il demanda à la Cour de déclarer illégales, nulles et de nul effet la résolution et l'assemblée à laquelle elle avait été adoptée, et de déclarer aussi que l'avis d'expropriation était prématuré.

La Cour supérieure rejeta cette contestation. Elle considéra qu'aux termes de l'art. 1066e du *Code de procédure civile*, l'exproprié ne peut produire un plaidoyer, à l'encontre de l'avis d'expropriation, que pour contester le droit de l'expropriant au recours de l'expropriation et qu'au surplus, l'intimée avait, suivant la preuve, observé, en l'espèce, toutes les formalités prescrites par la loi pour l'exercice du droit à ce recours. La Cour déclara que l'avis était valide et déféra le dossier à la Régie des services publics pour arbitrer le montant de l'indemnité.

Portée en appel, cette décision de la Cour supérieure fut confirmée par un jugement unanime de la Cour du banc de la reine[1]. La *ratio decidendi* de ce jugement apparaît à l'extrait suivant des raisons données par M. le juge Owen, avec le concours de ses collègues:

> In my opinion Article 1066(e) C.P. (as amended by 1-2 Eliz. II Chap. 20) clearly provided that the notice of expropriation could only be opposed by contesting the right of the expropriating party to have recourse to expropriation and that this was the sole question that could be tried and

[1] [1967] B.R. 483.

adjudged on in virtue of such contestation. In the present litigation Hamel does not contest the right of the Town of Asbestos to have recourse to expropriation with respect to his property. Hamel contends that there were irregularities and illegalities in the procedure followed by the Town of Asbestos in exercising its right of expropriation. Such objections to procedure cannot in my opinion be raised on a contestation of the notice of expropriation.

De là le pourvoi à cette Cour.

Au soutien de sa motion pour rejet d'appel, l'intimée soumet que cet appel est frivole, qu'il constitue une mesure dilatoire et préjudiciable et que, de toute façon, cette Cour n'a aucune juridiction vu que le prix ou la valeur de la propriété de l'appelant ou l'indemnité à laquelle il peut avoir droit, sont ici nullement en question à ce stade des procédures d'expropriation.

Sur le mérite de la motion:—Le droit de la Corporation intimée au recours de l'expropriation n'est pas et ne saurait être contesté. L'article 1 de la *Loi 21 George V,* c. 134, tel qu'amendée par la *Loi 12-13 Elizabeth II,* c. 88, y pourvoit. L'article 4 de cette loi indique la procédure à suivre:

> 4. Au cas d'expropriation, l'indemnité sera fixée par la Régie des services publics de Québec à laquelle juridiction spéciale est conférée par la présente loi. L'expropriation se fera suivant les articles 1066(a) et suivants du Code de procédure civile.

L'article 1066d du *Code de procédure civile* déclare que l'avis d'expropriation est introductif d'instance et l'art. 1066e limite, dans les termes ci-après de la version française et de la version anglaise, les moyens que l'exproprié peut opposer à cet avis.

> 1066e. L'exproprié ne peut produire un plaidoyer à l'encontre de l'avis que pour contester le droit de l'expropriant au recours de l'expropriation; dans ce cas, la cause est instruite et jugée sur cette seule question et elle est soumise aux règles de procédure applicables en matières sommaires.
>
> 1066e. No party being expropriated may file any plea against the notice save to contest the right of the expropriating party to have recourse to expropriation; in such case, the case is tried and adjudged on that sole question and shall be subject to the rules of procedure applicable to summary matters.

Cette prohibition relative aux moyens de contestation est exprimée dans un langage clair et précis. Il n'y a pas lieu de recourir aux règles d'interprétation. Donnant effet à cette prohibition, je dirais, comme la Cour d'appel en cette cause et, antérieurement, dans celle de *Ministre de la Voirie de la province de Québec et Le Procureur général de la*

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province de Québec v. Melcar Inc. et autre[1], qu'au regard des termes de l'article 1066e, l'exproprié peut, à l'encontre de l'avis, plaider que l'expropriant n'a pas le droit statutaire de recourir à l'expropriation, mais non les irrégularités ou illégalités dans la procédure suivie pour exercer le droit à ce recours. J'ajouterais que si cet appel était actuellement entendu au mérite suivant le cours ordinaire de la procédure, il me paraît certain que cette Cour adopterait sur la question les mêmes vues que celles qui sont exprimées aux raisons de jugement de M. le juge Owen. En présence de cette situation, il convient, je crois, de suivre la règle de conduite adoptée par cette Cour en pareil cas et ainsi formulée par Sir Lyman P. Duff dans *Laing v. The Toronto General Trusts Corporation*[2]:

> It is the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal.

Assumant même le mal fondé des vues qui précèdent, je dirais que, pour les raisons ci-après, cette Cour n'a pas juridiction. Le droit statutaire de la Corporation au recours de l'expropriation est admis par l'appelant; le prix ou la valeur de sa propriété ou le montant à l'indemnité à laquelle il peut avoir droit, sont, à ce stade des procédures, nullement en question et étrangers à la matière en litige dans cet appel où la seule question posée par l'appelant est de savoir s'il a droit de plaider, à l'encontre de l'avis d'expropriation, les irrégularités et illégalités de la procédure. Il n'y a donc aucun montant ou valeur en jeu et, en l'absence d'une permission d'appeler qui n'a pas été demandée, cette Cour n'a pas juridiction pour entendre cet appel.

Je maintiendrais la motion pour rejet d'appel, avec dépens.

Requête accordée.

Procureur de l'appelant: J. G. Geoffroy, Asbestos.

Procureur de l'intimée: Louis Langlais, Asbestos.

[1] [1964] B.R. 191.

[2] [1941] R.C.S. 32 à 33, 1 D.L.R. 13.

HER MAJESTY THE QUEEN .....APPELLANT;

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*Feb. 23, 24
May 11

AND

PASQUALE NATARELLI, PAUL VOLPE, ALBERT VOLPE and EUGENE VOLPE ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Extortion—Belief that thing demanded was due—Whether a defence—Criminal Code, 1953-54 (Can.), c. 51, s. 291.

The respondents' acquittal at trial on a charge of extortion under s. 291 of the *Criminal Code* was affirmed by the Court of Appeal. The Crown was granted leave to appeal to this Court on the following question of law: Did the Court of Appeal err in law in holding that there was no evidence of an intent to extort or gain anything if the accused believed that the thing demanded was due and owing at the time the demand was made?

Held: The appeal by the Crown should be allowed.

When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be a reasonable justification or excuse for making them. In the present case, as found by the Court of Appeal, the threats which, according to the evidence were uttered, were of such a nature that it was impossible as a matter of law for there to have been any reasonable justification or excuse for making them.

Droit criminel—Extorsion—Croyance que la chose demandée était due—Est-ce une défense—Code Criminel, 1953-54 (Can.), c. 51, art. 291.

La Cour d'Appel a confirmé l'acquittement des intimés lors de leur procès pour extorsion en vertu de l'art. 291 du *Code Criminel*. La Couronne a obtenu permission d'en appeler devant cette Cour sur la question de droit suivante: La Cour d'Appel a-t-elle erré en droit en décidant qu'il n'y avait aucune preuve d'une intention d'extorquer ou de gagner quelque chose si l'accusé croyait que la chose demandée était due lorsque la demande en a été faite?

Arrêt: L'appel de la Couronne doit être maintenu.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Spence JJ.

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Lorsqu'il est prouvé que des menaces ont été proférées sans justification ou excuse, que les menaces ont été proférées avec l'intention de gagner quelque chose et dans le but d'induire la personne menacée à accomplir quelque chose, le crime dont la définition apparaît à l'art. 291 a été commis, et il n'est pas nécessaire de se demander si la personne proférant les menaces avait un droit légal à la chose demandée ou croyait honnêtement qu'elle avait un tel droit; cette enquête ne serait nécessaire que si les menaces étaient telles qu'il pouvait exister une justification ou excuse raisonnable de les proférer. Dans le cas présent, tel que jugé par la Cour d'Appel, les menaces, qui selon la preuve ont été proférées, étaient telles qu'il était impossible comme question de droit qu'il y ait eu une justification ou excuse raisonnable de les proférer.

APPEL de la Couronne d'un jugement de la Cour d'Appel de l'Ontario confirmant l'acquittement des intimés. Appel maintenu.

APPEAL by the Crown from a judgment of the Court of Appeal for Ontario affirming the respondents' acquittal. Appeal allowed.

C. M. Powell and *James Crossland,* for the appellant.

F. Stewart Fisher, for the respondent P. Volpe.

D. H. Humphrey, Q.C., for the respondents A. and E. Volpe.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from judgments of the Court of Appeal for Ontario pronounced on June 6, 1966, dismissing appeals by the Attorney General for Ontario from the acquittals of the above named respondents in December 1965, after trial before His Honour Judge Forsyth and a jury.

The four respondents were jointly charged; the indictment contained two counts which read as follows:

1. The jurors for Her Majesty the Queen present that Pasquale Natarelli, Paul Volpe and Albert Volpe, in the month of March in the year 1965, at the Municipality of Metropolitan Toronto in the County of York, without reasonable justification or excuse and with intent to extort or gain seventeen thousand, five hundred dollars ($17,500.00) in money, more or less, or one hundred thousand (100,000) free shares of Ganda Silver Mines Limited, by threats attempted to induce Richard Roy Angle

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to turn over to them, seventeen thousand, five hundred dollars ($17,500.00) in money, more or less, or one hundred thousand (100,000) free shares of Ganda Silver Mines Limited, contrary to the Criminal Code;

2. The said jurors further present that the said Pasquale Natarelli, Paul Volpe, Albert Volpe and Eugene Volpe, in the month of March in the year 1965, at the Municipality of Metropolitan Toronto in the County of York, conspired one with the other and with persons unknown, to commit an indictable offence, to wit, extortion, in that they did, without reasonable justification or excuse and with intent to extort or gain seventeen thousand, five hundred dollars ($17,500.00) in money, more or less, or one hundred thousand (100,000) free shares of Ganda Silver Mines Limited, by threats attempted to induce Richard Roy Angle to turn over to them, seventeen thousand, five hundred dollars ($17,500.00) in money, more or less, or one hundred thousand (100,000) free shares of Ganda Silver Mines Limited, contrary to the Criminal Code.

It will be observed that Natarelli, Paul Volpe and Albert Volpe were charged in Count 1 and all four respondents were charged in Count 2.

From these acquittals the Attorney General appealed to the Court of Appeal pursuant to s. 584(1)(*a*) of the *Criminal Code,* the grounds stated in each notice of appeal being as follows:

1. The learned Trial Judge erred in law in instructing the jury that if the accused honestly believed they were entitled to the 100,000 shares or the $17,500.00 that would constitute a defence.

2. The learned Trial Judge's charge to the jury was inadequate in law in that he failed to instruct the jury that the threat to inflict grevious bodily harm upon someone can never be considered reasonable or justified.

The appeals were dismissed for reasons delivered orally by Aylesworth J.A. on the conclusion of the argument.

On October 4, 1966, the appellant was granted leave to appeal to this Court on the following question of law:

Did the Court of Appeal for Ontario err in law in holding that there is no evidence of an intent to extort or gain anything if the accused believe that the thing demanded is due and owing at the time the demand is made?

The first count in the indictment follows the wording of subs. (1) of s. 291 of the *Criminal Code.* That Section in its entirety reads as follows:

291. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or to cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

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After commenting on the fact that the section was recently enacted and paraphrasing subs. (1), Aylesworth J.A. continued:

> In our view, "without reasonable justification or excuse" as well as "with intent to extort or gain anything", applies in the case at bar, to any attempt to induce by threats and the jury should have been so charged. It is not desirable that any attempt should be made and indeed judicial observations before this have been made to this effect—should be made I say, to define what is or is not reasonable justification or excuse. There may be, although it is somewhat difficult to visualize such a case, facts which would afford reasonable justification or excuse in attempting to induce some person to do anything by threats. Upon the evidence in this case, however, the only evidence of threats was as to threats to the life or limb of persons and on the facts of the case, those threats, if they were made, in our view could not be made with reasonable justification or excuse and therefore the question of reasonable justification or excuse in this case should have been withdrawn from the jury.
>
> We think, too, that as was the law before the enactment of present section 291 so is the law under that section with respect to extortion or intent to extort. We think the law still is that a case of extortion is not made out if that which it is attempted to secure from the person threatened, is due or owing to the person who makes the attempted inducement by threat or if the person making those threats entertains an honest belief that it is due and owing. With respect to the learned trial Judge, his charge as a whole is in our view, confusing and must have been as to certain elements of the crime, confusing to the jury. On the whole, however, it is our view that a proper charge to the jury on the elements of the crime as I have attempted to outline them and with respect to the evidence adduced would have been at least as if not more favourable to the accused persons than the charge actually made to the jury.

I take the first paragraph of this passage to mean that the threats, which according to the evidence led by the prosecution were uttered, were of such a nature that it was impossible as a matter of law for there to have been any reasonable justification or excuse for making them and that the learned trial Judge should have explicitly so charged the jury; I agree with this conclusion.

In the second paragraph the learned Justice of Appeal expresses the view that an accused who by threats seeks to induce the person threatened to hand over something to him is not guilty of the offence defined in s. 291(1) if he is entitled or if he entertains an honest belief that he is entitled to the thing demanded.

The argument before us was directed chiefly to the question whether this is a correct statement of the law. Its solution depends on the true construction of s. 291.

This section has already been quoted. It was first enacted as part of the revised *Criminal Code* Statutes of Canada,

1953-54, 2 and 3 Eliz. II, c. 51, which came into force on April 1, 1955, and by which the *Criminal Code*, R.S.C. 1927, c. 36, was repealed.

Section 291 is new in form. It is stated in the "Table of Concordance Showing Source of Sections in the New Criminal Code", prepared in the Department of Justice from tables that accompanied the report of the Criminal Code Revision Commission to the Minister of Justice, that its sources are ss. 450, 451, 452, 453 and 454 of the former Code. While this Table of Concordance does not have any Parliamentary sanction, a comparison of the two Codes shows this statement to be accurate.

The crimes defined in ss. 450 to 454 may be briefly described as follows:

Section 450: Compelling the execution of a document by violence or restraint of the person of another or by threat thereof: penalty imprisonment for life.

Section 451: Uttering a letter or other writing demanding with menaces, and without any reasonable or probable cause, any valuable thing: penalty 14 years imprisonment.

Section 452: Demanding with menaces anything capable of being stolen with intent to steal it: penalty 2 years imprisonment.

Section 453: With intent to extort or gain anything accusing or threatening to accuse a person, whether the person accused or threatened with accusation is guilty or not, of certain listed crimes: penalty 14 years imprisonment.

Section 454: With intent to extort or gain anything accusing or threatening to accuse a person, whether the person accused or threatened with accusation is guilty or not, of crimes other than those listed in s. 453: penalty 7 years imprisonment.

It will be observed that under s. 451 it was necessary that the menaces be in writing and that it was the only one of the five sections which contained the words "without any reasonable or probable cause". Under the other four sections the threats might be either oral or written.

It appears to me that the wording of s. 291 of the present *Code* is so different from that of ss. 450 to 454 of the former

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Code that little is to be gained from a consideration of the cases decided under those sections.

The words of Lord Herschell in *Bank of England v. Vagliano Brothers*[1] appear to me to be appropriate to the problem before us. They are accurately summarized in *Halsbury*, 3rd ed., vol. 36, p. 406, s. 614, as follows:

> In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning; it is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. The object of a codifying statute has been said to be that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities. After the language has been examined without presumptions, resort must only be had to the previous state of the law on some special ground, for example for the construction of provisions of doubtful import, or of words which have acquired a technical meaning.

In the case at bar there was evidence on which it was open to the jury to find that the accused named in the first count in the indictment by threats to cause death or bodily injury to Angle or members of his family attempted to induce him to turn over to them the money or shares mentioned in the indictment. The appeal was argued on the assumption that there was some evidence in the record on which it was open to the jury to find that the accused had an honest belief that the money or shares demanded were owing to them.

The question of law raised on this appeal is whether assuming the threats to cause death or bodily injury were made and that the accused had the honest belief that the money or shares demanded were owing to them they were guilty of the offence defined in s. 291. The answer depends on what is the true meaning of the words of the section.

For the respondents it is submitted that on the assumption referred to in the preceding paragraph the accused might well be guilty of assault or of the offence of threatening as defined in s. 316(1)(*a*) of the present *Code* but that they would not be guilty of extortion as defined in s. 291, because the honest belief referred to would constitute reasonable justification or excuse for making the demand.

In my opinion, this argument should be rejected. To constitute a defence there must be reasonable justification or

[1] [1891] A.C. 107 at 144-45, 60 L.J.Q.B. 145.

excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand.

There are courses of action which a person might express his intention of taking which would constitute threats within the meaning of that word as used in the section but which would in some circumstances be in themselves lawful; an example is the statement of the intention to place the name of a person on a "stop list" in circumstances such as existed in *T'horne v. Motor Trade Association*[1].

That decision indicates that while it was lawful for the defendant to threaten to put the name of the plaintiff on a "stop list" it would be criminal to accompany the threat with a demand for the payment of an unreasonable sum as an alternative. It is not authority for the proposition that, because a demand is reasonable and there exists reasonable justification or excuse for the making of it, it is lawful to seek to enforce compliance with it by making threats which are unlawful and for which there is no justification or excuse.

I have already expressed my agreement with the opinion of the Court of Appeal that in the case at bar if the jury found that the threats alleged were made it was impossible as a matter of law for them to find that there was any reasonable justification or excuse for making them.

When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.

Speaking generally, the essential ingredients of an offence under s. 291 are, (i) that the accused has used threats, (ii) that he has done so with the intention of obtaining something by the use of threats; (whatever meaning be given to the word "extort" the word "gain" as used in the section is simply the equivalent of "obtain") and, (iii) that either

[1] [1937] A.C. 797.

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the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse; (the question on this aspect of the matter is not whether one item in the accused's course of conduct, if considered in isolation, might be said to be justifiable or excusable but rather whether his course of conduct considered in its entirety was without justification or excuse).

My view as to the true construction of s. 291 expressed above is not altered by the circumstance that on the assumption as to the facts on which the appeal was argued the accused could have been properly convicted if they had been charged under s. 316(1)(*a*) of the *Code* as it now reads since it was amended by Statutes of Canada 1960-61, c. 43, s. 10. In this connection, however, it may be observed that from April 1, 1955, until it was so amended s. 316 applied only to threats which were in writing.

For the reasons given above it is my opinion that the learned trial Judge should have instructed the jury that if they were satisfied beyond a reasonable doubt that the accused made the alleged threats to cause death or bodily injury with intent to induce Angle to hand over to them the money or shares mentioned in the indictment they should find the accused guilty regardless of whether the accused had a right to the money or shares demanded or honestly believed they had such a right.

It follows that, in my opinion, the question of law on which this appeal is brought should be answered in the affirmative.

I would allow the appeal, set aside the orders of the Court of Appeal and the verdicts of acquittal and order a new trial of all the respondents.

Appeal allowed and new trial ordered.

Solicitor for the appellant: The Attorney General for Ontario.

Solicitor for the respondent P. Volpe: F. S. Fisher, Toronto.

Solicitor for the respondents A. and E. Volpe: D. G. Humphrey, Toronto.

ADOLPHE KARCHESKY .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Jan. 16
Mar. 2

WRIT OF HABEAS CORPUS

Criminal law—Habeas corpus—Warrant of committal—Validity—Conditional licence to be at large—Validity of procedures for recommittal—Ticket of Leave Act, R.S.C. 1952, c. 264.

The applicant was imprisoned for armed robbery and conspiracy to commit armed robbery. Several years later he was granted a conditional licence to be at large pursuant to s. 3(1) of the *Ticket of Leave Act*, R.S.C. 1952, c. 264. While at large, he committed an armed robbery for which he was convicted and sentenced to imprisonment. This conviction caused the forfeiture of his conditional licence by the sole operation of s. 6 of the *Ticket of Leave Act*. Procedures authorized for the apprehension and committal of a licensee who has lost his licence were adopted and a warrant for his committal was issued by a justice of the peace. The applicant escaped but was recaptured and returned to the prison where he was detained.

The applicant made an informal written application to this Court for the issuance of a writ of *habeas corpus*. He argued that the only possible authority for his present detention were his very first convictions by the first judge, and that all the other terms of imprisonment—including the term imposed upon him for escape—had been fully satisfied. He challenged (a) the validity of the charges and procedures before the first judge and contended that the latter had failed to issue a warrant of committal in the form prescribed by the law, and challenged also (b) the validity of the procedures leading to his recommittal after he had lost his conditional licence, especially the warrant of committal issued by the justice of the peace.

Held: The application should be dismissed.

As to grounds raised in (a). None of the points raised with respect to the charges and procedures before the first judge had any relevancy on an application for the issue of a writ of *habeas corpus*. It has been repeatedly held that such a writ could not be converted into a writ of error or an appeal. The warrant of committal complied with the law and was valid and effective.

As to the grounds raised in (b). Everyone of the steps prescribed for the apprehension and committal of one who has lost his licence has been taken. There was no necessity, in this case, to formally proceed with the apprehension and recommittal of the applicant who was already validly confined. While the term of imprisonment, to which the applicant was sentenced for the offence in consequence of which his licence was forfeited, may now be said to have been satisfied, he must, according to s. 9 of the *Ticket of Leave Act*, further undergo a term of imprisonment equal to the portion to which he was originally sentenced and which remained unexpired at the time his licence was granted.

*PRESENT: Fauteux J. in Chambers.

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Droit criminel—Habeas corpus—Mandat de dépôt—Validité—Permis conditionnel d'être en liberté—Validité des procédures pour réincarcération—Loi sur les Libérations conditionnelles, S.R.C. 1952, c. 264.

Le requérant fut emprisonné pour vols à main armée et pour conspiration pour commettre ces vols. Plusieurs années plus tard, il a obtenu un permis conditionnel d'être en liberté en vertu de l'art. 3(1) de la *Loi sur les Libérations conditionnelles*, S.R.C. 1952, c. 264. Alors qu'il était en liberté, il a commis un vol à main armée pour lequel il a été trouvé coupable et condamné à l'emprisonnement. Cette condamnation lui a fait perdre son permis conditionnel en vertu de l'art. 6 de la *Loi sur les Libérations conditionnelles*. Les procédures autorisées pour l'appréhension et l'incarcération du porteur qui a perdu son permis ont été adoptées, et un mandat pour son incarcération a été émis par un juge de paix. Le requérant s'est évadé mais a été recapturé et retourné à la prison où il est détenu présentement.

Le requérant a présenté à cette Cour une requête non formelle, par écrit, pour obtenir l'émission d'un bref d'*habeas corpus*. Il soutient que la seule autorité possible pour sa détention présente se trouve dans la première condamnation qu'il a reçue du premier juge, et que tous les autres termes d'emprisonnement—y inclus celui imposé pour son évasion—ont été complètement purgés. Il met en question (a) la validité des actes d'accusation et des procédures devant le premier juge et prétend que ce dernier n'a pas émis un mandat de dépôt dans la forme prescrite par la loi, et met aussi en question (b) la validité des procédures en vertu desquelles il a été réincarcéré après avoir perdu son permis conditionnel, et spécifiquement le mandat de dépôt émis par le juge de paix.

Arrêt: La requête doit être rejetée.

Pour ce qui est des griefs soulevés dans (a). Aucun des points soulevés relativement aux actes d'accusation et aux procédures devant le premier juge n'a de pertinence en regard d'une requête pour l'émission d'un bref d'*habeas corpus*. Il a été maintes fois décidé qu'un tel bref ne peut pas être changé en un recours pour cause d'erreur ou en appel. Le mandat de dépôt est conforme à la loi et est valide et effectif.

Pour ce qui est des griefs soulevés dans (b). Toutes les mesures prescrites pour l'appréhension et l'incarcération de celui qui a perdu son permis ont été prises. Il n'y avait aucune nécessité, dans ce cas, de procéder formellement à l'appréhension et à l'incarcération du requérant qui était déjà validement en prison. Quoi qu'on puisse dire que le terme d'emprisonnement, auquel le requérant a été condamné pour l'offense qui eu comme résultat de lui faire perdre son permis, peut maintenant être considéré comme ayant été purgé, il doit, selon l'art. 9 de la *Loi sur les Libérations conditionnelles*, subir en outre un emprisonnement d'une durée égale à ce qui restait encore à courir de sa première peine le jour où il a obtenu son permis.

REQUÊTE devant le Juge Fauteux en chambre pour obtenir l'émission d'un bref d'*habeas corpus*. Requête rejetée.

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APPLICATION before Fauteux J. in Chambers for the issuance of a writ of *habeas corpus*. Application dismissed.

No one appearing for the applicant.

D. H. Christie, Q.C., for the Attorney General for Canada.

André Chaloux for the Attorney General for Quebec.

The following judgment was delivered by

FAUTEUX J.:—This is one of these prisoners' informal applications for the issuance of a writ of habeas corpus made, in this case, by one Adolphe Karchesky, presently detained in the penitentiary of Kingston, in the province of Ontario. The applicant did not appear nor was he represented at the hearing, the date of which had been fixed when it appeared, from the correspondence he exchanged with the Registrar of this Court, that he had exhaustively stated his grounds and arguments and also indicated his willingness to submit his application, even if contested, on the basis of his written presentation. Representatives of the Attorney General for Canada and of the Attorney General for the province of Quebec appeared at the hearing to contest this application. The material filed by the latter and the material submitted by the applicant show the following facts:—(i) on March 29, 1946, at the city of Montreal, the applicant appeared and pleaded guilty, before Judge Maurice Tétreau, a judge of the Sessions of the Peace for the district of Montreal, to seventeen charges of armed robbery and seventeen charges of conspiracy to commit those armed robberies, for which he was sentenced, on April 4, 1946, to life imprisonment and seven years respectively on each charge of armed robbery and conspiracy; (ii) on the same day, to wit on March 29, 1946, at the same place and before the same Judge, the applicant also pleaded guilty to two charges of attempting to commit an armed robbery and two additional charges of conspiracy to commit an armed robbery, for which he was sentenced, on April 4, 1946, to seven years' imprisonment on each count; (iii) on December 13, 1948, the Commissioner of Penitentiaries issued a Removal Warrant, pursuant to s. 52 of the *Penitentiary Act* (1939), Statutes of Canada 1939, c. 6, for the

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transfer of the applicant from St. Vincent de Paul Penitentiary—where he had been committed by Judge Tétreau to serve the above sentences—to the Manitoba Penitentiary; (iv) several years later, pursuant to subs. 1 of s. 3 of the *Ticket of Leave Act,* R.S.C. 1952, c. 264, a conditional license to be at large, effective May 1, 1957, was granted to the applicant, notice of which, dated April 11, 1957, was addressed by the Deputy Minister of Justice to the Warden of the Manitoba Penitentiary; (v) while being lawfully at large by virtue of this conditional license, the applicant committed, on November 28, 1958, at the city of Montreal, an indictable offence, to wit an armed robbery, for which he was arrested, charged and found guilty on December 1, 1958, by Judge Paul Hurteau, a judge of the Sessions of the Peace for the district of Montreal, and for which he was sentenced and committed on December 9, 1958, to five years' imprisonment in the penitentiary of St. Vincent de Paul; (vi) consequent upon the latter conviction, applicant's conditional license to be at large was *forfeited forthwith* by the sole operation of s. 6 of the *Ticket of Leave Act.* Procedures authorized for the apprehension and committal of a licensee whose license has been forfeited or revoked were then adopted by the various authorities concerned and on February 5, 1959, pursuant to a warrant of apprehension issued on January 16, 1959, by the Commissioner of the Royal Canadian Mounted Police, as provided in subs. 1 of s. 8 of the *Ticket of Leave Act,* the applicant, who was then actually incarcerated in the St. Vincent de Paul Penitentiary, where he had been committed by Judge Hurteau, was brought before Jean-Eudes Blanchard, a Justice of the Peace for the district of Montreal. The Justice of the Peace then issued a warrant of committal pursuant to subs. 3 of s. 8 of the *Ticket of Leave Act;* (vii) on August 12, 1959, the Commissioner of Penitentiaries, under the authority of s. 52 of the *Penitentiary Act,* R.S.C. 1952, c. 206, ordered the transfer of the applicant from St. Vincent de Paul Penitentiary to the Kingston Penitentiary; (viii) on August 14, 1959, the applicant was again transferred from the Kingston Penitentiary to the Joyceville Institution from which he escaped on August 18, 1964; and

upon being recaptured on August 27, 1964, the applicant was returned to the Kingston Penitentiary where he is, since then, presently detained.

In support of his application, the prisoner submitted, in the first place, that the only possible authority for his present detention must be the convictions registered against him on April 4, 1946, at Montreal, before Judge Maurice Tétreau,—cf. (i) and (ii) above,—all the other terms of imprisonment,—including the term imposed upon him for escape,—having been fully satisfied. He then challenged (a) the validity of the charges and procedures before Judge Tétreau and contended moreover that the latter had failed to issue a warrant of committal in the form prescribed by law, and he also challenged (b) the validity of the procedures leading to a recommittal after the forfeiture or revocation of a conditional license to be at large, and more specifically the warrant of committal issued by the Justice of the Peace, Jean-Eudes Blanchard.

Dealing with grounds mentioned in (a):—It is unnecessary to recite and deal here with the various points raised by the applicant with respect to the charges and procedures before Judge Tétreau; for assuming that, contrary to the opinion I formed after considering them, anyone of these points would have any merits, none of them has any relevancy on an application for the issuance of a writ of habeas corpus. Indeed, it has been repeatedly held that a writ of habeas corpus cannot be converted into a writ of error or an appeal and that its functions do not extend beyond an enquiry into the jurisdiction of the Court by which process a subject is held in custody and into the validity of the process upon its face. Bearing that in mind, it is sufficient to say that as a Judge of the Sessions of the Peace for the district of Montreal, Judge Maurice Tétreau had clearly jurisdiction in the matter and that the warrant of committal he then issued is valid on its face. The contention that this warrant is not in the form prescribed by law has no foundation. The applicant has vainly attempted to support this submission on some of the provisions of the new Criminal Code, assented to on April 1, 1955, for, at all

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relevant time, the law governing in the matter was to be found in the *Criminal Code*, R.S.C. 1927, c. 36. Section 799 of this Code provides that a conviction on a plea of guilty, under Part XVI, relating to the summary trial of indictable offences, may be in the form 56 or the forms appearing in Part XXV, or to the like effect; and s. 794 provides that a copy of such conviction, certified by the proper officer of the Court or proved to be a true copy shall be, in any legal proceedings, sufficient evidence of such conviction. The conviction or the warrant of committal issued by Judge Tétreau, of which a true copy has been filed before me, fully complies with these provisions of the law and this warrant is today as valid and effective a warrant as it was at the time of its issuance.

Dealing with grounds raised in (b):—The various steps of the procedure related to the apprehension and committal of a licensee, whose license has been forfeited or revoked, are set forth in s. 8(1), (2) and (3) of the *Ticket of Leave Act* and, subject to what is hereafter said with respect to the warrant of committal issued by Justice of the Peace Blanchard, I must say that a close examination of the various documents and affidavits filed on behalf of the Attorney General for Canada and of the Attorney General for the province of Quebec, has satisfied me that everyone of the steps prescribed for such an apprehension and committal has been taken in the present case.

Applicant questioned Blanchard's authority to issue a warrant of committal, suggesting, in fact, that he may not have been a Justice of the Peace, but merely a Commissioner of Oaths. This suggestion has no foundation. Indeed a certificate, under the signature and seal of a Clerk of the Peace and of the Crown for the district of Montreal, establishes that Blanchard was sworn in, as a Justice of the Peace, on June 10, 1958, and the affidavit of Crown Attorney André Chaloux indicates that this appointment has not been revoked. Furthermore and as stated by Lord Coleridge C.J., in *R. v. Morris Roberts*[1]:

> It is laid down in all the text books as a recognised principle that a person acting in the capacity of a public officer is prima facie to be taken to be so, . . .

[1] (1878), 38 L.T.R. 690 at 691.

As to the substance of the warrant, the representative of the Attorney General for Canada pointed out that blank spaces which, in the form of such warrants, are intended to be used for the designation of the person to whom the prisoner is to be conveyed and the penitentiary to which he is to be committed, were not, in this case, completed by Blanchard after the applicant had appeared before him at the St. Vincent de Paul Penitentiary where, again, he was already incarcerated pursuant to the warrant of committal issued by Judge Hurteau—cf. (v). The Crown, having considered that these omissions might be said to constitute a defect on the face of the warrant, secured, two days before the hearing of the present application, a new warrant from Justice of the Peace Blanchard. In this new warrant, these omissions were remedied and a direction was given to the Warden of the St. Vincent de Paul Penitentiary, to whom such warrant was addressed, to substitute it to the original one. Needless to say that the new, as well as the original warrant, contains a recital of the facts referred to in (i), (ii), (iv), (v) and (vi) above.

As to the law respecting the issuance of a substituted warrant of committal for a defective one, the Crown relied on the authorities collected in *Tremeear's Annotated Criminal Code*, 6th ed., 1964, p. 1373, and in *Crankshaw's Criminal Code of Canada*, 7th ed., p. 1167, and alternatively placed reliance upon s. 688 of the *Criminal Code* (1955) which provides that:

> 688. No warrant of committal shall, on certiorari or habeas corpus, be held to be void by reason only of any defect therein where
>
> (*a*) it is alleged in the warrant that the defendant was convicted, and
>
> (*b*) there is a valid conviction to sustain the warrant.

Whatever view might be taken as to the validity or effectiveness of the original warrant issued by Justice of the Peace Blanchard or the corrected warrant he substituted thereto, in my opinion, there was no necessity, under all the circumstances of this case, to formally proceed with the apprehension and recommittal of the applicant who, at the time he was brought before the Justice of the Peace at the St. Vincent de Paul Penitentiary and even before any of the procedures set forth in s. 8(1), (2) and (3) of the

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Ticket of Leave Act had been resorted to, was then already validly confined by force of the unimpeached and unimpeachable warrant of committal issued by Judge Hurteau, as well as by force of the following provisions of s. 6 of the *Ticket of Leave Act* which were set in action consequent to and upon the conviction of the applicant by Judge Hurteau.

> 6. If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited. R.S., c. 150, s. 5.

While the term of imprisonment, to which the applicant was sentenced for the offence in consequence of which his license was forfeited, may now be said to have been satisfied, he must, according to s. 9 of the *Ticket of Leave Act, further undergo a term of imprisonment equal to the portion to which he was originally sentenced and which remained unexpired at the time his license was granted.* And, as indicated above in (i) and (ii), the term of the original sentence in his case is life imprisonment.

Having fully considered the material filed and all the points raised by the applicant, I have satisfied myself that he is lawfully detained. His application must therefore be and is dismissed.

Application dismissed.

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*June 5
June 26

GERALD WILLIAM POOLE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Preventive detention—Whether expedient—Jurisdiction—Criminal Code, 1953-54 (Can.), c. 51, s. 660(1).

The appellant, who was 34 years of age, was convicted on August 10, 1965, of two offences of obtaining goods by false pretences and two offences of attempting to obtain goods by false pretences. This was done by

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

drawing cheques on non-existent bank accounts. The amount involved in each offence was under $100. The appellant was subsequently found to be an habitual criminal and sentenced to preventive detention. His record of convictions commenced at age 16 and all but one included an element of theft. On June 25, 1965, the day of the expiration of a four-year sentence for theft of an automobile, the appellant received a gift of money to take him from New Brunswick to Vancouver. On his arrival in Vancouver the same day, he at once got a job as a labourer and appeared to have been continuously so employed until his conviction on August 10 of the substantive offences. The Court of Appeal, by a majority judgment, affirmed the sentence of preventive detention. The appellant was granted leave to appeal to this Court.

Held (Cartwright and Judson JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Martland and Ritchie JJ.: On the facts, the magistrate properly concluded that the appellant was an habitual criminal and this was rightly affirmed by a majority in the Court of Appeal. If the decision of that Court on that issue was correct, it is not open to this Court to substitute its opinion on the question as to whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention. The judgment of this Court in *The Queen v. MacDonald,* [1965] S.C.R. 831, is authority for the proposition that, once the finding as to the status of the accused as an habitual criminal is not in issue, this Court has no jurisdiction to entertain an appeal against the sentence.

Per Cartwright and Judson JJ., *dissenting*: On the assumption that the finding that the appellant was an habitual criminal should not be disturbed, it has not been shown that it was expedient for the protection of the public to sentence him to preventive detention. Since his convictions in 1959, the appellant has been guilty of no violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, he has been sentenced to severe punishment. There is some evidence of his trying to live a normal life. It has not been satisfactorily shown that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody.

The judgment of this Court in *The Queen v. MacDonald, supra,* is distinguishable and does not bind this Court to say that it is without jurisdiction in the case at bar.

Droit criminel—Repris de justice—Détention préventive—Opportunité—Juridiction—Code Criminel, 1953-54 (Can.), c. 51, art. 660(1).

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L'appelant, âgé de 34 ans, a été trouvé coupable le 10 août 1965, de deux offenses d'avoir obtenu des biens par faux prétexte et de deux offenses d'avoir tenté d'obtenir des biens par faux prétexte. Il s'agissait de chèques tirés sur un compte de banque qui n'existait pas. Le montant en jeu dans chaque offense était de moins de $100. L'appelant a été subséquemment reconnu repris de justice et a été condamné à la détention préventive. Son dossier de condamnations commence à l'âge de 16 ans et toutes les condamnations, à l'exception d'une, contiennent un élément de vol. Le 25 juin 1965, le jour de l'expiration d'une sentence de quatre ans pour vol d'automobile, l'appelant a reçu un don en argent pour lui permettre de se rendre du Nouveau-Brunswick à Vancouver. A son arrivée à Vancouver le même jour, il a immédiatement obtenu un emploi comme manœuvre et il semble qu'il a été continuellement employé de la sorte jusqu'au jour de sa condamnation le 10 août pour les offenses substantives. La Cour d'Appel, par un jugement majoritaire, a confirmé la sentence de détention préventive. L'appelant a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Cartwright et Judson étant dissidents.

Les Juges Fauteux, Martland et Ritchie: Sur les faits de cette cause, le magistrat a conclu correctement que l'appelant était un repris de justice et la majorité dans la Cour d'Appel a eu raison de confirmer cette conclusion. Si la décision de la Cour d'Appel sur cette question était la bonne, cette Cour n'a pas le droit de substituer son opinion sur la question de savoir s'il était opportun pour la protection du public de condamner l'appelant à la détention préventive. Le jugement de cette Cour dans la cause de *The Queen v. MacDonald,* [1965] R.C.S. 831, est une autorité pour la proposition que, lorsque la conclusion concernant le statut de repris de justice d'un accusé n'est pas en question, cette Cour n'a pas juridiction pour entendre un appel de la sentence.

Les Juges Cartwright et Judson, *dissidents:* Selon l'hypothèse que la conclusion à l'effet que l'appelant était un repris de justice ne doit pas être changée, il n'a pas été démontré qu'il était opportun pour la protection du public de condamner l'appelant à la détention préventive. Depuis ses condamnations en 1959, l'appelant n'a été trouvé coupable d'aucun crime de violence. Pour le vol d'une automobile en 1962 et pour les quatre offenses substantives en 1965, il a reçu des punitions sévères. Il y a une preuve à l'effet qu'il essaie de vivre une vie normale. Il n'a pas été démontré d'une façon satisfaisante que sa mise en liberté à l'expiration de l'emprisonnement auquel il a été condamné pour les offenses substantives aurait pour effet de créer une menace à la société ou que pour la protection du public il serait opportun qu'il passe le reste de sa vie sous arrêt.

Le jugement de cette Cour dans la cause de *The Queen v. MacDonald, supra,* peut être distingué et ne force pas cette Cour à dire qu'elle est sans juridiction dans le cas présent.

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APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique confirmant une sentence de détention préventive. Appel rejeté, les Juges Cartwright et Judson dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia affirming a sentence of preventive detention. Appeal dismissed, Cartwright and Judson JJ. dissenting.

B. H. Kershaw, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia affirming, by a majority, a sentence of preventive detention imposed on the appellant by His Worship Magistrate G. L. Levey at Vancouver on June 14, 1966. Bull J.A., dissenting, would have allowed the appeal, quashed the sentence of preventive detention and restored the sentences imposed in respect of convictions of four substantive offences in lieu of which the sentence appealed against had been imposed.

The appellant was born on March 3, 1932.

The evidence as to his past record is accurately summarized by Bull J.A. as follows:

> Just after reaching 16 years of age, the appellant was convicted of a charge of taking an automobile without consent and stealing four pairs of shoes a day or so earlier, and was fined $20.00 and given a suspended sentence, respectively. Three years later, at the age of 19 years, he was convicted of breaking and entering a drug store and was sentenced to two years in the penitentiary. Upon being released from this imprisonment about 19 months later, he joined the Canadian Army and served with it in Canada and Korea for about 2 years until he was dishonourably discharged shortly after having been convicted in Montreal of two

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charges of robbery and sentenced to five years on each to run concurrently. On his release at expiration of sentence the appellant had odd jobs in and around his home area in New Brunswick for about five months, when he again fell foul of the law. This time he was convicted on four charges of breaking and entering business premises within the space of a few days, and was awarded various sentences to run concurrently, of which the longest was three years in the penitentiary. The appellant was released from imprisonment on November 19, 1961, and worked fairly steadily with some success and employer approval at labouring work for about ten months when he was convicted of theft of a U-Drive automobile which he had rented. For this offence he was sentenced to four years in the penitentiary. On his release from this sentence in June, 1965, the somewhat unusual events occurred which led to his commission of, and convictions on, the substantive offences. On the day of release and provided with funds and an airline ticket by his mother in the Maritimes, he flew to Vancouver claiming to be filled with the admirable resolution to there start a new honest life away from the associations which he claimed had always led him into trouble. Although there were many inconsistencies in his evidence as to exactly what the appellant did for the next few weeks, it does appear quite clear and uncontradicted that promptly after arrival he did get a job with a wrecking company, which lasted about two weeks, followed by a job with a salvage company commencing on July 12, 1965. On July 9, 1965, however, he purchased $41.85, and attempted to purchase a further $91.37, worth of goods from a department store with cheques signed in his own name but drawn on a non-existent account in a local bank. The appellant said the account number used was that of an account that he had in the same bank in Fredericton, N.B., but quite properly little credence was given to this excuse. It is clear that some at least of the goods in question were working clothes and gear needed by the appellant in the new job he was just starting. On the same day, allegedly to replace one stolen from his room, the appellant attempted to buy a watch from a jeweller with a cheque for $83.99 drawn on the same non-existent account. The appellant was released on bail, went back to work and about ten days later obtained a pipe and some tobacco from a tobacconist with a cheque for $12.74 drawn on a fictitious account. The appellant was convicted of these four depredations on August 10, 1965, and given concurrent sentences aggregating 3 years. Apparently, notwithstanding these shopping sprees, the appellant did have gainful employment for substantially the whole time from his release on June 25, 1965, to his conviction on August 10, 1965. There was no evidence adduced that during this last period of freedom the appellant associated with criminals or undesirable characters.

I do not find it necessary to choose between the conflicting views of Bull J.A. and of the majority in the Court of Appeal as to whether on the evidence the finding that the appellant is an habitual criminal can safely be upheld; for the purpose of these reasons I will assume that it can.

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On the assumption that the finding that the appellant is an habitual criminal should not be disturbed, I have reached the conclusion that it has not been shewn that it is expedient for the protection of the public to sentence him to preventive detention.

Whether or not in any particular case it is expedient to so sentence a person found to be an habitual criminal is a question of fact or perhaps a question of mixed law and fact; it is certainly not a question of law alone. But, leave to appeal to this Court having been granted, it is clear that we have jurisdiction to deal with questions of fact.

In *Mulcahy v. The Queen*[1], this Court in a unanimous judgment expressly adopted the reasons of MacQuarrie J. who had dissented from the judgment of the majority in the Supreme Court of Nova Scotia (in banco) and set aside the sentence of preventive detention which had been imposed upon the appellant. The dissenting judgment of MacQuarrie J. is reported in 42 C.R. at page 1.

In that case the record shewed that, prior to being convicted of the substantive offence, the appellant had been convicted between 1941 and 1961 on nineteen occasions of offences, for which he had been sentenced to a total of fifteen years and six months in the penitentiary and twenty-six months in prison. None of his convictions were for crimes of violence; six were for breaking and entering and the remainder for theft or having possession of stolen goods.

MacQuarrie J. based his judgment on two distinct grounds. The first of these was that there was no evidence to support a finding that the appellant was leading persistently a criminal life. The second ground was expressed as follows:

> While I do not attempt to minimize the record of the appellant, a perusal of it (apart from the lack of evidence to justify finding him to be leading persistently a criminal life) indicates that he is not the type of person of whom it can properly be said "it is expedient for the protection of the public to sentence him to preventive detention". In my opinion the Crown has failed to prove that (even although the accused

[1] (1963), 42 C.R. 8.

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was leading persistently a criminal life) a sentence of preventive detention was expedient for the protection of the public.

In the case at bar no exception can be taken to the terms in which the learned Magistrate instructed himself as to the applicable principles of law. Following the judgment of the Court of Appeal for British Columbia in *Regina v. Channing*[1], he expressed the view that in order to impose a sentence of preventive detention he must be satisfied beyond a reasonable doubt that the appellant was leading persistently a criminal life, that the decision of each case must depend on its own particular facts, (i) as to whether the finding that a person is an habitual criminal should be made and, (ii) as to whether that finding having been made, a sentence of preventive detention should be imposed. It is, I think, implicit in the last sentence of his reasons, read in the light of his reference to *Regina v. Channing,* that he held it necessary that he should be satisfied beyond a reasonable doubt on the second of these points as well as on the first. The sentence to which I refer reads as follows:

> I find that the Crown has proved beyond all reasonable doubt, in my mind, that it is expedient for the protection of the public to sentence you to preventive detention, and I so do.

In the Court of Appeal Lord J.A., with whom McFarlane J.A. expressed substantial agreement, dealt with this branch of the matter as follows:

> Nor can I say that he reached the wrong opinion in finding it expedient for the protection of the public that the appellant be sentenced to preventive detention.

Bull J.A., having held that the finding that the appellant was an habitual criminal could not safely be upheld, did not find it necessary to deal with this question.

In *Regina v. Channing, supra,* Sheppard J.A., with whom Norris, Lord and MacLean JJ.A. agreed and Davey J.A. agreed "in general", said at page 110:

> In the case at bar, the crown must assume the onus of proving that it is expedient for the protection of the public that the accused be

[1] (1965), 52 W.W.R. 99, 51 D.L.R. (2d) 223.

sentenced beyond that imprisonment for the substantive offence: *Mulcahy v. Reg.*, and that must be proven beyond a reasonable doubt: *Parkes v. Reg.* and *Kirkland v. Reg.*

In the same case at page 101, Davey J.A. said:

> Likewise it is undesirable for us to lay down detailed tests of the sufficiency of evidence to prove either that an accused is a habitual criminal or that it is expedient for the protection of the public that he be sentenced to preventive detention. All that is required is that the evidence be sufficient to prove both these essential matters beyond a reasonable doubt to the satisfaction of the magistrate or trial judge.

As already indicated, I am dealing with this appeal on the assumption that the finding that the appellant is an habitual criminal should not be disturbed and the question to be answered is therefore whether it can properly be said "that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention".

The answer to this question depends upon the application to the facts of the case of the words of s. 660(1) of the *Criminal Code* which reads as follows:

> 660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if
>
> (*a*) the accused is found to be an habitual criminal, and
>
> (*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

It will be observed that the section is worded permissively. Even if both conditions (*a*) and (*b*) are fulfilled the court is not bound to impose the sentence of preventive detention. The wording may be contrasted with that used by Parliament in s. 661 (3):

> (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention . . .

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The wording of s. 660 may also be contrasted with that of the corresponding sub-section in the *Criminal Justice Act*, 1948, of the United Kingdom, 11 & 12 George VI, c. 58, s. 21(2) of which reads as follows:

> (2) Where a person who is not less than thirty years of age—
>
> (*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and
>
> (*b*) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training;
>
> then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five or more than fourteen years as the court may determine.

I do not consider that the use of the words "The court is of the opinion" in s. 660(1)(*b*) of the *Criminal Code* prevents the Court of Appeal or this Court from substituting its opinion for that of the learned Magistrate. That course has been followed in *Mulcahy v. The Queen, supra.*

In *Regina v. Channing, supra,* after stating that what is expedient for the protection of the public is a question of fact in each case, Sheppard J.A. continued at page 109:

> Moreover, as the sentence for the substantive offence will have considered the protection of the public as one of the elements, it would follow that preventive detention should not be imposed unless the crown has proven that the protection of the public is not sufficiently safeguarded by sentence for the substantive offence, but does require some additional protection involved in a sentence of preventive detention: *Mulcahy v. Reg.*, supra; *Reg. v. Rose,* supra, to the extent of making that sentence expedient for the protection of the public.

and at page 110 he quoted with approval the following passage in the reasons of Currie J.A. in *Harnish v. The Queen*[1]:

> The real, essential principle of the preventive detention provisions of the *Criminal Code,* s. 660, and of the *Prevention of Crime Act,* 1908,

[1] (1960), 129 C.C.C. 188 at 197, 34 C.R. 21.

8 Edw. VII, ch. 59, is the protection of the public. It is not enough that the accused is merely anti-social, or is a nuisance, or that it is a convenience to the police to have a person removed to a penitentiary.

In *R. v. Churchill*[1], Lord Goddard, giving the judgment of the Court of Criminal Appeal, said at page 110:

> The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large.

and at page 112:

> As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect. It has become a matter of putting a man where he can no longer prey upon society even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

In considering the decisions in England it must always be borne in mind that the maximum sentence of preventive detention which can be imposed there is fourteen years and that, as stated by Lord Goddard on the page last referred to, in the great majority of cases which had come before that Court the sentence passed had been one of eight years. In Canada if the sentence is passed at all it must decree imprisonment for the remainder of the prisoner's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal.

Since his convictions in 1959, the appellant has been guilty of no violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, which involved comparatively trifling sums, he has been sentenced to severe punishment; there is some evidence of his trying to live a normal life; he is now 35 years of age. While I cannot say, in the words used by Currie J.A., that he is merely a nuisance I am not satisfied that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will, to use the words of Lord Goddard, constitute a menace to society or that the protection of the public

[1] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.

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renders it expedient that he should spend the rest of his life in custody. Any doubt that I feel in this case arises from the fact that I am differing from the learned Magistrate and the majority in the Court of Appeal. In a case in which the consequences of an adverse decision are so final and so disastrous for the man concerned I think that doubts should be resolved in his favour.

I had written the above reasons and reached the conclusion that I would dispose of the appeal as Bull J.A. would have done before I had the advantage of reading the reasons of my brother Martland, holding, on the basis of the reasons of Ritchie J. speaking for the majority of the Court in *The Queen v. MacDonald*[1], that, unless we can say that the finding of the Courts below that the appellant is an habitual criminal should be set aside, we are without jurisdiction to interfere with the imposition of the sentence of preventive detention.

While in *The Queen v. MacDonald, supra,* I agreed with the conclusion of the majority that the appeal should be quashed it was for different reasons. The sole question relating to our jurisdiction which was raised for decision in that appeal was whether the Attorney-General had a right of appeal to this Court from the order of a Court of Appeal expressly affirming a finding that an accused was an habitual criminal but deciding that the sentence of preventive detention imposed upon him should be set aside. The formal order of the Court of Appeal in that case read as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the appeal of the above-named Appellant from the finding that the Appellant is an habitual criminal be and the same is hereby dismissed, the Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby allowed, the sentence of preventive detention imposed on him as aforesaid be and the same is hereby set aside, and pursuant to section 667 of the Criminal Code, a sentence of imprisonment in Oakalla Prison Farm, Burnaby, British Columbia, for a term of one year be and the same is hereby imposed in respect of the said conviction by Magistrate L. H. Jackson entered on the 20th day of May 1964 on the above-described charge, such sentence to run from the 20th day of May, 1964.

[1] [1965] S.C.R. 831, 46 C.R. 399.

This may be contrasted with the order of the Court of Appeal in the case at bar, the operative part of which reads:

> THIS COURT DOTH ORDER AND ADJUDGE THAT the said Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby dismissed;

In my view the present case is distinguishable from *The Queen v. MacDonald*. The appeal before us is simply from the imposition of the sentence, and this is as it should be for the only right of appeal given to a person sentenced to preventive detention is that set out in section 667(1) of the *Criminal Code*:

> 667. (1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against that sentence on any ground of law or fact or mixed law and fact.

No right of appeal is given from a finding that an accused is an habitual criminal unless that finding is followed by the imposition of a sentence of preventive detention. Such a finding unless followed by a sentence is *brutum fulmen*. It is a trite observation that an appeal is from the judgment pronounced in the court appealed from and not from its reasons. It appears to me that the existence of our jurisdiction cannot depend upon the grounds upon which we think the sentence should be upheld or set aside. Our jurisdiction to set aside the sentence in the case at bar upon the grounds set out in the reasons of Bull J.A. could not be questioned; I do not think it is destroyed because, as it appears to me, the same result should be reached by a different line of reasoning. It may be mentioned in passing that no question of our jurisdiction was raised in the course of the full and able arguments addressed to us and I would be hesitant to rule that we have no jurisdiction without giving Counsel an opportunity to present their views. I have reached the conclusion that the judgment of the majority in *The Queen v. MacDonald, supra,* does not bind us to say that we are without jurisdiction in the case at bar.

I would dispose of the appeal as Bull J.A. would have done, that is to say, I would allow the appeal, quash the

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sentence of preventive detention and restore the sentences imposed on the convictions of the four substantive offences.

The judgment of Fauteux, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The facts involved in this appeal are stated by my brother Cartwright, including the evidence as to the past record of the appellant as summarized by Bull J.A. in the Court below. On the basis of that summary I think that the magistrate properly concluded that the appellant was an habitual criminal and I agree with the views expressed by the majority of the Court of Appeal on this point.

If the decision of the Court of Appeal on that issue was correct, it is not open to this Court, even if it wished to do so, to substitute its opinion for that of the Court of Appeal on the question as to whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention. The judgment of this Court in *The Queen v. MacDonald*[1] is authority for the proposition that, once the finding as to the status of the accused as an habitual criminal is not in issue, this Court has no jurisdiction to entertain an appeal against the sentence.

I would, therefore, dismiss the appeal.

Appeal dismissed, CARTWRIGHT and JUDSON JJ. *dissenting.*

Solicitor for the appellant: Brian H. Kershaw, Vancouver.

Solicitor for the respondent: R. D. Plommer, Vancouver.

[1] [1965] S.C.R. 831, 46 C.R. 399.

GEORGE MODDE ..... APPELLANT;

AND

DOMINION GLASS COMPANY LIMITED and RALPH W. TAYLOR, JR. ..... RESPONDENTS.

1967
*May 18
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Oil and gas—Lease—Delay rental provision—Failure to pay rental on time —Subsequent acceptance of rental payment—Application for order declaring void and vacating registration of lease dismissed—Waiver of default—The Gas and Oil Leases Act, 1962-63 (Ont.), c. 49.

By an agreement of lease dated August 5, 1955, the appellant leased certain lands to the respondent company for the purpose of carrying on operations regarding crude oil and natural gas and other related hydrocarbons. Paragraph 1 of the agreement of lease contained a provision for the termination of the lease in the event that the lessee did not exercise his privilege of either commencing operations within one year or paying delay rentals in lieu thereof on the 5th of August of each year, in which case the time within which operations could be commenced was extended for a further year. The lessee company paid the rental in lieu of drilling until the end of the rental year 1961-62.

The lessee assigned the lease to one T by an assignment made on May 31, 1961. No drilling took place in the rental year 1962-63 and no rental was paid in lieu of drilling until some day in October or November of 1962 when T paid to the lessor the sum of $100, the payment being made in the form of a cheque with an attached counterfoil. The lessor cashed the cheque and signed and returned the counterfoil. In the subsequent rental year, no drilling was commenced and no rental in lieu of drilling was tendered until September 23, 1963, when a cheque for $100 was forwarded to the lessor. This cheque was cashed by the lessor although he did not sign or return the rental receipt acknowledgment attached thereto.

Subsequently, the lessor applied to a County Court Judge for an order under the provisions of *The Gas and Oil Leases Act,* 1962-63 (Ont.), c. 49, declaring void and vacating the registration of the oil and gas lease dated August 5, 1955. The County Court Judge dismissed the application and on appeal to the Court of Appeal his judgment was upheld. With leave, an appeal was then brought to this Court.

Held: The appeal should be dismissed.

The County Court Judge was exercising a statutory jurisdiction only, and apart from the provisions of *The Gas and Oil Leases Act* he had no jurisdiction to make the declaration requested. Under the provisions of s. 2(1)(*a*) of the Act the lessor's right to make an application is

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

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confined to the situation where the lessee has (1) made default under the terms of an oil or gas lease in that he has failed to commence to drill a well, and (2) failed to pay rentals in lieu thereof. In the present case, the lessee, *i.e.*, the assignee T had failed to commence to drill a well but on March 12, 1964, when the appellant applied for the order, the lessee had not failed to pay the rent in lieu of drilling. In fact, he had paid on September 23, 1963, and it had been accepted. This circumstance was sufficient to require the County Court Judge to dismiss the application declaring the lease void.

As held by the Court below, if a judge under s. 6 of the Act is entitled to take into account a payment made and accepted after the making of the application, *a fortiori* he is entitled to take into account one made before. Section 6 gives the clearest indication that a failure to pay rent in lieu of drilling is, under the statute, considered to be a default and, therefore, is one which may be relieved against even after the application has been filed.

Canadian Superior Oil of California, Ltd. v. Kanstrup et al., [1965] S.C.R. 92; *East Crest Oil Co. v. Strohschein*, [1952] 2 D.L.R. 432, considered.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from an order of Beardall Co.Ct.J., whereby a lessor's application made under the provisions of *The Gas and Oil Leases Act*, 1962-63 (Ont.), c. 49, was dismissed. Appeal dismissed.

C. M. V. Pensa, for the appellant.

C. E. Woolcombe, for the respondent, R. W. Taylor, Jr.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on March 2, 1965. By that judgment the Court of Appeal dismissed an appeal from the order of His Honour Judge W. B. Beardall made on June 19, 1964, whereby His Honour had dismissed an application made by the lessor under the provisions of *The Gas and Oil Leases Act*, 1962-63 (Ont.), c. 49.

The appellant George Modde had granted to the Dominion Glass Company Limited an interest in the lands in question by a document dated August 5, 1955, and entitled "Agreement of Lease". This document is in a well-recognized form for an oil and gas lease. The habendum read, in part:

TO HAVE AND TO HOLD the said lands for and during the term of 20 years from the date hereof and as long thereafter as crude oil and natural gas and related hydrocarbons (all of which are hereinafter called "the said substances") or any of them are produced from the said lands or as the Lessee conducts operations on the said land or any part thereof for the recovery of the same, with the exclusive right (subject to a reasonable compensation to be paid to the Lessor as hereinafter provided) to make geological surveys and otherwise to prospect and explore and to drill for, recover, remove and/or sell all the said substances . . . .

Clause 1 of the lease read, in part:

1. The Lessee agrees that if operations for drilling a well for the said substances or any of them shall not be commenced on the said land within one year from the date hereof, this lease shall terminate unless within such year the Lessee shall pay or tender to the Lessor or shall pay in accordance with this lease a sum equivalent to $1.00 per acre for the said land, which shall operate as rental and which shall extend for one year the time within which such operations may be commenced. In like manner the duration of this lease may be extended from year to year by commencement of operations or by payment or tender of rentals as follows: for the third and fourth years sum equivalent to $1.00 per acre of the said land per annum, for the fifth and sixth years equivalent to $1.00 per acre of the said land per annum and thereafter sum equivalent to $1.00 per acre of the said land per annum . . . .

The lessee Dominion Glass Company Limited paid the rental in lieu of drilling until the end of the rental year 1961-62. The rental year commenced on the 5th of August annually.

The lessee assigned the lease to Ralph W. Taylor, Jr., by an assignment made on May 31, 1961. No drilling took place in the rental year 1962-63 and no rental was paid in lieu of drilling until some day in October or November of 1962 when the assignee Taylor paid to the lessor the sum of $100 being at the rate of $1 per acre, the payment being made in the form of a cheque with a counterfoil attached bearing the instructions "Please detach, sign and return to Brady, Findlay and Quillian Ltd., P.O. Box 367, Chatham, Ontario". The lessee cashed that cheque, signed the said counterfoil and returned the same.

In the subsequent rental year, no drilling was commenced and no rental in lieu of drilling was tendered until September 23, 1963, when the same firm on behalf of the assignee issued its cheque in favour of the lessor for $100 and forwarded it to the lessor with a similar counterfoil attached.

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The lessor took the cheque and cashed the same but he did not sign and return the rental receipt acknowledgment attached thereto.

By application verified by an affidavit sworn on March 12, 1964, the appellant applied to the County Court Judge of the County of Kent for an order under the provisions of the said statute declaring void and vacating the registration of the said oil and gas lease dated August 5, 1955.

It must be noted that this statute is one in special and rather unusual form and that counsel for the appellant was not able to indicate that its counterpart existed elsewhere in Canada. The learned County Court Judge was exercising a statutory jurisdiction only, and apart from the provisions of *The Gas and Oil Leases Act* he had no jurisdiction to make the declaration requested. The appellant would have been left to his right to proceed by action in the Supreme Court of Ontario, the jurisdiction of the County Court Judge being limited, by the provisions of *The County Courts Act,* R.S.O. 1960, c. 76, to cases where the value of the real property does not exceed $1,000.

The jurisdiction of the County Court Judge to consider the application is set out in s. 2(1) of *The Gas and Oil Leases Act,* which provides:

> 2. (1) Where the lessor of any land alleges,
>
> (*a*) that a lessee has made default under the terms of a gas or oil lease affecting the land in that he has failed to commence to drill a well for natural gas or oil and has failed to pay rentals in lieu thereof; or
>
> (*b*) that a lessee has made default under the terms of a gas or oil lease affecting the land, other than a default specified in clause (*a*), and
>
> (i) that the default has continued for a period of two years, or
>
> (ii) that, the default having continued for a period of less than two years, the lessor has given notice in writing to the lessee specifying the default alleged and requiring the lessee to cure the default within thirty days of the giving of the notice, and that the lessee has not cured the default within such thirty days, the lessor may apply, upon affidavit, to a judge for an order declaring the lease void and, if the lease or any assignment or transfer thereof is registered, vacating every such registration.

Therefore, under the provisions of the said s. 2(1)(*a*) the lessor's right to make an application is confined to the situa-

tion where the lessee has (1) made default under the terms of an oil or gas lease in that he has failed to commence to drill a well, and (2) failed to pay rentals in lieu thereof.

In the present case, the lessee, *i.e.*, the assignee Taylor, had certainly failed to commence to drill a well but on March 12, 1964, when the appellant applied for the order of the County Court Judge, the lessee had not failed to pay the rent in lieu of drilling. In fact, he had paid on September 23, 1963, and it had been accepted. In my view, this circumstance was sufficient to require the County Court Judge to dismiss the application declaring the lease void. This is sufficient to dispose of this appeal.

Roach J.A. giving the judgment for the Court of Appeal, said:

> We are of the opinion that the learned trial judge was right in dismissing that application for the reasons stated by him, *viz.*, that the payment, though late, having been accepted and retained by the lessor, that amounted to a consent by him to waive strict compliance with the lease as far as the delayed rental provision for that year was concerned.

That conclusion brings up the question dealt with in many cases in this Court, in the Courts in the western provinces, and the United States as to whether the doctrine of waiver applies in the case of these oil and gas leases. Such decisions hold that there being no duty upon the lessee to either drill or pay rental unless he elects to do so, there was no breach by the lessee of any obligation arising under the lease and therefore there was no breach which the lessor could waive by the acceptance of the rental after its due period: *Canadian Superior Oil of California, Ltd. v. Kanstrup et al.*[1], where, however, the default took place after the end of a fixed term while here it took place during the course of the fixed term; *East Crest Oil Co. v. Strohschein*[2], adopted by this Court *per* Martland J. in the aforesaid *Canadian Superior Oil* case at p. 105.

The appellant submits that under such a view there was in the present case no default and therefore there could be no waiver of default, despite the fact that the failure to pay the rent in lieu of drilling occurred here during the currency of the fixed term of the lease.

[1] [1965] S.C.R. 92. [2] [1952] 2 D.L.R. 432, 4 W.W.R. (N.S.) 553.

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I repeat again, however, that the jurisdiction of the learned County Court Judge herein was solely statutory. The statute, *i.e.*, *The Gas and Oil Leases Act*, specifically refers to the failure to drill or to pay rent in lieu thereof as a default and it was in respect of such an alleged default that the appellant's application was made under that Act. If it is a default then, of course, it may be waived and, in my opinion, the learned County Court Judge was correct in his view that it had been waived. I am confirmed in that view, as were both the learned County Court Judge and the Court of Appeal, by s. 6, of *The Gas and Oil Leases Act* which provides, in part, as follows:

> 6. The judge, upon the hearing of the application, shall not take into account, [among other things]
>
> ...
>
> (*b*) any rentals or other remuneration tendered after the making of the application;
>
> unless [the same] is agreed to or accepted by the applicant.

I adopt herein the words of Roach J.A., giving judgment of the Court of Appeal, when he said:

> If a judge under that section is entitled to take into account a payment made and accepted after the making of the application, *a fortiori* he is entitled to take into account one made before.

I add that certainly s. 6 gives the clearest indication that a failure to pay rent in lieu of drilling is, under the statute, considered to be a default and, therefore, is one which may be relieved against even after the application had been filed.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Giffen & Pensa, London.

Solicitors for the respondent, R. W. Taylor, Jr.: Burgess & Irwin, Wallaceburg.

WILLIAM EADIE (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF BRANTFORD (*Defendant*) ..... RESPONDENT.

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*Nov. 14, 15
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June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Restitution—Application to sever land—Conditions including severance fee and conveyance of lands for road widening purposes complied with—By-laws respecting fee and conveyance subsequently quashed—Whether applicant entitled to recovery of money paid and property conveyed.

Certain property acquired by the plaintiff was located in a subdivision control area and could only be divided into different parcels either by the registration of an approved plan of subdivision or by obtaining permission from the appropriate Planning Board to sever the land under the provisions of *The Planning Act*, R.S.O. 1960, c. 296. An attempt to have a plan approved and registered was rejected by both the Minister and by the Brantford and Suburban Planning Board. The plaintiff later followed the alternative course and he was told what the conditions would be. These were a severance fee of $800, a strip of land to widen the road on which the property fronted, and an easement for drainage across the property.

Subsequently, he repeated his application through his solicitor and again was advised of the conditions, which were the same as before with the exception that the township also wanted a rounded corner where the aforementioned road met a highway. The plaintiff complied with these conditions. He paid the money and registered the necessary conveyances of land. The Board then gave its consent to the severance of the plaintiff's property. The plaintiff then was able to complete the sale of a house that he had built in the centre of the land.

At the time when this transaction was completed By-laws 3284 and 3306 of the defendant municipality were in force. By-law 3284 provided for a severance fee of $400 per lot. By-law 3306 provided that the land it needed for the widening of a road should be deeded by the applicant to the municipality, and at the applicant's expense. These by-laws were later quashed in separate proceedings by another party. Thereafter, the plaintiff sued to recover the $800 paid to the defendant and for damages for the value of the lands allegedly illegally taken. The judgment at trial allowed the recovery of the money and ordered the reconveyance of the land. On appeal, the Court of Appeal held that neither the money nor the property could be recovered. With leave, the plaintiff then appealed to this Court.

Held (Judson and Ritchie JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Martland, Hall and Spence JJ.: The by-law by virtue of which the municipality demanded that the $800 be paid by the plaintiff to the defendant, by its words, required the plaintiff to enter into an

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

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agreement to both make the payment and convey the lands in question. Such agreement could not be considered at all as if it were an ordinary case in which parties being in dispute as to their respective rights compromised them in agreement.

In so far as the sum of $800 was concerned, this was an action for the repayment of moneys paid under a mistake in law. On the basis of the exception to the general principle that money so paid cannot be recovered, outlined in *Maskell v. Horner* (1915), 84 L.J.K.B. 1752, the plaintiff was entitled to have returned to him the $800 paid under compulsion and in mutual mistake of law. A practical compulsion was alone necessary. Also, the defendant's Clerk-treasurer, who was under a duty toward the plaintiff and other taxpayers of the municipality, was not, in the circumstances, in *pari delicto* to the taxpayer who was required to make the payment.

The Planning Board, in its demand for the conveyance of the lands, was simply acting as the agent of the defendant corporation in whose favour as grantee the said conveyance was made. The matter of compulsion applied to the conveyance as well as to the payment. There was no jurisdiction in the Planning Board under subs. (4) of s. 28 of *The Planning Act*, as it then existed, and was to be found in 1960-61 (Ont.), c. 76, which would have justified the demand for such conveyance. The plaintiff was, therefore, entitled to have such conveyance expunged from the register.

Per Judson J., *dissenting*: As held by the Court of Appeal, the matter, having been dealt with by agreement, could be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. The agreement, whether authorized or not, was entered into freely by the parties, and the plaintiff, having enjoyed the fruits of his agreement, was not now entitled to recover either the money paid or the property conveyed in fulfilment thereof.

Per Ritchie J., *dissenting*: The plaintiff did not convey his land and pay $800 to the municipality with any intention of preserving a right to dispute the legality of the demand, but rather as the result of an agreement which he entered into voluntarily under the advice of a competent solicitor. The fact that the by-law which was thought to make this action necessary was later quashed made it clear that the plaintiff was acting under a mistake of law, but the accompanying circumstances were not such as to entitle him to relief.

[*Beaver Valley Developments Ltd. v. Township of York et al.* (1961), 28 D.L.R. (2d) 76; *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*, [1964] S.C.R. 326; *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419; *Municipality of St. John et al. v. Fraser Brace Overseas Corpn. et al.*, [1958] S.C.R. 263; *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] A.C. 192, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Reville Co.Ct.J. Appeal allowed, Judson and Ritchie JJ. dissenting.

[1] [1965] 2 O.R. 704, 51 D.L.R. (2d) 679.

Gordon F. Henderson, Q.C., and *P. A. Ballachey,* for the plaintiff, appellant.

Douglas K. Laidlaw, for the defendant, respondent.

The judgment of Martland, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] which allowed an appeal from the judgment of Reville Co.Ct.J., setting aside the sum ordered and directing that judgment at trial should go dismissing the action with costs.

His Honour Judge Reville had given judgment in favour of the plaintiff (appellant in this Court) for $800 plus interest at 5 per cent from January 28, 1963, until payment. Leave to appeal to this Court was granted by the order of this Court made on December 6, 1965.

The respondent corporation had enacted By-law 3284 on March 20, 1961. That by-law was amended by By-law 3306 dated June 12, 1961. There had been in existence for some time a general subdivision by-law, No. 2377, which provided for the approval of plans of subdivision by the Brantford and Suburban Planning Board. The said By-law 3284 as amended, provided:

1. That all severances of land within the Municipality of the Township of Brantford which require the consent of the Brantford Suburban Planning Board under by-law 2377 shall be considered premature unless the owner enters into an agreement with the Municipality to pay a severance fee as hereinafter set forth;

2. The said agreement shall provide for the payment of a severance fee which severance fee will be used to provide for the resulting development of the municipality and to assist in defraying in part the expenses which otherwise would be met by the general funds of the municipality resulting from the development of such lands;

3. A severance fee of $400.00 per lot shall be charged for a lot having an area of 15,000 square feet, any smaller or larger lot shall contribute on a pro-rata basis having regard to the purpose for which it was sold and to its area and frontage;

4. The agreement shall provide that where a severance is granted on a road that requires to be widened or is planned for widening, such land as is required for widening such road shall be deeded to the municipality. The survey costs and furnishing of the deed shall be the responsibility of the owner requesting the separation. [by amending By-law 3306.]

[1] [1965] 2 O.R. 704, 51 D.L.R. (2d) 679.

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The appellant owned some 9.79 acres on the east side of a township road known as the Forced Road. These lands abutted on the south on King's Highway No. 53. When the plaintiff had purchased the lands in the year 1957 they were vacant but he subsequently erected a residence approximately in the middle of the lands. Thereafter, he decided to subdivide his lands and to this end he had a plan of subdivision prepared. This plan of subdivision showed the land upon which his house sat as being a lot with a 100-foot frontage designated as lot 6, and other lots 1 to 5 to the north of the said lot containing his home, lot 7 to the south of the lot containing his home, and lot 8 to the east of lots 1 to 7. The appellant attempted in vain to have this plan of subdivision approved by the Brantford and Suburban Planning Board under By-law 2377 but such approval was subject to certain conditions which the applicant considered unreasonable and with which he was therefore unwilling to comply. The plaintiff thereupon abandoned his plans to so subdivide his property and determined to effect a severance by selling the 100-foot lot on which the house was situate to one Woodcock. Again the appellant made an application, on this occasion not for subdivision but for severance, and again the appellant was refused such right by the municipality and the matter was referred to the Planning Board.

By letter dated March 14, 1961, the Planning Board informed the appellant:

> The following resolution was duly moved and seconded at a regularly constituted meeting of the Planning Board held on the 7th day of March, 1961: "That the Secretary be instructed to notify Mr. Eadie that a road widening strip, along his entire frontage on Forced Road, and an easement for drainage, across the property, to the satisfaction of the Township of Brantford, will be required, and that the parcel having approximately 2.4 acres and property on the east side, be combined in one deed."

In addition to that condition, the appellant was informed by the Clerk-treasurer of the Township of Brantford that his application for severance would not be approved unless he paid a severance fee of $400 per lot to the corporation. The appellant objected to this additional condition imposed by the corporation as well as to the other conditions imposed by the Planning Board with the result that this application for severance was not approved.

In the fall of 1962, the plaintiff became ill and was confined to hospital for some seven and a half months. During this time, the plaintiff's wife became apprehensive about living alone in such a secluded area. He came to the conclusion that in any event he must sell the residence and do so with expedition. The appellant, therefore, made an agreement for sale with one John P. Gibbons and his wife subject to the severance of the appellant's property being approved by the proper authorities. In the meantime, the said By-law 3284 having been enacted on March 20, 1961, and amended on June 12, 1961, by By-law 3306, the appellant submitted his application to the Municipality of the Township of Brantford. After some conferences between the appellant's solicitor and the Clerk-treasurer of the Township of Brantford, the appellant's solicitor, Mr. R. T. L. Innes, wrote to the corporation a letter dated December 5, 1962, in which he said:

> Confirming the writer's telephone conversation with your Mr. Biggar today, we will undertake to pay to the Corporation of the Township of Brantford the sum of $800.00 severance fee upon the completion of the sale from William Eadie to John Patrick Gibbons and Hilda May Gibbons of part of Blocks 1 and 2 in the Kerr Tract having a frontage of 100 feet on the easterly side of Forced Road.
>
> We have handed to Mr. Harold Marr, the secretary of the Brantford and Suburban Planning Board, a deed of a 17 foot strip on the easterly side of the Forced Road to the Corporation of the Township of Brantford for roadway widening purposes and also the deed from Mr. Eadie to Mr. and Mrs. Gibbons for approval.
>
> We would be obliged if you would request the Brantford and Suburban Planning Board to approve of these conveyances in order that we may proceed with this deal.
>
> Your very truly,
> READ & INNES
> Per: "R. T. L. Innes"

To that letter, the said Clerk-treasurer replied, by his letter of December 14th, as follows:

> Your communication of December 5th re the undertaking to pay $800 severance fee for the sale from Eadie to Gibbons is acceptable to Council.
>
> I have advised Mr. Marr of the Planning Board of the approval of Council.

The Planning Director and Secretary of the Brantford and Suburban Planning Board also wrote to the solicitor, on December 19, 1962, as follows:

> The following resolution was duly moved and seconded at a regularly constituted meeting of the Planning Board, held on the 18th day of December, 1962:

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"The Conveyance William Eadie to John Gibbons, being part of blocks 1 and 2, Kerr Tract, be approved for registration, provided a daylight corner at the junction of Highway #53 and Forced Road be included in the 17' strip of land being dedicated to the Township of Brantford."

It is to be noted that in the latter letter an additional requirement was added, *i.e.*, that he should provide for a daylight corner at the junction of Highway 53 and Forced Road. Mr. Innes sought instructions from his client who authorized submission to even this additional condition. The Brantford and Suburban Planning Board then consented to the severance and returned the copy of the deed by which the severance was to be carried out with its consent endorsed thereon. Subsequently, the solicitor wrote to the corporation enclosing the deed from the appellant to the corporation of the 17-foot strip for road widening and the land to form the daylight corner, and also remittance of the sum of $800 demanded by the corporation.

The said By-law 3284 was considered in the Supreme Court of Ontario in the action of *Noble v. Township of Brantford*[1]. By judgment dated May 22, 1963, Donnelly J. quashed the appeal. No appeal was taken from that judgment.

Thereafter, by writ issued February 24, 1963, this appellant sued to recover the sum of $800 paid to the respondent, for damages for the value of the lands allegedly illegally taken, and for costs.

The learned County Court Judge said, in his reasons for judgment:

> This raises the question of whether the severance fee of $800.00, demanded illegally as it turns out ...
>
> In addition, this action raises the further question of whether the defendant Corporation is entitled to retain the 17-foot strip of land across the whole frontage of the plaintiff's lands for road-widening purposes, and the lands for the daylight corner which were deeded by the plaintiff to the defendant in order to comply with conditions imposed by the Brantford and Suburban Planning Board.

The learned County Court Judge dealt first with the second question and concluded:

> It follows, therefore, that the conveyance by the plaintiff to the defendant, dated the 29th of November, 1962, and registered as No. A-49398 (Exhibit 9) is a nullity, and an order will be made expunging the particulars of this conveyance from the abstract in the Registry Office for the Registry Division of the County of Brant dealing with Blocks 1 and 2 of the Kerr Tract in the said Township.

[1] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

There had been, up to the date of the trial, no physical change in the lands which are the subject of such conveyance.

In his statement of claim, the plaintiff claimed relief in addition to costs of only the return of the sum of $800 with interest and damages in the sum of $2,000. The learned County Court Judge, however, as I have pointed out, gave judgment expunging the conveyance of the lands in question from the plaintiff to the defendant. I find no mention in the notice of appeal of the present respondent to the Court of Appeal of any objection to such an order on the basis that it was beyond the relief claimed, nor is there any such objection in its factum to this Court.

It, therefore, will be my course to consider this appeal as if the learned County Court Judge had the jurisdiction to make the order which he did make.

The Court of Appeal allowed the appeal of the present respondent from the judgment of the learned County Court Judge and dismissed the action upon the basis that the matter was dealt with by agreement. The Court of Appeal held that the plaintiff had agreed to both make the payment and convey the land aforesaid, and the defendant had agreed to accept such payment and conveyance in satisfaction of any terms or conditions which it might otherwise request the Board to impose whether those terms took their root in the by-law or not. Schroeder J.A., said:

> The matter may therefore be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. In that view of the case it falls squarely within the principle laid down by this Court in *Beaver Valley Developments Limited v. Township of North York and Dominion Ins. Corp.*, (1960), 23 D.L.R. (2d) 341, and affirmed by the Supreme Court in (1961), 28 D.L.R. (2d) 76.

With respect, that view fails to take into account the fact that the by-law by virtue of which the municipality demanded that the $800 be paid by the appellant to the respondent, by its words which I have recited above, required the appellant to enter into such an agreement. I am of the opinion that such agreement cannot be considered at all as if it were an ordinary case in which parties being in dispute as to their respective rights compromised them in an agreement.

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In the *Beaver Valley Developments* case, *supra,* Locke J. in this Court said at pp. 78-9:

> If it were necessary to deal with these contentions on the merits they should, in my opinion, fail, quite apart from any consideration of the amendment to s. 26 of the *Planning Act* (1955 (Ont.), c. 61) made by s. 4 (3) of c. 71 of the Statutes of 1959. The Glendale sewage disposal plant had been built by the respondent township and rates imposed upon other lands in the township which enjoyed the benefit of its use in order to pay for its construction and operation. At the time the appellant applied to the township for approval of its plan the township was under no obligation to permit the use of its sewage disposal plant by the appellant, a fact recognized by the agreement of August 19, 1954, above mentioned. The sums stipulated for in the agreement between the parties were simply contributions to be made towards the cost theretofore incurred by the township for the plant. The agreement was entered into by the appellant under legal advice and voluntarily. The contention that, in these circumstances, the moneys so to be paid were in the nature of taxes, direct or indirect, is, in my opinion, untenable.
>
> I agree with the learned trial judge that the power of the township to enter into such an agreement was undoubted. If the contrary was fairly arguable prior to the passing of the amendment of 1959, this was no longer so, in my opinion, after that was done.

I am of the opinion that the learned trial judge was correct in considering the plaintiff's action, in so far as the sum of $800 is concerned, was an action for the return of $800 paid upon the respondent's demand which was based on a by-law subsequently found to be illegal and a nullity. I am prepared to accept the submission of counsel for the respondent that this is an action for the repayment of moneys paid under a mistake in law. Counsel draws a distinction between the present case and the decision of this Court in *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*[1]. There, this Court dealt with a demand for payment of licence fees. It turned out that no by-law existed by which such fees as were demanded could be exacted. It is true, therefore, that that decision is an illustration of a mutual mistake in fact. It must be pointed out, however, that the judgment of this Court therein was based upon both a mistake in fact and a payment made under the compulsion of urgent and pressing necessity. At p. 330, Hall J. gave judgment for the Court. He said:

> I am of the opinion that the payments were made under compulsion of urgent and pressing necessity and not voluntarily as claimed by the respondent. The law on this subject was aptly summarized by Lord Reading C.J. in *Maskell v. Horner* (1915), 84 L.J.K.B. 1752 at 1755.

[1] [1964] S.C.R. 326.

That decision of this Court, therefore, in so far as it dealt with the matter of payment under urgent and pressing necessity, is applicable to the present case where a by-law did exist which purported to permit the payment of such fee as was demanded by the respondent corporation but that by-law was subsequently found illegal and quashed.

It is, of course, a trite principle that money paid under a mutual mistake of law cannot be recovered. That principle, however, is subject to several well-established exceptions. I need not deal with the various exceptions in detail. The learned County Court Judge relied, *inter alia,* upon the exception that money paid to such person as a court officer under a mistake of law may be recovered. He was of the view that money was paid to the respondent corporation on the insistence of its Clerk-treasurer, whose position he equated to that of a highly-placed civil servant in a government department or an officer of the court, and it was highly inequitable, if not dishonest, for the respondent corporation to insist on the retention and that, therefore, they should be repaid. There is much to be said in support of such a view.

I prefer to base my opinion upon the exception to the general principle outlined by Lord Reading C.J. in *Maskell v. Horner*[1], who said:

> If a person with knowledge of the facts pays money which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be re-opened. If a person pays money which he is not bound to pay, under the compulsion of urgent and pressing necessity, or of seizure, actual or threatened, of his goods, he can recover it as money had and received. The money is paid, not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods, which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction... The payment is made for the purpose of averting a threatened evil, and is made, not with the intention of giving up a right, but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.

The *Maskell* case was approved by this Court in *Knutson v. Bourkes Syndicate*[2]; *Municipality of St. John et al.*

[1] (1915), 84 L.J.K.B. 1752, [1915] 3 K.B. 106.
[2] [1941] S.C.R. 419.

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Spence J.

v. Fraser Brace Overseas Corpn. et al.[1]; and *George (Porky) Jacobs Enterprises Ltd. v. City of Regina, supra.*

It was submitted by counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff's recovery is not so stringent and that a practical compulsion is alone necessary. In each of the three cases in this Court approving *Maskell v. Horner,* which I have cited above, there were other courses available to the plaintiffs but those other courses were time consuming and impractical. Counsel for the respondent said, in the present case, the appellant could have forced a consideration by the Brantford and Suburban Planning Board then appealed from their refusal to grant the severance to the Ontario Municipal Board. That Board, I am convinced, would have felt itself bound by the by-laws of the corporation and the best the appellant could have done was to have appealed to the Court of Appeal from their refusal to disallow or vary the order of the Brantford and Suburban Planning Board upon the point of law. It is true that this exact course was taken in *Mary Margaret Noble v. Brantford and Suburban Planning Board,* which apparently is unreported but where judgment in the Court of Appeal was delivered on February 3, 1964. Such a course, however, would, of necessity, have been so fraught with delays that the sale to Mr. and Mrs. Gibbons would have been lost. In the meantime, the appellant was languishing in hospital. It was at that very time that he had the paramount need of selling the property and establishing his wife into other habitation more suitable to their then circumstances, not months or even years later.

In *Knutson v. Bourkes Syndicate, supra,* Kerwin J., said at p. 425:

> In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a *practical* compulsion to make the payments in question and is entitled to their repayment.

The italicizing is my own.

[1] [1958] S.C.R. 263.

There is also, in support of my view, the decision of the Judicial Committee in *Kiriri Cotton Company Ltd. v. Dewani*[1], where Lord Denning said at p. 204:

> . . . if there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back... Likewise, if the responsibility for the mistake lies more on the one than the other—because he had misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back.

In this case, the appellant, as a taxpayer and inhabitant of the defendant corporation, was dealing with the Clerk-treasurer of the corporation and that Clerk-treasurer was under a duty toward the appellant and other taxpayers of the municipality. When that Clerk-treasurer demands payment of a sum of money on the basis of an illegal by-law despite the fact that he does not then know of its illegality, he is not in *pari delicto* to the taxpayer who is required to pay that sum.

Counsel for the respondent argued that the appellant's demand for payment here could not be based upon the illegality of the by-law as subsequently found by Donnelly J., as there was nothing in the evidence to show that the appellant even knew of the existence of the by-law. I think such a position is untenable. The appellant had been, prior to the date of this transaction, himself a member of the municipal council and would have had to know that the municipal officers act only in accordance with what they believe are their rights and duties under by-laws. The appellant was in hospital at the time of the transactions and was represented by an able solicitor who had many decades of experience in that very municipality, and who conferred frequently with the Clerk-treasurer of the municipality. It is absolutely inevitable that the existence of the by-law and its terms would have been discussed between these two persons. Moreover, the demand was made in purported exact compliance with the said by-law.

For these reasons, I am of the opinion that the appellant is entitled to have returned to him the sum of $800 paid under compulsion and in mutual mistake of law.

[1] [1960] A.C. 192.

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In my view, the Brantford and Suburban Planning Board, in its demand for the conveyance of the lands which were described in that deed, was simply acting as the agent for the respondent corporation in whose favour as grantee the said conveyance was made. All that I have said as to compulsion heretofore applies to the conveyance as well as to the payment. I am in agreement with the view of the learned County Court Judge that there was no jurisdiction in the said Planning Board under subs. (4) of s. 28 of *The Planning Act*, as it then existed, and was to be found in the Statutes of Ontario 1960-61, c. 76, which would have justified the demand for such conveyance.

I am, therefore, of the opinion that the appellant is entitled to have such conveyance expunged from the register.

In the result, I would allow the appeal with costs and restore the judgment of the learned County Court Judge. The appellant is also entitled to his costs in the Court of Appeal.

JUDSON J. (*dissenting*):—The plaintiff acquired the property in question on the road known as Forced Road in October of 1957. The area in which the land was located was designated as a subdivision control area and it could only be divided into different parcels either by the registration of an approved plan of subdivision or by obtaining permission from the appropriate Planning Board to sever the land under the provisions of *The Planning Act*. An attempt was made in the year 1958 to have a plan approved and registered. This plan was rejected both by the Minister and by the Brantford and Suburban Planning Board.

In March of 1961, the plaintiff followed the alternative course and he was told what the conditions would be. These were a severance fee of $800, a road widening strip to bring the width of the road up to 66 feet, and an easement for drainage across the property.

In December of 1962, he repeated his application through his solicitor and again was advised of the conditions, which were the same as before with the exception that the township also wanted a rounded corner where the Forced Road met the highway. These conditions were imposed and communicated to the plaintiff's solicitor by

the Brantford and Suburban Planning Board and by the Clerk of the Township of Brantford. The plaintiff complied with these conditions. He paid the money and executed and registered the necessary conveyances of land. The Board then gave its consent to the severance of the plaintiff's property. The plaintiff then was able to complete the sale of a house that he had built in the centre of the land.

The conditions imposed were not complied with under protest, nor was there any attempt made to appeal against the conditions imposed by the Planning Board.

At the time when this transaction was completed, By-laws 3284 and 3306 of the Township of Brantford were in force. They were passed on March 20, 1961, and June 12, 1961. By-law 3284 provided for a severance fee of $400 per lot. By-law 3306 provided that the land it needed for the widening of a road should be deeded by the applicant to the municipality, and at the applicant's expense.

These are the by-laws that were quashed in 1963 in the case of *Noble v. Township of Brantford*[1]. The present action was begun in February of 1964.

The judgment of the County Court Judge allowed the recovery of the money and ordered the reconveyance of the land which had been given up as a condition of the consent from the Planning Board. He held that the transfers and payment were made under effective protest and that although they had been made under mistake of law, they came within certain recognized exceptions to the rule that payments made under mistake of law are not recoverable.

I agree with the unanimous conclusion of the Court of Appeal that this money cannot be recovered nor the transfers annulled on the grounds stated by the Court of Appeal in the following passage:

> We do not find it necessary to dispose of the present case on that basis. What the plaintiff desired here was, in effect, a subdivision of his property by severance. In the ordinary course he would have been bound to apply to the Planning Board for approval of the registration of the deed of the parcel which he sought to convey. The Planning Board on due notice to the municipality would have heard it as to any terms or conditions which, in its submission, ought to be imposed. The parties did not proceed in this way. The matter was dealt with by agreement, the plaintiff having agreed to make the payment and the transfer of land aforesaid, which the defendant agreed to accept in satisfaction of any terms or conditions which it might otherwise request the Planning Board to impose, whether those terms took their root in the by-law or not. The

[1] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

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matter may therefore be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. In that view of the case it falls squarely within the principle laid down by this Court in *Beaver Valley Developments Ltd. v. Township of North York and Dominion Ins. Corp.* (1960), 23 D.L.R. (2d) 341, and affirmed by the Supreme Court of Canada in (1961), 28 D.L.R. (2d) 76. Whether the agreement between the parties was authorized or unauthorized, they entered into it freely as a means of securing the consent of the Planning Board to the severance of this particular parcel from the rest of the land, all of which was in an area of subdivision control. The plaintiff completed his transaction of sale and having thus enjoyed the fruits of his agreement with the defendant, he is not now entitled to recover either the money paid or the property conveyed in fulfilment thereof.

I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brothers Judson and Spence and I agree with the former that this appeal should be dismissed with costs.

This does not appear to me to be a case to which the decision of Lord Reading in *Maskell v. Horner*[1] applies. *Maskell v. Horner* was not a case of payment under a mistake in law. In the course of his reasons for judgment Lord Reading said, at p. 118:

> As I have come to the conclusion that the plaintiff did not pay under a mistake, it becomes unnecessary to decide whether such mistake was of fact or of law. I express no opinion on the point.

It appears to me, therefore, that Lord Reading's decision is not to be treated as applying to a situation where a person has paid money voluntarily under a mistake of law but is rather to be confined, as Lord Reading indicates, to cases in which:

> The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right *but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.*

As it appears to me, the appellant did not convey his land and pay $800 to the municipality with any intention of preserving a right to dispute the legality of the demand, but rather as the result of an agreement which he entered into voluntarily under the advice of a competent solicitor. The fact that the by-law which was thought to make this action necessary was later quashed in the case of *Noble v. Township of Brantford*[2], makes it clear that the appellant

[1] [1915] 3 K.B. 106.
[2] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

was acting under a mistake of law, but with the greatest respect for those who hold a different view, I do not think that the accompanying circumstances are such as to entitle him to relief.

Like my brother Judson, I adopt the grounds stated by the Court of Appeal and as I have indicated, I would dismiss this appeal with costs.

Appeal allowed with costs and judgment at trial restored, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Ballachey, Moore & Hart, Brantford.

Solicitors for the defendant, respondent: Boddy, Ryerson, Houlding & Clarke, Brantford.

1967
*Oct. 4

NORMAN STUART ROBERTSON .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income Tax—Land purchased for proposed housing development—Proposed project later abandoned and land resold—Secondary intention of purchaser—Income or capital gain.

In making the assessments for the 1955 and 1956 taxation years, the respondent added to the income of the appellant the appellant's share of the profit made by a syndicate known as the Mainshep Syndicate, which profit arose from the purchase and sale of certain land. The respondent also added to the income of the appellant for the 1955 and 1956 taxation years, as well as for the 1954 and 1957 taxation years, the appellant's share of the profit of another syndicate known as the New Sheppard Syndicate, the profit of which also arose from the purchase and sale of certain land. The purpose in forming the Mainshep Syndicate was to acquire a parcel of land and erect thereon duplexes or other multiple dwellings, or to otherwise deal with the said land. The New Sheppard Syndicate was formed for the purpose of acquiring land in the vicinity of the Mainshep property on which to develop a shopping centre to service the proposed housing development. Zoning difficulties having been encountered, the proposed housing project was abandoned and both the Mainshep and New Sheppard properties were later sold at a profit.

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

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ROBERTSON v. MINISTER OF NATIONAL REVENUE

The appellant appealed from the assessment for each of the years 1954, 1955, 1956 and 1957 to the Tax Appeal Board, claiming that the amounts added from the profit of the Mainshep Syndicate and the New Sheppard Syndicate were not income and the Tax Appeal Board allowed the appellant's appeal. An appeal by the respondent from the decision of the Tax Appeal Board was allowed by the Exchequer Court and the appellant then appealed to this Court. The appeal to this Court was limited to the issue as to whether the appellant's share of the profit of the Mainshep Syndicate in the years 1955 and 1956 was part of the appellant's income for each of the years or was a capital gain.

Held: The appeal should be dismissed.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], allowing an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board. Appeal dismissed.

W. Z. Estey, Q.C., for the appellant.

F. J. Dubrule and *J. M. Halley*, for the respondent.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*orally*):—We are all of opinion that the inferences drawn by the learned trial judge from the evidence were correct. We agree with his reasons. Consequently, the appeal fails and is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

[1] [1964] Ex. C.R. 866, *sub nom. The Minister of National Revenue v. Clifton H. Lane*, [1964] C.T.C. 101, 64 D.T.C. 5059.

JASPER TUPPER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967

*May 5
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Possession of housebreaking instruments—Whether evidence of possession—Instruments normally used for ordinary purposes—Whether onus on accused to explain—Criminal Code, 1953-54 (Can.), c. 51, ss. 3(4), 295(1).

The appellant was convicted of possession of housebreaking instruments under s. 295(1) of the *Criminal Code*. In the early hours of the morning he had been a passenger in a car which, to his knowledge, was wrongfully out of the possession of its owner. In the car there were found three screwdrivers, a flashlight, socks, nylon stockings, a crowbar and a pair of woollen gloves with leather palms. Some ten days earlier, the police had seen the appellant and the same driver in the same car at about the same hour and had found therein similar articles with the exception of the crowbar. The appellant's conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the following questions of law: (1) was there any evidence, before the magistrate, of possession by the appellant; and (2) was the Crown obliged to adduce evidence to show suspicious circumstances before the onus was cast on the accused to provide an explanation?

Held: The appeal should be dismissed.

There was evidence on which the magistrate, acting judicially, could convict the appellant of possession.

Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

Droit criminel—Possession d'instruments d'effraction—Preuve de possession—Instruments employés normalement pour des fins ordinaires—L'accusé a le fardeau de donner une explication—Code criminel, 1953-54 (Can.), c. 51, arts. 3(4), 295(1).

L'appelant a été trouvé coupable de possession d'instruments d'effraction sous l'art 295(1) du *Code Criminel*. Aux petites heures du matin, il était passager dans une automobile qui, à sa connaissance, était illégalement hors de la possession de son propriétaire, et dans laquelle ont été trouvés trois tournevis, une lampe de poche, des bas de nylon, un levier et une paire de gants de laine dont les paumes étaient en cuir. Dix jours auparavant, la police avait vu l'appelant et le même conducteur dans la même automobile à peu près à la même heure et y avait trouvé des objets semblables, à l'exclusion du levier. La déclaration de culpabilité a été confirmée par la Cour

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

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d'Appel. L'appelant a obtenu la permission d'en appeler devant cette Cour sur les questions de droit suivantes: (1) Est-ce qu'il y avait une preuve de possession par l'appelant devant le magistrat; et (2) la Couronne devait-elle produire une preuve montrant des circonstances suspectes avant que le fardeau de fournir des explications ne tombe sur l'appelant?

Arrêt: L'appel doit être rejeté.

Le magistrat, agissant juridiquement, pouvait déclarer l'appelant coupable de possession en se basant sur la preuve existante.

Lorsqu'il a été démontré qu'il y a possession d'un instrument pouvant servir aux effractions, l'accusé a alors le fardeau de démontrer par une balance des probabilités qu'il existait une excuse légitime pour être en possession de l'instrument à ce moment et à cet endroit.

APPEL d'un jugement de la Cour d'Appel de l'Ontario confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the appellant's conviction. Appeal dismissed.

B. A. Crane, for the appellant.

D. A. McKenzie, for the respondent.

The judgment of Fauteux, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant Jasper Tupper was charged under s. 295(1) of the *Criminal Code* with possession of housebreaking instruments. Section 295(1) reads:

> 295. (1) Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

On October 5, 1965, at 1:50 a.m., the police stopped a car at James and King Streets in Hamilton. One Donald Richardson was the driver and the appellant was a passenger in the front seat. The police found in the vehicle:

(1) a yellow-handled screwdriver in the rear seat;

(2) a Phillips maroon-handled screwdriver on the front seat on the passenger side;

(3) a red flashlight in the glove compartment;

(4) two white socks in the glove compartment;

(5) two nylon stockings in the glove compartment;

(6) a seventeen-inch gooseneck crowbar under the front seat on the driver's side;

(7) a pair of grey woollen gloves with leather palms under the front seat on the driver's side;

(8) a screwdriver with a three and one-half inch blade which was inserted in the right-hand woollen glove under the front seat on the driver's side.

On September 24, 1965, at 1:45 a.m., the same car had been stopped on Birge Street in Hamilton. Richardson was the driver and the appellant Tupper was a passenger, together with one other person. The police had found on this occasion similar articles with the exception of the crowbar. The police did not lay a charge on this occasion.

Both Richardson, the driver, and the appellant, Tupper, were convicted. Tupper appealed to the Court of Appeal. His conviction was affirmed and his sentence increased. With leave, he appeals to this Court on two questions of law:

1. Whether there was any evidence, before the magistrate, of possession of the instruments by the Appellant;
2. If the instruments found are capable of and normally used for ordinary purposes, but may also be used for housebreaking, is the Crown obliged to adduce evidence to show suspicious circumstances before the onus is cast on the accused to provide an explanation?

Question 1.

On the question of possession, my opinion is that there was evidence on which the magistrate, acting judicially, could convict.

This car was owned neither by Richardson nor by Tupper. It had been leased by a third person, Edward Ryckman, from Snelgrove Motors on September 23, 1965, for one day. They got it back a month later with an extra 3,000 miles on the car. The articles were not in the car when it was rented to Ryckman. Ryckman said they belonged to him and his wife.

The car was first stopped the day after it was leased by Ryckman, that is, on September 24, 1965, at 1:45 a.m., with Richardson as driver, Tupper as a passenger, together with a third person. It was stopped again on October 5,

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1965, and it was in connection with the articles then found in the car that Richardson and Tupper were charged.

In my opinion, on that occasion, Richardson and Tupper were both in wrongful possession of the car. The fact that Richardson was driving in these circumstances does not give him sole possession of the car. They were both in possession of the car and both as wrongdoers, knowing that the car had been retained by Ryckman beyond the term of its lease, which was one day.

Richardson and Tupper were not going about their ordinary business with screwdrivers, flashlights, nylon stockings and a crowbar in the middle of the day. They were abroad at a highly suspicious time. There was also evidence that one of the screwdrivers was on the seat on which Tupper was actually sitting. Screwdrivers are not left haphazardly on the seats of cars.

On these facts the magistrate could properly find that both Richardson and Tupper were in possession of these instruments. Section 3(4) of the Criminal Code reads:

> (4) For the purposes of this Act,
>
> (*a*) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Question 2.

Leave was given on this question because of a conflict in the jurisprudence between some of the provinces. On the one side there are the cases of *R. v. Smith*[1]; *R. v. Haire*[2]; *R. v. McRae*[3]. These cases held that if the tools, although capable of being used for housebreaking, would normally serve a lawful purpose, the Crown should prove "some event, overt action, or declaration, to identify the tools with a specific unlawful purpose".

[1] (1957), 40 M.P.R. 267, 27 C.R. 107, 119 C.C.C. 227 (Nfld. C.A.).
[2] (1958), 122 C.C.C. 205, 29 C.R. 233, 26 W.W.R. 575 (Alta. C.A.).
[3] (1967), 59 W.W.R. 36, 50 C.R. 325 (Sask. C.A.).

In my opinion, this statement of the law is erroneous and ignores the plain wording of the section. The English version reads: "any instrument for house-breaking"; the French version reads: "un instrument pouvant servir aux effractions de maisons". The French version makes the meaning clear. Both versions mean the same thing. An instrument for house-breaking is one capable of being used for house-breaking.

The principle contended for here is that there is no onus on the accused to provide an explanation until the Crown has adduced some evidence from which an inference might be drawn that the accused intended to use such instruments for the purpose of house-breaking.

I think the law is correctly stated by the Ontario Court of Appeal in *R. v. Gilson*[1] and in the earlier judgment of the Ontario Court of Appeal in *R. v. Kernychne* but unreported; *R. v. Singleton*[2], decided in 1956, and in *R. v. Jones*[3].

Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

I would dismiss the appeal.

HALL J.:—I have read the reasons of my brother Judson and, with respect to question 1, I agree that there was evidence upon which the magistrate, acting judicially, could convict and I would dismiss the appeal.

Question 2 has given me a great deal of concern. I am, with reluctance, compelled by the wording of s. 295(1) which reads:

> 295. (1) Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

to agree that, as stated by my brother Judson:

> Once possession of an instrument capable of being used for house-breaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

[1] [1965] 2 O.R. 505, 46 C.R. 368, 4 C.C.C. 61, 51 D.L.R. (2d) 289.
[2] (1956), 115 C.C.C. 391, 23 C.R. 399, [1956] O.W.N. 455 (Ont. C.A.).
[3] (1960), 128 C.C.C. 230 (B.C. C.A.).

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Whether Parliament intended it or not, s. 295(1), as it reads, permits of no other interpretation. It puts the possessor of many necessary tools of trade, automobile accessories and tools and hundreds of similar instruments used and carried daily for routine purposes which might be capable of being used for house-breaking in the position that merely from being in possession under the most innocent circumstances, he can be brought into court and put to the proof that he has a lawful excuse for having a screwdriver, a flashlight or some other such household tool or instrument in his car, boat, tool kit or on his person at any given time or place which includes his home. It can be argued and readily accepted that this may not happen frequently, but it can and may happen if Parliament really intended what the section says when, without any qualification as to time or circumstance, it put the burden of proof on the person in whose possession any such item may be found.

The interpretation which the wording of the section compels should, I think, be drawn to Parliament's attention.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.

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*Feb. 24

June 26

HORST BINUS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Dangerous driving—Whether beyond inadvertent negligence—Whether miscarriage of justice—Criminal Code, 1953-54 (Can.), c. 51, ss. 221(4), 592(1)(b)(iii).

The appellant was convicted, before a judge and jury, of driving in a manner dangerous to the public, contrary to s. 221(4) of the *Criminal Code*. His conviction was affirmed by the Court of Appeal and he appealed to this Court on the ground that the jury was not properly instructed. Two questions were raised before this Court: Whether, in

*PRESENT: Taschereau C.J. and Cartwright, Judson, Ritchie and Spence JJ.

order to convict under s. 221(4), it was necessary for the tribunal of fact to be satisfied that the conduct of the accused went beyond inadvertent negligence and amounted to advertent negligence, and secondly, whether the Court of Appeal erred in the circumstances in applying the provisions of s. 592(1)(*b*)(iii) of the Code.

Held: The appeal should be dismissed.

Per Taschereau C.J. and Judson J.: The distinction between criminal negligence in the operation of a motor vehicle and dangerous driving is that for the former what must be shown is advertence or subjective foresight as to the consequences of one's conduct, and that for the latter all that must be shown is inadvertence in the sense of failure to exercise the care that a reasonable person would exercise in the circumstances. The jury's task is to determine whether the driving was in fact dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. By its very terms s. 221(4) goes beyond the minimum of civil negligence and the task of the jury is to consider the actual facts of the driving in the light of the section. Applying the section to the facts of this case, the appellant's conduct brought him within the wording of the section. There was no error in the judgment of the Court of Appeal on the instruction to be given to a jury on a charge of dangerous driving under s. 221(4) of the Code, and the Court of Appeal did not err in applying the provisions of s. 592(1)(*b*)(iii) of the Code.

Per Cartwright, Ritchie and Spence JJ.: In *Mann v. The Queen,* [1966] S.C.R. 238, it was decided that proof of inadvertent negligence is not sufficient to support a conviction under s. 221(4) of the Code. In so deciding, the Court was expressing a legal proposition which was a necessary step to the judgment pronounced. That proposition should have been accepted by the Court of Appeal under the principle of *stare decisis*. Under the circumstances the instruction given by the trial judge was adequate. In any event, on consideration of all the record, this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the Code.

Droit criminel—Conduite dangereuse—Est-ce au-delà de la négligence inattentive—Y a-t-il eu erreur judiciaire—Code criminel, 1953-54 (Can.), c. 51, arts. 221(4), 592(1)(b)(iii).

L'appelant a été trouvé coupable par un jury d'avoir conduit d'une façon dangereuse pour le public, contrairement à l'art. 221(4) du *Code criminel*. Le verdict de culpabilité a été confirmé par la Cour d'Appel et il en appela devant cette Cour pour le motif que les directives au jury n'avaient pas été les bonnes. Deux questions ont été soulevées devant cette Cour: A savoir si, en vue d'obtenir un verdict de culpabilité sous l'art. 221(4), il est nécessaire que le tribunal des faits soit satisfait que la conduite de l'accusé était au-delà de la négligence inattentive et équivalait à la négligence intentionnelle, et deuxièmement, à savoir si la Cour d'Appel a erré dans l'espèce en mettant en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Arrêt: L'appel doit être rejeté.

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Le Juge en Chef Taschereau et le Juge Judson: La distinction entre la négligence criminelle dans la mise en service d'un véhicule à moteur et la conduite dangereuse est que dans le cas de la première ce qui doit être établi est une préméditation intentionnelle ou subjective quant aux conséquences de l'acte, et que dans le cas de la deuxième tout ce qui doit être établi est l'inattention dans le sens d'un défaut d'exercer le soin qu'une personne raisonnable exercerait dans les circonstances. La tâche du jury est de déterminer si la conduite était en fait dangereuse pour le public, compte tenu de toutes les circonstances, y compris la nature et l'état de cet endroit, l'utilisation qui en est faite ainsi que l'intensité de la circulation alors constatable ou raisonnablement prévisible à cet endroit. De par ses termes même, l'art. 221(4) va au-delà du minimum de la négligence civile et la tâche du jury est de considérer les faits actuels de la conduite à la lumière de l'article. Appliquant l'article aux faits de cette cause, la conduite de l'appelant l'a placé dans son langage. Il n'y a eu aucune erreur dans le jugement de la Cour d'Appel relativement aux directives données au jury sur l'accusation de conduite dangereuse sous l'art. 221(4) du Code, et la Cour d'Appel n'a pas erré en mettant en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Les Juges Cartwright, Ritchie et Spence: Dans la cause de *Mann v. The Queen*, [1966] R.C.S. 238, il a été décidé que la preuve d'une négligence inattentive n'était pas suffisante pour supporter un verdict de culpabilité sous l'art. 221(4) du Code. En décidant de cette façon, la Cour a exprimé une proposition légale qui était un échelon nécessaire au jugement prononcé. Cette proposition aurait dû être acceptée par la Cour d'Appel en vertu du principe du *stare decisis*. Dans l'espèce, les directives données au jury étaient adéquates. A tout événement, en considérant tout le dossier, cette cause est une où il est à propos de mettre en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité à l'égard d'une charge de conduite dangereuse. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a conviction for dangerous driving. Appeal dismissed.

Robert J. Carter, for the appellant.

R. G. Thomas, for the respondent.

The judgment of Taschereau C.J. and Judson J. was delivered by

[1] [1966] 2 O.R. 324.

JUDSON J.:—In *O'Grady v. Sparling*[1], this Court decided that s. 55(1) of the *Highway Traffic Act*, R.S.M. 1954, c. 112, was within the provincial legislative power. This section read:

> 55. (1) Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

At that time the *Criminal Code* dealt only with criminal negligence in the operation of a motor vehicle. What had been formerly s. 285(6) of the *Criminal Code* as enacted by 1938, c. 44, s. 16, was omitted when the new *Criminal Code* was enacted by 2-3 Eliz. II, c. 51. This dealt with dangerous driving. Dangerous driving was reintroduced into the Code by 1960-61, c. 43, s. 3, as s. 221(4). It reads:

> 221. (4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for two years, or
>
> (*b*) an offence punishable on summary conviction.

It differs from s. 285(6) of the old Code in this respect: The old Code said "recklessly or in a manner which is dangerous to the public". The new Code drops "recklessly or" and says only "in a manner which is dangerous to the public". The new section may be referred to conveniently as the "dangerous driving section".

This was the charge against Horst Binus, the appellant in this appeal. He was charged that he

> on the 15th day of May, 1965 at the Township of East Gwillimbury, in the County of York, did unlawfully drive a motor vehicle bearing Ontario licence #385703, upon a road in a manner that is dangerous to the public having regard to all the circumstances including the nature, condition and use of such road and the amount of traffic that at the time is or might reasonably be expected to be on such road, contrary to Section 221(4) of the *Criminal Code* of Canada.

He was convicted before a judge and jury. His conviction was affirmed on appeal[2] and he now appeals to this Court on the ground that the jury was not properly instructed. He says that the jury must be told that they cannot convict

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 120 C.C.C. 1, 25 D.L.R. (2d) 145.

[2] [1966] 2 O.R. 324.

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of dangerous driving unless there is something more than that minimum of negligence which may involve a driver in liability to pay damages. The submission has been put in a variety of ways: that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment, or that there should be distinguishing marks of criminality or proof of a high degree of negligence and a moral quality carried into the act. It is argued that this type of instruction must be given because of the combined effect of *O'Grady v. Sparling, supra,* and *Mann v. The Queen*[1]. In *Mann v. The Queen* the point involved was whether the provincial Careless Driving section, similar in effect to the one involved in *O'Grady v. Sparling,* could stand after Parliament had introduced again to the *Criminal Code* the offence of "dangerous driving". This Court held that it could.

All the *obiter* observations in *O'Grady v. Sparling* and *Mann v. The Queen* have been collected in support of this submission. If the submission is accepted it means the formalization of a judge's charge or self-instruction in these cases. First of all, he must start with civil negligence, which involves liability if a driver departs from the standard that may be expected of a reasonably competent driver. Then he must say something more than is needed for dangerous driving and something more still for criminal negligence, i.e., recklessness.

We are not concerned with criminal negligence in the sense of recklessness here. Dangerous driving is an offence of lower degree. The following passage is a summary of the reasons of the Court of Appeal in this case:

> To convict of dangerous driving under s. 221(4) (enacted 1960-61, c. 43, s. 3) of the *Criminal Code* no proof is required of *mens rea* in the sense of either intention to jeopardize the lives or safety of others or recklessness as to such consequences. It is sufficient for the Crown to prove beyond a reasonable doubt that the accused did not drive with the care that a prudent person would exercise in the circumstances confronting him having regard to the nature, condition, and use of the place where the accused was driving and the amount of traffic that was or might reasonably have been expected to be in such place, and that the accused in failing to exercise such care in fact endangered the lives or safety of others whether or not harm resulted. Consideration of the ingredients of the offence of dangerous driving for the purpose of determining legislative competence of a provincial Legislature as opposed to Parliament is not controlling for the purpose of the substantive

[1] [1966] S.C.R. 238, 47 C.R. 400, 2 C.C.C. 273, 56 D.L.R. (2d) 1.

criminal law. Although an examination of the penalties provided by Parliament for criminally negligent driving, which does involve *mens rea* in the sense of recklessness, on the one hand, and for dangerous driving, on the other, suggests that Parliament envisaged these two offences as shading into each other, it does not follow that Parliament intended that dangerous driving involved *mens rea* and this conclusion is supported by the language of s. 221(4) which speaks of the objective factor of driving in a *manner* dangerous to the public. The distinction between criminal negligence in the operation of a motor vehicle and dangerous driving is that for the former what must be shown is advertence or subjective foresight as to the consequences of one's conduct, and that for the latter all that must be shown is inadvertence in the sense of failure to exercise the care that a reasonable person would exercise in the circumstances.

I think that this is the correct approach. The fallacy in the appellant's submission is this: He wants the Court to say that unless it does as he suggests, he will be convicted of the crime of dangerous driving for conduct which may amount to no more than civil negligence, or, to put it another way, negligence which should involve only civil consequences—compensation. This is not so. The section itself contains its own definition. The jury's task is to determine whether the driving was in fact dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. By its very terms the section goes beyond the minimum of civil negligence and the task of the jury is to consider the actual facts of the driving in the light of the section. If this is done, there will be no conviction for negligence involving only civil consequences. To this extent the section does involve a consideration of the state of mind of the driver towards his task. A motor car does not drive itself. It responds to the direction which it gets from the driver within the limits of space and time available to him.

The application of the section to the facts of this case gives no difficulty. This motorist was driving on a county road. He came out of an "S" curve and saw ahead of him two boys on a bicycle 150 yards away. There was no oncoming traffic. He struck the bicycle from the rear. His defence was that the boys swerved ahead of him. There was evidence given by a bystander that no such thing happened and that he drove straight into the boys and did not apply his brakes or swerve until the moment of impact. The jury was confronted with a very simple situation. What

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did this man do? What should he have done? Did his conduct bring him within the wording of the section? It obviously did.

I would answer the points in issue in this appeal generally by saying that there was no error in the judgment of the Court of Appeal on the instruction to be given to a jury on a charge of dangerous driving under s. 221(4) of the Criminal Code and that the Court of Appeal did not err in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

I would dismiss the appeal.

The judgment of Cartwright, Ritchie and Spence JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises and the grounds for the decision of the Court of Appeal[1] are summarized in the reasons of my brother Judson.

This appeal raises two questions, (i) whether in order to convict on a charge of dangerous driving under s. 221(4) of the *Criminal Code* it is necessary for the tribunal of fact to be satisfied that the conduct of the accused went beyond inadvertent negligence and amounted to advertent negligence and (ii) whether the Court of Appeal, having reached the conclusion that the charge of the learned trial Judge was not adequate, erred in the circumstances of this case in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

In stating the first question I am using the terms "inadvertent negligence" and "advertent negligence" in the sense in which they were employed by all members of this Court in *O'Grady v. Sparling*[2], adopting the phraseology used in Kenny's Outlines of Criminal Law, 17th ed., p. 34, and in Glanville Williams' Criminal Law, 1953, p. 82.

If the matter were *res integra* I would find the reasoning of my brother Judson and that of Laskin J.A. in the case at bar most persuasive; but it appears to me that in *Mann v. The Queen*[3] at least five of the seven members of this

[1] [1966] 2 O.R. 324.

[2] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 120 C.C.C. 1, 25 D.L.R. (2d) 145.

[3] [1966] S.C.R. 238, 47 C.R. 400, 2 C.C.C. 273, 56 D.L.R. (2d) 1.

Court who heard the appeal decided that proof of inadvertent negligence is not sufficient to support a conviction under s. 221(4) and that in so deciding they were expressing a legal proposition which was a necessary step to the judgment pronounced. I find it impossible to treat what was said in this regard as *obiter,* and, in my respectful view, that proposition should have been accepted by the Court of Appeal under the principle of *stare decisis.* The binding effect of a proposition of law enunciated as a necessary step to the judgment pronounced is not lessened by the circumstance that the Court might have reached the same result for other reasons.

I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons. The ancient warning, repeated by Anglin C.J.C. in *Daoust, Lalonde & Cie Ltée v. Ferland*[1], *ubi jus est aut vagum aut incertum, ibi maxima servitus prevalebit,* should not be forgotten.

Turning now to the second question, as to whether the Court of Appeal erred in applying the provisions of s. 592(1)(*b*)(iii) of the Code, I have reached the conclusion that they did not.

Following the charge of the learned trial Judge to the jury, counsel for the appellant raised certain objections and after some discussion the jury were recalled for further instructions as follows:

> THE COURT: Gentlemen, I thought that perhaps you might require a little more assistance than I gave you on this word "dangerous" to be found in Section 221, subsection 4 of the Code.
>
> As you recall, the section speaks of driving in a manner that is dangerous to the public having regard to all the circumstances including the nature and condition and use of such place and the amount of traffic that at that time is or might reasonably be expected to be on such place. *Now, since the word is found in the Criminal Code and this is a criminal prosecution it's to be presumed that what we are talking about is criminal conduct, something that is more than mere civil negligence; that is, mere inattention from which civil liability might flow.* You will in this case, determine from the evidence the manner in which the accused was driving. You will determine from the evidence the circumstances which existed at the time he was driving in this fashion. And after considering the manner in which he was driving determine whether or not that way he was

[1] [1932] S.C.R. 343 at 351, 2 D.L.R. 642.

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driving is in your opinion dangerous to the public. *Evidence which shows mere failure to exercise reasonable care under all the circumstances and perhaps resulting in civil liability is not sufficient to support a conviction for dangerous driving.* All right.

Counsel for the defence, rightly as I think, expressed his satisfaction with this and stated he had no further comments.

Later the jury returned to ask a question. The record at this point reads as follows:

> CLERK OF THE COURT: Gentlemen of the Jury, I understand you wish to ask the Court a question. Mr. Foreman, will you please put your question to the Court?
>
> FOREMAN OF THE JURY: Your Honour, I have been requested to ask you to define for us "dangerous". Could it be dangerous without intent? Would you define it?
>
> THE COURT: Yes, if you find on the facts that the manner of driving was dangerous in your opinion you may disregard the matter of intent. Does that answer your question?
>
> FOREMAN OF THE JURY: Yes.

On the view of the meaning of s. 221(4) of the Code which I have expressed above, I incline to think that the instruction given by the learned trial Judge when the jury were re-called, and particularly the passages which I have italicized, was adequate in the circumstances of this case. Be that as it may, on consideration of all the record I agree with the conclusion of Laskin J.A. that this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Robert J. Carter, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

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DÉVELOPPEMENT CENTRAL VILLE DE L'ISLE (*Defendant*) ..... APPELLANT;

AND

SIDNEY LEIBOVITCH and EDWARD LEIBOVITCH (*Plaintiffs*) ..... RESPONDENTS;

AND

DÉVELOPPEMENT PLATEAU LA-SALLE LTÉE *et al.* ..... (MISE-EN-CAUSE).

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contracts—Loan secured by hypothec—Transfer of debt—Right of redemption—Incorporeal property—Whether sixty days notice required under art. 1040a of the Civil Code.

The words "an immoveable" and "the immoveable" as used in art. 1040a of the Civil Code refer only to corporeal property and the article has no application to incorporeal property such as the transfer of a debt.

Contrats—Créance hypothécaire—Cession de créance—Droit de rachat —Bien incorporel—Le préavis de soixante jours est-il requis sous l'article 1040a du Code Civil.

Les mots «un immeuble» et «l'immeuble» tels qu'employés dans l'article 1040a du Code Civil se réfèrent seulement à des biens corporels et l'article n'a pas d'application lorsqu'il s'agit de biens incorporels tels qu'une cession de créance.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Smith. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Smith J. Appeal dismissed.

Jean Filion, Q.C., and *André Bélanger,* for the defendant, appellant.

Harry Aronovitch, Q.C., and *Boris Berbrier,* for the plaintiffs, respondents.

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*PRESENT: Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1967] Que. Q.B. 419.

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DÉVELOPPEMENT CENTRAL VILLE DE L'ISLE INC. v. LEIBOVITCH *et al.*

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a majority judgment of the Court of Queen's Bench[1] dismissing an appeal from a judgment of Smith J. in the Superior Court, rendered May 11, 1965, which maintained respondents' action and declared cancelled and annulled appellant's right to redeem a sum of $798,269.97, transferred as security for the repayment of a loan of $80,000, made by respondents to appellant under a certain deed of loan executed before J. Bernard Billard, Notary, on March 6, 1962.

The facts, which are not in dispute, are fully set out in the judgments below. Shortly stated they are as follows.

1. On May 5, 1961, by deed before Robert Désy, Notary, the mise-en-cause Développement Plateau LaSalle Ltée acknowledged being indebted to appellant in the amount of $798,269.27, and obligated itself to pay the said amount on or before May 1, 1964. To secure the reimbursement of said sum, it hypothecated in favour of the appellant certain immoveable properties more fully described in the said deed.

2. On March 6, 1962, by deed before J. Bernard Billard, Notary, respondents loaned to the appellant a sum of $80,000 payable one year later on March 6, 1963, with interest at the rate of 2 per cent per month and also an additional indemnity of $16,000. To secure the reimbursement of the said sum of $80,000, interest and accessories, the appellant transferred and conveyed to respondents the sum of $798,269.97 due by the mise-en-cause under the deed of May 5, 1961, above referred to. This transfer reads in part as follows:

> To secure the reimbursement of the said sum of $80,000, the payment of the interest thereon, costs and accessories, ...the borrower has by these presents transferred and conveyed with warranty of fournir and faire valoir unto the said creditors Sidney and Edward Leibovitch ...the sum of $798,269.97 due by Développement Plateau LaSalle Limitée ...under the terms of a deed of obligation passed before Me Robert Désy, notary.

Under the terms of said deed of March 6, 1962, appellant had the right to redeem

> within ten days following the maturity of the present loan, any principal balance remaining due on the said sum of $798,269.97, by paying to the creditors the amount of the present loan plus interest, costs and accessories as hereinabove stipulated plus the sum of $1.00.

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It was also stipulated that should the appellant fail to fulfill its obligations, the respondents would have, *inter alia,* the following rights:

> Should the said Transferor-Borrower fail to fulfill any of the obligations herein stipulated, should he fail to pay at maturity any instalments of interest or should he fail to pay the amount of the present loan at maturity ... the Borrower-Transferor shall lose ipso facto without any notice or mise-en-demeure whatsoever, the right hereinabove stipulated to redeem the remainder of said sum of seven hundred and ninety-eight thousand two hundred and sixty-nine dollars and ninety-seven cents ($798,269.97) without any notice or mise-en-demeure whatsoever, and shall collect all interest accrued or to accrue, paid or to be paid on the said sum, and all instalments paid by the borrower on the loan hereinabove consented to him shall remain the property of the creditors as liquidated damages, without prejudice to any rights or recourse of the said creditors, in which case the said right to redeem shall become automatically, ipso facto, without any mise-en-demeure or notice whatsoever on the part of the said creditors-transferees, null and void.

3. On May 1, 1962, by deed before J. Bernard Billard, Notary, respondents and one Henry Marcovitz acting in Trust loaned to the mise-en-cause Développement Plateau LaSalle Ltée a sum of $340,000. To secure the reimbursement of the said sum of $340,000, the mise-en-cause Développement Plateau LaSalle Ltée hypothecated, in favour of the respondents and the said Marcovitz, the immoveable properties already hypothecated in favour of appellant in virtue of the deed of May 5, 1961, above referred to. This deed of May 1, 1962, also contained a *dation en paiement* clause. Appellant intervened in the said deed and granted priority of hypothec in favour of the lenders over the hypothecs securing its claims under the deed of May 5, 1961.

4. On June 19, 1963, the respondents and Marcovitz obtained before Tellier J. in the Superior Court a judgment by default declaring them to be owners of the immoveable properties hypothecated to secure the reimbursement of the said sum of $340,000.

5. The appellant defaulted on the payment of the $80,000 due to the respondents on March 6, 1963, and, some fifteen months later, on June 4, 1964, respondents served on appellant a notice of default, giving appellant the option of paying the said sum of $80,000 (which had become due on March 6, 1963) with interest and accesso-

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ries, within a delay of seven days or of losing its right to redeem the sum due under the deed of loan to mise-en-cause dated March 5, 1962.

Payment was not made by appellant and on June 17, 1964, respondents instituted the present action and in their conclusions asked

> WHEREFORE plaintiffs, under reserve of all of their rights and recourses, and praying acte of their tender to defendant of its N.S.F. Cheque, Exhibit P-2, pray that by judgment of this Honourable Court to intervene, it be ordered and declared that defendant's right to redeem the remainder of the sum of $798,269.97 is cancelled and annulled and is null and void, and that plaintiffs are the sole and absolute owners of the sum of $798,269.97, or such balance remaining under terms as set forth in a deed of obligation registered at Montreal under No. 1532489 and under the terms of a deed of transfer registered at Montreal under No. 158763, affecting the following immoveable properties, namely: ... (here follows a description of the immoveable properties hypothecated).

Appellant's principal defence was that respondents' claim of $80,000 had been extinguished by compensation. Alternatively, appellant pleaded that respondents' action was premature because it had not been given the statutory notice required under art. 1040a of the *Civil Code*.

Dealing first with appellant's plea of compensation. Although under the judgment of Tellier J., to which I have referred, the respondents became the undivided owners —with Marcovitz—of the immoveable property on which the claim of $798,269.97 was secured by hypothec, they were never personally liable for that amount. It follows that, as all the learned judges in the Courts below have held, the respondents' claim of $80,000 against the appellant was not extinguished by compensation.

Appellant's second ground of defence was that respondents' action is premature because they did not give to appellant the sixty-day notice called for under art. 1040a of the *Civil Code*. That article was enacted in 1964 by the Statute 12-13, Eliz. II, c. 67. It reads as follows:

> Under a contract to guarantee the performance of an obligation, a creditor cannot exercise the right to become the absolute owner of an immoveable or the right to dispose thereof until sixty days after he has given and registered a notice of the omission or breach by reason of which he wishes to do so.
>
> Such notice must be registered with a designation of the immoveable and served on the person whose rights as holder of the immoveable as proprietor thereof are then registered; it takes effect against any other interested person to whom the creditor's rights are opposable.

The notice may be served on the holder or his heirs in the same manner as a summons under the Code of Civil Procedure.

The registrar must, by registered letter, inform each hypothecary creditor whose name appears in the register of addresses of the registration of the notice.

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DÉVELOPPEMENT CENTRAL VILLE DE L'ISLE INC. v. LEIBOVITCH *et al.*

Abbott J.

In my opinion the words "an immoveable" and "the immoveable" as used in the said article refer only to corporeal property and the article has no application to incorporeal property such as the debt transferred to the respondents under the deed of March 6, 1962, although the payment of that debt appears to have been secured by a third hypothec.

For the foregoing reasons as well as for those given by Smith and Rivard JJ. in the Courts below, with which I am in substantial agreement, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Filion, Lafontaine, Laurier & Bélanger, Montreal.

Attorney for the plaintiffs, respondents: Boris J. Berbrier, Montreal.

MOTEL PIERRE INC. (*Plaintiff*) ..... APPELLANT;

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*Apr. 28
June 26

AND

LA CITÉ DE SAINT-LAURENT (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Municipal corporations—Taxation—Business tax—Motel—Whether business tax prohibited by Quebec Licence Act, R.S.Q. 1941, c. 76, s. 33.

The plaintiff sued the municipality for the recovery of business tax it paid during the years 1959 to 1962 and which had been levied at the rate of 8 per cent on the rental value of a motel it occupied. It was contended that the tax paid by the motel was a tax contemplated by s. 33 of the *Licence Act*, R.S.Q. 1941, c. 76, which enacts that no municipality may levy any tax, impost or duty for keeping a hotel, restaurant or lodging-house. The trial judge dismissed the action and his judgment was affirmed by the Court of Appeal. The plaintiff appealed to this Court.

*PRESENT: Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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Held: The appeal should be dismissed.

The trial judge and the majority in the Court of Appeal were right in holding that s. 33 dealt only with licence fees of the type contemplated under the Act in which it was contained and that it had no application to a business tax of general application based upon rental value which was in issue here.

Corporations municipales—Revenu—Taxes d'affaires—Motel—Est-ce que la taxe d'affaires est prohibée par la Loi des licences, S.R.Q. 1941, c. 76, art. 33.

Le demandeur a poursuivi la municipalité en recouvrement de la taxe d'affaires qu'il a payée durant les années 1959 à 1962 et qui avait été prélevée au taux de 8 pour-cent sur la valeur locative d'un motel qu'il occupait. On a soutenu que la taxe payée par le motel était une taxe envisagée par l'art. 33 de la *Loi des licences*, S.R.Q. 1941, c. 76, qui décrète qu'aucune municipalité ne peut prélever aucune taxe, aucun impôt ou droit pour tenir un hôtel, un restaurant ou une maison de logement. Le juge au procès a rejeté l'action et sa décision fut confirmée par la Cour d'appel. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le juge au procès et la majorité dans la Cour d'appel ont jugé avec raison que l'art. 33 traite seulement des droits de licence du genre envisagé par le statut qui le contient et qu'il ne s'applique pas à une taxe d'affaires d'une application générale basée sur la valeur locative dont il est question dans cette cause.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du juge Lamarre. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Lamarre J. Appeal dismissed.

Paul Trudeau, for the plaintiff, appellant.

Pierre Coutu, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant sued the respondent municipality to recover the sum of $11,447.68 alleged to have been paid in error as business tax for the years 1959, 1960, 1961 and 1962. During that period, appellant operated a motel in

[1] [1967] Que. Q.B. 239

the said municipality and the tax in question was paid as business tax levied at the rate of 8 per cent on the assessed rental value of the immoveable property occupied by the appellant. The tax was imposed under the authority of municipal By-law 158, enacted in 1934 under the authority of the *Montreal Metropolitan Commission Act,* 11 Geo. V, c. 140 as amended which, generally speaking, applied to all businesses in the municipality.

It is common ground that the motel operated by the appellant is a "hotel" within the meaning of that word as used in s. 33 of the *Quebec License Act,* R.S.Q. 1941, c. 76. That section reads as follows:

> Notwithstanding any special act to the contrary, no municipality may, by by-law, resolution or otherwise, levy any tax, impost or duty for keeping a hotel, a restaurant or a lodging-house.

The License Act creates a provincially administered system of licensing certain specified types of business—including hotels—and provides for control and supervision of such businesses throughout the province. The possession of a license under the Act is a condition precedent to carrying on business.

As counsel for appellant conceded in his factum, the sole question in issue on this appeal is whether the business tax amounting to $11,447.68 paid by appellant, is a tax contemplated by s. 33 of the *Quebec License Act.*

The learned trial judge and the majority in the Court of Queen's Bench[1] held that the said s. 33 dealt only with license fees of the type contemplated under the Act in which it was contained, and had no application to a business tax of general application based upon rental value which is in issue here.

I share that opinion and am in respectful agreement with the reasons of Casey J. in the Court below which were concurred in by Rinfret, Owen and Brossard JJ.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Prévost, Trudeau & Bisaillon, Montreal.

Attorneys for the defendant, respondent: Savard & Coutu, St-Laurent.

[1] [1967] Que. Q.B. 239.

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*Oct. 27

C. BECKETT & CO. (EDM.) LTD., UNDERWOOD TRANSIT MIXED (1961) LTD., DOMINION BRONZE LTD., FREEZE MAXWELL CO. LTD., HOLM'S MASONRY (NORTHERN) LTD., and WESTERN ELECTRICAL CONSTRUCTORS LTD. ... APPELLANTS;

AND

J. H. ASHDOWN HARDWARE CO. LTD. ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mechanics' liens—Waiver of lien rights by subcontractors—Effect—The Mechanics' Lien Act, 1960 (Alta.), c. 64.

The registered owners of certain lands employed a construction company as general contractor to erect a building on their property. The construction company fell into financial difficulties and was unable to complete the building and the appellants, who were unpaid subcontractors on the project, filed mechanics' liens against the property. A form of waiver of lien had been signed by each of the appellants and contained, *inter alia*, the words "waive and renounce any lien or right of lien which we have or may have upon the...land and...building...and do waive and renounce any and all right to register or to hold a claim of lien against the said land, building or chattels." This waiver was given by the appellants at the request of the owners of the property in order that a first mortgage might be arranged and for the benefit of any subsequent purchaser and also for the benefit of any subsequent mortgagee.

Applications having been filed to have declared invalid the appellants' liens, an order was made directing the determination of two questions: (1) Did the execution of a waiver of lien rights by any party preclude it from filing a valid lien? (2) A lien having in fact been filed by such party, could those lienholders not being parties to the said waiver of lien rights, take advantage of the provisions contained therein to exclude those parties who executed such waiver from sharing in funds paid into Court by the owners of the lands in question in satisfaction of all liens?

In the judgment of the Chambers Judge both of these questions were answered in the negative. On appeal from this judgment to the Appellate Division of the Supreme Court of Alberta it was held that

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Pigeon JJ.

the appeal should be allowed and that the questions should be answered in the affirmative. An appeal from the judgment of the Appellate Division was brought to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Greschuk J. Appeal dismissed.

J. C. Cavanagh, Q.C., and *R. J. Biamonte,* for the appellants.

D. Spitz and *G. A. Lucas,* for the respondent.

At the conclusion of the argument of counsel for the appellants, the following judgment was delivered:

CARTWRIGHT C.J. (*Orally for the Court*):—We find ourselves in complete agreement with the reasons of Mr. Justice Allen who gave the unanimous judgment of the Appellate Division. It follows that the appeal is dismissed.

We find ourselves unable to act upon the arrangement as to costs made between the parties and our order is that the appeal be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Cavanagh, Henning, Buchanan, Kerr & Witten, Edmonton.

Solicitors for the respondent: Macdonald, Spitz & Lavallée, Edmonton.

[1] (1967), 59 W.W.R. 204 (*sub nom. Customs Glass Ltd. v. Waverlee Holdings Ltd. et al.*)

1967
*Oct. 13

A. & D. LOGGING CO. LTD. (*Plaintiff*) ....APPELLANT;

AND

THE CATTERMOLE-TRETHEWEY CONTRACTORS LTD. (*Defendant*) ..... RESPONDENT;

AND

CONVAIR LOGGING LTD. (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Agreement to log certain timber licences—Interpretation of agreement—Whether an interest in land or timber acquired by contractor.

Timber licences in respect of two timber berths and four timber sale contracts were issued by the Crown in right of the Province of British Columbia to Fleetwood Logging Co. Ltd. By an agreement dated August 11, 1961, that company granted to Convair Logging Ltd. the exclusive right to cut and remove all merchantable timber on the timber berths and timber sale contracts subject to certain terms and conditions, and the right to subcontract in that regard. By an agreement made on December 12, 1963, between the Fleetwood company and Cattermole-Trethewey Contractors Ltd., the former sold and transferred to the latter "free and clear from all liens, charges and encumbrances whatsoever" the two timber licences and "all of the right title and interest of the vendor in and to and all rights to cut timber under" the four timber sale contracts. Assignments of the timber licences and the timber sale contracts to Cattermole-Trethewey were consented to by the Minister of Lands, Forests and Water Resources as was required by the terms thereof. By this process Cattermole-Trethewey became the legal owner of the timber licences and timber sale contracts.

On December 19, 1962, Convair had entered into an agreement with A. & D. Logging Co. Ltd. whereby A. & D. was "to log the said TIMBER LICENCES for and on behalf of Convair". A. & D. obtained a judgment against Cattermole-Trethewey declaring that the former was entitled as against the latter to cut and remove the timber situated on the timber berths and timber sale contracts and for damages for being deprived of its cutting rights. On appeal, the Court of Appeal allowed the appeal and held that the agreement between Convair and A. & D. did not confer on A. & D. a *profit à prendre*. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

*PRESENT: Cartwright C.J. and Abbott, Martland, Ritchie and Hall JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment declaring the appellant to be entitled as against the respondent Cattermole-Trethewey Ltd. to cut and remove timber situated on certain lands and for damages for being deprived of its cutting rights. Appeal dismissed.

D. M. Gordon, Q.C., and *H. R. A. McMillan*, for the plaintiff, appellant.

S. Martin Toy, for the defendant, respondent, The Cattermole-Trethewey Contractors Ltd.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*Orally for the Court*):—Mr. Toy, it will not be necessary for us to call upon you. We are all in agreement with the view which Mr. Justice Tysoe expressed as follows:

> It is my opinion that the agreement is plainly a contract of employment of the respondent as contractor to log and cut the timber for Convair. The respondent's remuneration is to be based on the sale price received by Convair on the sale of the logs produced by the respondent. The language of the agreement is quite inappropriate to the creation of an interest in the land or timber. It does not create such an interest but is a mere personal contract between the parties named therein for services by the respondent. It does not purport to give possession—exclusive or otherwise—of the land to the respondent. At most it purports, by necessary implication, to confer a right to go upon the land for the purpose of performing the contractual obligation to cut and log the timber thereon.

It follows that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Copeman, Henderson, Davies & McMillan, Victoria.

Solicitors for the defendant, respondent, The Cattermole-Trethewey Contractors Ltd.: Boyd, King & Toy, Vancouver.

Solicitor for the defendant, respondent, Convair Logging Ltd.: John C. Bouck, Vancouver.

[1] (1967), 61 D.L.R. (2d) 263.

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*May 26, 29 30, 31 Oct. 3

CLARK'S-GAMBLE OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

GRANT PARK PLAZA LIMITED, GRANT PARK WESTERN LIMITED, GRANT PARK EASTERN LIMITED and ARONOVITCH & LEIPSIC LIMITED (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contracts—Interpretation—Premises in shopping centre constructed for and leased to plaintiff department store—Plaintiff later advised that further development of centre would include additional department store—Injunction sought to restrain developer from constructing proposed store.

The defendant Grant Park Plaza Ltd. was engaged in the development and construction of a shopping centre and after prolonged negotiations it had accepted a proposal for a lease from the plaintiff department store. The proposal and the lease itself were executed at the same time and formed one contract. The defendant encountered difficulties in securing tenants and as a result of financial stringency, work on the centre ceased after completion of the building leased to the plaintiff and certain other buildings. Some two years later, the plaintiff was advised by the defendant that it was proceeding with further development of the centre and that this additional development would include another department store. The plaintiff immediately objected to the proposed lease for a "Woolco Store" and upon the defendant's refusing to desist, an action was brought for a permanent injunction restraining Grant Park Plaza Ltd., its two subsidiary companies and its agent, from entering into an agreement with W Co. for the construction and operation of an additional department store in the Grant Park Centre. This action was dismissed at trial. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these claims were dismissed.

On appeal to the Court of Appeal, the main appeal was dismissed; the appeal from the dismissal of the claim for damages by the plaintiff was discontinued and the counterclaim for damages was not pursued. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The Court rejected the appellant's contention that by the agreement between the parties the leasing of any space in a building within the proposed shopping centre to any department store or discount store was prohibited. The appellant had relied on para. 5 of the proposal which read "We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown

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

on the layout in the plans submitted by Waisman & Ross dated November 22, 1961." However, as held by the trial judge, there was no covenant by Grant Park Western Ltd. (the assignee of the lease) to build the shopping centre other than that building which was constructed for and leased to the appellant.

The section of the lease relating to competitive use had no application to the present situation: (1) It applied only outside the shopping centre and had no application to two sites within the same shopping centre. (2) The proposed construction of a building for the "Woolco Store" and the lease thereof was not one of the things prohibited by the section if the respondents were bound by it.

The submission that the proposal which the appellant made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implied a negative covenant of the respondent not to depart from that scheme failed. This was not a building scheme as dealt with in the many cases upon that subject. In such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and that was not at all the situation contemplated in the present case. The argument that to permit the respondent to lease any part of the shopping centre to a discount department store the activities of which would be competitive with the appellant's business would be in derogation of its grant was not accepted.

The further submission that the respondents were estopped by the conduct of Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store also failed. That there was no covenant by the said respondent to build the shopping centre other than the one building to be leased to the appellant was in itself sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence. The representations alleged here were all representations of intentions to act in a certain way in the future.

[*Browne v. Fowler*, [1911] 1 Ch. 219; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; *Jorden v. Money* (1854), 5 H.L. Cas. 185; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Marquess of Salisbury v. Gilmore*, [1942] 2 K.B. 38, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal by the plaintiff from a judgment of Smith J. Appeal dismissed.

Hon. C. H. Locke, Q.C., and *M. J. Mercury*, for the plaintiff, appellant.

Clive K. Tallin, Q.C., and *A. S. Dewar, Q.C.*, for the defendants, respondents.

[1] (1966), 57 W.W.R. 27.

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The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[1] which dismissed an appeal by the plaintiff from the judgment delivered at trial by Smith J., as he then was.

The learned trial judge had dismissed the plaintiff's action for a permanent injunction restraining the defendants from entering into an agreement with the F. W. Woolworth Company for the construction and operation of an additional department store in the Grant Park Plaza Shopping Centre in the City of Winnipeg. The plaintiff also claimed for damages and the defendants counterclaimed for damages. Both of these damage claims were dismissed. The appeal from the dismissal of the claim for damages by the plaintiff was discontinued on the appeal to the Court of Appeal for Manitoba and the counterclaim for damages was not pursued. Therefore, we are left with the main appeal by Clark's-Gamble of Canada Limited only, that is, against the judgment refusing the injunction.

The defendant Grant Park Plaza Limited, represented by Aronovitch and Leipsic Limited, was engaged in the development and construction of a shopping centre in the City of Winnipeg. It entered into negotiations with Clark's-Gamble of Canada Limited and its founders and main shareholders Marshall Wells of Canada and MacLeod's Limited. Clark's-Gamble was represented by Mr. P. C. Fikkan and Mr. Irving Strum. Mr. Fikkan was the merchandising expert for the appellant and Mr. Strum was the real estate expert for the appellant who had negotiated its leases.

As pointed out by the learned trial judge, the lease in this case, which is the subject of the present action, was the result of thorough and prolonged negotiations between the officials of the parties and their solicitors. The negotiations culminated in the delivery by the appellant to the respondents Grant Park Plaza Limited of a document, ex. 25, which bears the date March 27, 1962 and which has been designated throughout the proceedings as "The Proposal". That was a proposal for the lease which was accepted by the respondent Grant Park Plaza Limited.

[1] (1966), 57 W.W.R. 27.

The lease itself, two copies of which had been filed, one as ex. 1 and one as ex. 55, bears the same date, March 27, 1962. The learned trial judge found, upon the evidence, that exs. 1 and 25 were executed at the same time and that ex. 25 was intended to be part of the contract holding that the two exhibits must be read together as forming one contract. That finding was accepted in the Court of Appeal for Manitoba and I propose to adopt the finding in these reasons. It might be added that the same is in exact accordance with para. 7 of the Proposal, ex. 25, which reads:

> 7. The Company will enter into a lease with Grant Park Plaza Limited (hereinafter called the "Lessor") in the form to be attached and executed by the Lessor and the Company and the said lease together with this letter when executed by us and accepted by you and the Lessor will constitute but one agreement between the parties.

It should be noted that the lease is on the printed form supplied by the solicitors for Grant Park Plaza Limited and, apart from schedules, it is thirteen pages in length. Many of those pages have extensions pasted to them and every page but one bears alterations, strike-outs and additions. It is quite apparent and in accordance with the evidence that the lease resulted from intense negotiations between not only the representatives of the parties but their solicitors. The counsel for the appellant, when the lease was produced at trial, upon the Court putting to him the query, "Did you draft the lease?", replied, "Our firm drafted it". Despite the fact the lease is on a form from Aronovitch & Leipsic Limited, under these circumstances I am of the opinion that there is no basis for the argument advanced by counsel for the appellant in this Court based upon the maxim *contra proferentem*. The mere fact that the document was originally first typed on a form provided by the solicitor for one of the parties in the light of the circumstances which occurred thereafter and up to its execution is not sufficient to bring the transaction within the class of cases where a contract is presented by one person for execution by another.

Grant Park Plaza Limited encountered difficulties in obtaining leases for the various stores which were to line each side of an enclosed mall under the original concept for the shopping centre and although certain work was carried out in the construction of the shopping centre other than

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the building intended for occupancy by the appellant, due to financial stringency the respondent after construction of the building leased to the appellant and certain other buildings, particularly a food store and a service station, ceased work, levelled the site of the enclosed mall and its adjoining stores, and cut off at ground level the pilings which had been driven for such construction. Matters stood in this fashion until the year 1964. On April 22, 1964, Mr. Aronovitch, as President of Aronovitch & Leipsic Ltd., which is described as managing agent for the respondent Grant Park Plaza Limited, wrote to the plaintiff as follows:

> We are pleased to advise that we are now completing negotiations for further development of Grant Park Plaza Shopping Centre. This additional development will include a second food store; 53,000 square feet of closed mall, made up of approximately thirty allied stores; and a department store having an area of approximately 150,000 square feet.
>
> We are quite confident that the increased number of retail stores, with their added variety of merchandise, will generate additional sales. The increased size of the centre should draw from a greater trading area. It is anticipated that these new additions will be completed before August, 1965.

The appellant immediately objected to the proposed lease to the F. W. Woolworth Company for a "Woolco Store" and upon the respondent's refusing to desist, commenced the present action. Almost at the same time, the respondent Grant Park Plaza Limited transferred to its fellow respondent Grant Park Eastern Limited part of the land in the proposed shopping centre on which it proposed that the department store should be constructed for lease to the F. W. Woolworth Company.

In 1962, the respondent Grant Park Plaza Limited had already transferred to Grant Park Western Limited a portion of the land which included that which was the subject of the lease to the appellant, and on November 21, 1962, by a document produced at trial as ex. 56, the respondent Grant Park Western Limited and the appellant had agreed as to the term of the lease of the premises in question, *i.e.*, 25 years, and as to the amount of rental, and the appellant had acknowledged that it had received notice of the assignment of the lease to the respondent Grant Park Western Limited, and accepted the latter as its lessor.

The appellant contends that by the agreement between the parties the leasing of any space in a building within the

proposed shopping centre to any department store or discount store is prohibited. The appellant particularly relies on para. 5 of the Proposal, ex. 25, which reads as follows:

> 5. We understand that Grant Park Plaza will be constructed at your cost and under your supervision approximately as shown on the layout in the plans submitted by Waisman & Ross dated November 22, 1961.

and submits that under that paragraph the respondent Grant Park Plaza Limited was compelled to construct a shopping centre approximately in accordance with the plans referred to which shopping centre envisaged the store which was constructed for the appellant and occupied by it under the lease, adjoined on the west by a building to be occupied as a food store, on the east by an enclosed mall into which were to face a large number of smaller stores referred to throughout the evidence as "allied stores", and further to the east of them again another food store. I find it most significant that the lease bears as section 2.06 a typed section which has been pasted over the original printed section. That printed section as it appeared in the unaltered original document read as follows:

> With all due diligence to commence and complete the construction *of the shopping centre* and the leased premises in accordance with the schedule.

(The italicizing is my own.)

On the other hand, the opening words of s. 2.06 as they appear on the lease as executed and with the original clause replaced by another pasted over it are "with all due diligence to commence and complete the construction of the leased premises in accordance with the schedule". I am at a loss to understand how in the light of these circumstances, that is, the careful amendment of a very broad clause requiring completion of the whole shopping centre to an exact clause requiring completion of the leased premises, there can be any argument that the respondent Grant Park Western Limited was under any duty to complete the buildings of the shopping centre other than that the subject of the lease. I am in complete agreement with the learned trial judge when he notes that para. 5 of the Proposal by its very words was only an understanding of what was intended, and what is more, by the use of such words as "approximately" and "layout" the outline of what was intended was, to put it conservatively, very

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tentative. It should, moreover, be noted that the plan referred to in the said para. 5 of the Proposal which was dated November 22, 1961, and produced at trial as ex. 26, places the building to be occupied by the appellant and the surrounding buildings a considerable distance further to the east than the appellant's building was actually constructed, and that this alteration is again reflected in the plan attached to the lease as schedule 2. This plan was dated April 16, 1962, some 19 days after the lease was actually executed but it is signed by the appellant and the respondent Grant Park Plaza Limited. Again, it is, in my view, most significant as it shows on the east side of the proposed shopping centre a large area upon which the words "future expansion" appear and the area of the enclosed mall with its allied stores is designated as "proposed Stage 2".

For all of these reasons, it would seem that the learned trial judge, with respect, was justified in his holding that there was no covenant by the respondent, Grant Park Western Ltd., to build the shopping centre other than that building which was constructed for and leased to the appellant.

In the Court of Appeal for Manitoba, Dickson J., *ad hoc*, said:

> Smith J. considered paragraph 5 of the Proposal to be nothing more than an expression of the parties' intention, and not a binding obligation of Grant Park Plaza Limited. It is a general rule of construction that terms of a written instrument which import that the parties have agreed upon certain things being done have the same effect as express promises. For this reason I think that Grant Park Plaza Limited did become obligated to construct the shopping centre approximately as shown on the layout in the plans attached to the lease. But I hasten to add this: Paragraph 5 must not be considered in isolation, and when read in the context of the lease and of the circumstances obtaining at the time the lease was entered into it is apparent that great latitude was reserved to Grant Park Plaza Limited in the development of the shopping centre.

I am of the opinion that the learned justice in appeal failed to appreciate that the learned trial judge had found that the parties had not "agreed upon certain things", *i.e.*, the completion of the shopping centre in accordance with the plan (ex. 26), and therefore the recital of an understanding was not a recital of matters upon which the parties had agreed. Holding this view, I am not required, therefore, to consider whether the section in the lease

relieving the respondent Grant Park Plaza Ltd. from construction in case it met financial difficulties resulted in a permanent or only temporary release.

I also note in the lease other sections which have been referred to both by the learned trial judge and in the majority judgment of the Court of Appeal for Manitoba, and which further emphasize the latitude granted to the respondent Grant Park Plaza Ltd., particularly s. 8.04:

> NOTWITHSTANDING anything hereinbefore contained, the Lessor may cause other buildings to be constructed within the boundaries of the lands or to retain on the lands any buildings presently located thereon,
>
> PROVIDED that the Lessor shall provide on the lands a parking area not less in extent than three (3) times the aggregate of the following areas:

Section 8.06 reserves to the landlord the right to relocate the auto parking areas and other common areas. The covered mall, which according to the last proposed plans will run from a food store adjoining the appellant's building to the east easterly to the proposed Woolco Store and will be considerably shorter than originally planned, is certainly one of the "common areas".

The appellant relies particularly on para. 1.11. Again as to this section we have an example of the alteration of the original lease. That term originally read:

> Section 1.11—Competitive Use
>
> AND THAT during the term hereof the Lessee shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder, or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the Shopping Centre unless in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor.

That section was amended partly in type and partly in handwriting. The typed amendments were these: the insertion of the word "firstly" after the words "Shopping Centre unless" and before the words "in any instance" in the third line from the end of the original printed section, and by the addition at the end of the printed section of the words "and secondly, in any instance where the business

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enterprise or undertaking occupies store premises self-contained, not exceeding in gross area 5,000 square feet". The hand printed amendment was by the insertion after the words "hereof the Lessee" of the words "or Lessor" in s. 1 of the printed form, so that the section after its amendment read as follows:

> AND THAT during the term hereof the Lessee *or Lessor* shall not directly or indirectly, whether as an owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt of or furnish any financial aid or other support or assistance of any nature whatsoever to any business enterprise or undertaking which in any manner or degree is competitive with its use of the leased premises hereinbefore stated if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of five thousand (5,000') feet from any part of the shopping centre unless *firstly*; in any instance the Lessor shall have given its prior written consent which consent may be withheld in the sole discretion of the Lessor, *and, secondly, in any instance where the business enterprise or undertaking occupies store premises, self-contained, not exceeding in gross area, 5,000 square feet.*

(I have italicized the amendments.)

I am in agreement with the learned trial judge and with the majority judgment in the Court of Appeal that the clause prior to its alteration was an ordinary covenant by the lessee and by no one else which prohibited the lessee going outside the shopping centre to establish or assist in any way another enterprise which would compete with its enterprise inside the shopping centre and therefore reduce the revenue accruing to the lessor from the percentage lease. Much debate both below and in this Court occurred as to the proper interpretation of the section as so amended. I am of the opinion that I need not attempt to resolve the problems of whether the amendments did work out a mutual covenant and if so the extent thereof, as I am of the opinion that the question may be solved very simply.

In my view, the section has no application to the present situation for two reasons: Firstly, it applies only outside the shopping centre. The words " ... if such business enterprise or undertaking is situated in whole or in part conducted from premises situated within a distance of 5,000 feet from any part of the shopping centre..." in their natural meaning could only apply outside the shopping centre and have no application to two sites within the

same shopping centre, and I know of no doctrine of law which would require, in the interpretation of the section, the insertion of a revised covenant to apply both within and without the limits of the shopping centre: See *Toronto Railway Company v. City of Toronto*[1], *per* Sedgewick J. at p. 434:

> In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.

Secondly, I am of the opinion that the proposed construction of a building for the Woolco Store and the lease thereof to the F. W. Woolworth Company is not one of the things prohibited by the section if the respondents are bound by it. It prohibits the person, to use the most indefinite word, as an "owner, stockholder, principal, agent, employee or independent contractor or otherwise howsoever engage or participate in or be a stockholder or holder of any other security of any nature whatsoever of or a lender to or an owner of any debt or portion of a debt or to furnish any financial aid or other support or assistance of any nature whatsoever". None of those words are appropriate to the position of the respondent who would be acting as a landlord for the proposed Woolco Store. As Romer J. said in *Ward v. Patterson*[2], if a party had wished to provide against such a course of conduct then it was perfectly easy for it to have done so. When parties, advised by their solicitors, as in the present case, amend a printed clause by the insertion of additional words, then every effort must be made to give meaning to those words, but there is no

[1] (1906), 37 S.C.R. 430.

[2] [1929] 2 Ch. 396.

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requirement that the clause so amended be extended to import covenants which there is no indication in the material or in the circumstances, as revealed in the evidence, the parties ever contemplated.

The appellant also makes the submission that the Proposal which it made to the respondent Grant Park Plaza Ltd. and which was accepted by the latter contemplated a building scheme and implies a negative covenant of the respondent not to depart from that scheme. The cases, of course, of such building schemes and the enforcement of such so-called negative covenants are numerous and it is quite plain that the common grantor who had required the grantee to enter into restrictive covenants may be enjoined from the utilization of the balance of his lands in a fashion contrary to that envisaged by such restrictive covenants despite the fact that the grantor himself has not entered into like covenants with his grantee. It is, however, significant that in such cases it was contemplated that like covenants should be taken from each of the grantees receiving their grants from the common grantor, and in my view that was not at all the situation contemplated in the present case.

On the other hand, the evidence would indicate that it was intended that each of the grantees, for instance, all these proposed allied stores, would be required to enter into certain covenants as to their utilization of the premises which would vary in each case in accordance with the type of operation which such tenants intended to pursue. One would be under a covenant to sell shoes and other small leather goods such as purses, while another would be under a covenant to sell ladies' wear which might include ladies' shoes, another under a covenant to sell men's wear which might include some men's shoes, and others under covenants to sell only certain wares which would almost inevitably be amongst the stock carried by the appellant. This is not a building scheme as dealt with in the many cases upon that subject.

The appellant argues that to permit the respondent to lease any part of the shopping centre to a discount depart-

ment store the activities of which would be competitive with the appellant's business would be in derogation of its grant.

In *Browne v. Flower*[1], at p. 227 it is said:

> It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which might prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. *After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort.*

(The italicizing is my own.)

And in *Aldin v. Latimer Clark, Muirhead & Co.*[2], Stirling J. said at p. 444:

> The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on...

In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F. W. Woolworth Company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from *Browne v. Flower, supra,* "after all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it

[1] [1911] 1 Ch. 219. [2] [1894] 2 Ch. 437.

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CLARK'S-GAMBLE OF CANADA LTD. v. GRANT PARK PLAZA LTD. et al.

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a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise.

The appellant further submits that the respondents are estopped by the conduct of the respondent Grant Park Plaza Ltd. in the premises from asserting as against the appellant the right to lease any part of the shopping centre to a discount department store. An amendment of the statement of claim to present this argument was permitted by the judgment of the Court of Appeal for Manitoba. The said order permitted the amendment of the statement of claim by the addition of para. 9a which read as follows:

> 9(*a*). The Plaintiff repeats the allegations in paragraphs 5, 7, 8 and 9 hereof and says that the Plaintiff altered its position, relying upon such representations made orally by the President of the Defendant Grant Park on its behalf and in writing by the said plans prepared by the said Defendant and exhibited to the Plaintiff on its behalf, and entered into the lease referred to in paragraph 11 hereof and the Plaintiff says that the said Defendants are estopped by their conduct in the premises from asserting as against the Plaintiff the right to lease any part of the said shopping centre to a discount or other department store, the activities of which are competitive with the Plaintiff in the said location.

It would seem that the findings of fact made by the learned trial judge affirmed by the majority judgment of the Court of Appeal of Manitoba have held that the appellant failed to prove the allegations made in paras. 5, 7, 8 and 9 which it repeated as the basis of its claim for estoppel. I have already indicated that there was no covenant by the respondent Grant Park Plaza Ltd. to build the shopping centre other than the one building to be leased to the appellant. This in itself would be sufficient to dispose of the argument based upon estoppel. Moreover, it would seem that an estoppel can only be based upon representations made as to facts in existence: *Citizens' Bank of Louisiana v. First National Bank of New Orleans*[1], *per* Lord Selborne L.C. at pp. 360-361, where the Lord Chancellor quoted Lord Cranworth in *Jorden v. Money*[2] at pp. 214-215:

> I think that that doctrine does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not.

[1] (1873), L.R. 6 H.L. 352. [2] (1854), 5 H.L. Cas. 185.

In *Maddison v. Alderson*[1], Lord Selborne L.C. said at p. 473:

> I have always understood it to have been decided in *Jorden v. Money* that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futoro,* which, if binding at all, must be binding as contracts...

I do not regard *Marquess of Salisbury v. Gilmore*[2] as being an authority for the proposition that representations of intention as distinguished from representations of existing facts can found an estoppel. In my opinion, that case turns on the interpretation of the provisions of s. 18 of the United Kingdom *Landlord and Tenant Act, 1927*. MacKinnon L.J., at pp. 51-2, when dealing with estoppel finds that the estoppel alleged was not one of intention although framed in those words, but was a representation of fact.

The representations alleged here were all representations of intentions to act in a certain way in the future which the trial court had found to be nothing more and which the majority judgment of the Court of Appeal has found to be only a very rough guide to the probable development of the centre.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Thorvaldson, Eggertson, Saunders & Mauro, Winnipeg.

Solicitors for the defendants, respondents: Tallin, Kristjansson, Parker, Martin & Mercury, Winnipeg.

[1] (1883), 8 App. Cas. 467.

[2] [1942] 2 K.B. 38.

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*May 31
*June 1
Oct. 3

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 2085, J. E. PULLEN; D. T. KNIGHT; THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 343, RUSSELL ROBINS; THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABOURERS' UNION OF AMERICA, LOCAL UNION NO. 101, WINNIPEG, MANITOBA, KAMIL MICHAEL GAJDOSIK; ARNO WISCHNEWSKI, PETER KUBISH, JOHN SPENCE, ELOF JACOBSEN, EMIL ANDERSON, NICK GONCHARUK, RINO GEMIN, PETER PIEROZINSKI, KEN CHRISTENSEN, MELVIN EVENSON, HENRY WALL, ROGER FILLION, J. LAMOUREUX, ERLING NORDAL, V. VALLITTU, TED LAMOR, DAVE ADAMS, GILBERT ANDERSON, MURRAY ARMSTRONG, ROBERT HOEHN, LUIGI CARLUCCI; THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA, GLASS WORKERS LOCAL UNION NO. 1554 (*Defendants*) .....APPELLANTS;

AND

WINNIPEG BUILDERS' EXCHANGE, THE GENERAL CONTRACTORS' SECTION OF THE WINNIPEG BUILDERS' EXCHANGE and POOLE CONSTRUCTION LIMITED (*Plaintiffs*) ...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Labour relations—Picketing—Stoppage of work—Strike in violation of collective agreements and in breach of statute—Injunction restraining employees from continuing illegal strike—Whether in effect directing specific performance of contract for personal service—Whether Courts below in error in continuing injunction—The Labour Relations Act, R.S.M. 1954, c. 132, ss. 2(1), 18(1), 22(1).

On a motion to continue an interlocutory injunction until the trial of the action the judge who heard the motion concluded (i) that the business agent and members of the defendant Glass Workers' Union had brought a building project to a complete halt for the purpose of compelling a subcontractor to coerce its employees into joining the said union, (ii) that the employees who were the individual defendants had acted in concert in ceasing to work until picketing ceased and had done so for the purpose of collaborating with the members of the Glass Workers' Union in their attempt to coerce non-union glaziers employed by the subcontractor to join that union, and (iii) that this

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

conduct on the part of the individual defendants constituted a strike as being a cessation of work in concert for the purpose of compelling their employer to agree to a condition of employment *viz.* that there should be no non-union workers employed on the project. On this view of the facts the judge decided that the conduct of the business agent was illegal, that the cessation of work by the employees constituted an illegal strike and that the injunction should be continued to the trial. All of the defendants, including the defendant unions, were enjoined from taking part in the strike action and from picketing. The injunction order was affirmed, subject to a variation, by a majority decision of the Court of Appeal and an appeal, with leave, was then brought to this Court.

On this appeal a motion to quash the appeal was dismissed and the question to be decided was whether on the facts as found by the judge of first instance he was right in law in ordering that the defendants be enjoined from engaging in the strike action. In the Court below, Freedman J.A., who dissented in part, would have set aside this part of the injunction order on two main grounds: (i) that the evidence was insufficient to show that in refusing to work the defendants were acting in concert, (ii) that the order, which in essence told the employees that they must not strike—that is to say, that they must continue to work on the project, was contrary to a well-founded policy of the courts not to direct what was in effect specific performance of a contract for personal service.

Held: The appeal should be dismissed.

As to the first of the above grounds of dissent, it was held, for reasons referred to *infra*, that this Court should not depart from the view of the facts taken concurrently in both Courts below.

As to the second ground, it was true that the courts have repeatedly refused to issue an injunction if it will result in the enforcement *in specie* of a contract not otherwise specifically enforceable and that a contract for personal services such as an agreement for hiring and service constituting the common relation of master and servant will not be specifically enforced. But there was no principle of law that when a group of employees engage in concert in an illegal strike, forbidden alike by statute and by the terms of the collective agreement by which their employment is governed, the courts must not enjoin them from continuing the strike leaving the employer to resort to forms of redress other than an application for an injunction.

There was a real difference between saying to one individual that he must go on working for another individual and saying to a group bound by a collective agreement that they must not take concerted action to break this contract and to disobey the statute law of the province. The strike engaged in here was in direct violation of the terms of collective agreements binding on the striking employees and in breach of express provisions of *The Labour Relations Act*, R.S.M. 1954, c. 132. Undoubtedly, an effect of the injunction was to require the striking employees to return to work, but that constituted no error in law; to hold otherwise would be to render illusory the protection afforded to the parties by a collective agreement and by the statute.

[*Winnipeg Builders' Exchange et al. v. Operative Plasterers and Cement Masons International Association et al.* (1964), 50 W.W.R. 72, approved; *Lumley v. Wagner* (1852), 1 De G.M. & G. 604, referred to.]

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 2085 *et al.* *v.* WINNIPEG BUILDERS' EXCHANGE *et al.*

Appeals—Appeal to Supreme Court of Canada—Motion to quash dismissed—Injunction granted by lower Court now spent—Whether judgment sought to be appealed within words "any final or other judgment" in s. 41(1) of the Supreme Court Act, R.S.C. 1952, c. 259.

At the opening of the argument of this appeal counsel for the respondents moved to quash the appeal on the grounds, (i) that the injunction was spent and the question whether or not it should have been granted had become academic and (ii) that this Court had no jurisdiction to hear the appeal because the judgment sought to be appealed did not come within the words "any final or other judgment" in s. 41(1) of the *Supreme Court Act*.

Held: The motion to quash the appeal should be dismissed.

As to the first ground, it was not questioned, the building having long since been completed, that the injunction was spent and without further effect. In such circumstances the well-settled practice of the Court was to refuse to entertain an appeal. However, leave to appeal had been granted because it was urged that a question of law of great and nation-wide importance was involved as to which there was a difference of opinion in the Courts below and, from the nature of things, it was unlikely that unless leave were granted in this or a similar case it would ever be possible to bring that question before this Court for determination.

In this state of affairs, the members of the Court were of opinion that they ought not to concern themselves with the question whether the inferences of fact drawn by the judge of first instance and the majority of the Court of Appeal were warranted by the evidence. The view of the facts on which the majority in the Court of Appeal proceeded did not constitute a final finding as between the parties as to those facts; at the trial they might be found differently. The proper course for this Court was to endeavour to state and to answer the question of law which arose on the facts as found by the majority.

As to the second ground, the Court was of opinion that the words of s. 41(1) are wide enough to embrace any judgment of the Court therein referred to pronounced in a judicial proceeding and that the respondents' argument that the Court can grant leave to appeal only in respect of a final judgment or an "other judgment akin to a final judgment" should be rejected.

[*Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 11; *The King ex rel. Tolfree v. Clark et al.*, [1944] S.C.R. 69; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming, subject to a variation, an order of Bastin J. continuing until trial an interlocutory injunction enjoining the defendants from bringing about or continuing an unlawful strike and from picketing at certain premises. Appeal dismissed.

W. Stewart Martin, Q.C., and *Sidney Green*, for the defendants, appellants.

[1] (1966), 57 D.L.R. (2d) 141.

S. A. Dewar, Q.C., and *W. L. Ritchie, Q.C.,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Manitoba[1] pronounced on March 15, 1966, affirming, subject to a variation, an order of Bastin J. made on October 21, 1965, continuing until the trial of the action an interlocutory injunction which he had granted *ex parte* on October 6, 1965.

The evidence before Bastin J. on the application to continue the injunction consisted of affidavits which were in some respects in conflict. There was no cross-examination on any of the affidavits and no transcript of any *viva voce* evidence appears in the appeal case although the formal order of Bastin J. recites having read the *viva voce* evidence of Earl Larson.

The action was commenced on October 6, 1965. The above-named respondents are plaintiffs and the defendants are the above-named appellants and also the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union No. 254 Winnipeg, Manitoba, hereinafter referred to as "the Plumbers' Union", P. Grouette, Gary Petrie, Alex Couvier, Gilbert Gregoire and Marcel Jubinville, who in the statement of claim were included with those designated as the "Labourers", and Abe Ruben sued on his own behalf and representing all members of The Brotherhood of Painters, Decorators and Paper Hangers of America, Glass Workers Local Union No. 1554, hereinafter referred to as "the Glass Workers' Union".

At the time of the hearing before Bastin J. Poole Construction Limited, hereinafter called "Poole" was engaged as a general contractor in the construction of an eighteen-storey office building on the Royal Bank site in the City of Winnipeg. Poole was a member of the respondent Winnipeg Builders' Exchange, hereinafter called "the Exchange", and of the General Contractors' Section of the Exchange, hereinafter called "the Section".

[1] (1966), 57 D.L.R. (2d) 141.

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The defendant unions are all trade unions within the meaning of s. 2(1) of *The Labour Relations Act*, R.S.M. 1954, c. 132.

Canadian Comstock Company was a subcontractor of Poole. It entered into a collective agreement on August 9, 1965, with the International Brotherhood of Electrical Workers, hereinafter called "the Electricians' Union", whose business agent was the appellant Pullen.

Section 5 of the agreement is as follows:

Strikes and Lockouts:

(*a*) It is agreed by the Union that there shall be no strike or slowdown either complete or partial, or other collective action which will stop or interfere with production during the life of this Agreement or while negotiations for a renewal or revision are in progress.

(*b*) It is agreed by the employer that there shall be no lockout during the life of this Agreement or while negotiations for a renewal or revision are in progress.

The appellant Robbins was the business agent of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as "the Carpenters' Union". This union had signed a collective agreement with the Section. Sections 1(*c*) and 5 of the agreement are as follows:

Both parties hereto agree to enforce and see that its members enforce all provisions of this Agreement and also any decision of an Arbitration Board under Section 4.

Strikes and Lockouts

(A) It is agreed by the Union that there shall be no strike or slowdown either complete or partial, or other action which will stop or interfere with production during the life of this Agreement or while negotiations for a renewal of this Agreement are in progress.

The appellant Gajdosik was the business agent of the International Hod Carriers, Building and Common Labourers' Union of America, hereinafter called "the Labourers' Union". The Labourers' Union had signed a collective agreement with the Section, on April 1, 1965. Sections 1(*c*) and 5 of this agreement are similar to the sections in the Carpenters' agreement above quoted.

Ruben was the business agent of the Glass Workers' Union. No collective agreement was entered into by this Union. None of its members worked on the project. The Glass Workers' Union was not the certified bargaining agent for any of the employees of Poole or its sub-trades and there was no application pending for its certification.

The appellant Knight was the business agent of the Plumbers' Union. There was no collective agreement between this union and any of the respondents or their sub-trades.

On or before September 20, 1965, Ruben found out that non-union glaziers were working on the site and he so informed Knight. These non-union workers were employed by Arthur Rempel Ltd., a subcontractor of Seal Dow Ltd., which was a subcontractor of Poole. Ruben felt that this matter should be brought to the attention of Poole.

On September 21, Ruben and Knight attended at Poole's office where they met one Oneschuck, its district manager. They advised Oneschuck of the situation, stating that members of trade unions normally object to working with non-union employees and that the presence of such employees could lead to difficulty on the job site.

On October 1, 1965, at the site, Ruben approached Arthur Rempel, the President of Arthur Rempel Ltd., and insisted that he advise his company's employees to contact Ruben at the Labour Temple at a fixed date for the purpose of joining the Glass Workers' Union. Ruben further insisted that Arthur Rempel Ltd., sign a collective agreement with his union. Rempel reported that his company would not force its employees to join the union. Ruben then informed him that if his company did not co-operate it could expect trouble.

In the early morning of October 5, 1965, Ruben set up a picket line at the entrance of the Royal Bank site. He was carrying a placard with the following wording:

"There are non-union glaziers on this project."

One person crossed the picket line, otherwise there was a complete stoppage of work. Later Knight and Pullen were present on the site and when Pullen was reminded that the electricians were bound by a collective agreement, and was asked whether they would abide by it, he failed to give a definite answer.

At approximately 11.30 a.m. the picket line was withdrawn whereupon the electricians went to work.

At approximately 7.30 a.m. on the next day, October 6, Ruben, along with one or two others, established a picket line and all employees refused to report for work or to

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cross the picket line, with the result that construction was brought to a standstill. An *ex parte* injunction was granted by Bastin J. late the same afternoon. Notwithstanding service of a copy of this injunction upon Ruben, he again picketed the site on the next morning but by 8.30 a.m. on October 7, 1965, the employees resumed work gradually.

At the time when Ruben commenced picketing at the site there was no dispute between any of the plaintiffs and the defendant unions or the individual defendants.

In his reasons for judgment Bastin J. after setting out the contents of a number of the affidavits filed in support of the application before him and of all the affidavits filed by the defendants reached the following conclusion as to the facts, (i) that Ruben and members of the Glass Workers' Union had brought the building project to a complete halt for the purpose of compelling Arthur Rempel Ltd. to coerce its employees into joining the Glass Workers' Union, (ii) that the employees who are the individual defendants had acted in concert in ceasing to work until the picketing ceased and had done so for the purpose of collaborating with the members of the Glass Workers' Union in their attempt to coerce the glaziers employed by Arthur Rempel Ltd. to join that union, and (iii) that this conduct on the part of the individual defendants constitued a strike as being a cessation of work in concert for the purpose of compelling their employer to agree to a condition of employment *viz.* that there should be no non-union workers employed on the project.

As to whether or not the defendant unions had authorized the conduct of the individual employees which the learned judge had found to constitute a strike he was of opinion that this issue of fact could not be determined until the trial.

On this view of the facts Bastin J. decided that the conduct of Ruben was illegal, that the cessation of work by the employees constituted an illegal strike and that the injunction should be continued to the trial in the following terms:

> 1. THIS COURT DOTH ORDER that the defendants and each of them, their officers, servants, agents and members and any person acting under their instructions or any other person having notice of this order be and are hereby strictly enjoined and restrained until the trial or other final disposition of this action, from declaring, authorizing, counselling, aiding or engaging in or conspiring with others either direct or indirectly

to bring about or continue an unlawful strike with respect to the employment of employees with the plaintiff Poole Construction Limited or its sub-contractors in combination or in concert or in accordance with a common understanding.

2. AND THIS COURT DOTH ORDER that the defendants and each of them, their officers, servants, agents and members and any person acting under their instructions or any other person having notice of this order be and are hereby strictly enjoined and restrained until the trial or other final disposition of this action from

(i) watching, besetting or picketing or attempting to watch, beset or picket at or in the vicinity of The Royal Bank Building premises at the South-east corner of Fort Street and Portage Avenue, in the City of Winnipeg, in Manitoba;

(ii) interfering with the servants, agents, employees or suppliers of the plaintiff Poole Construction Limited or its sub-contractors or any other persons seeking peaceful entrance to or exit from said premises by the use of forces, threats, intimidations, coercion or any other manner or means;

(iii) ordering, aiding, abetting, counselling or encouraging in any manner whatsoever either directly or indirectly, any person to commit the acts aforesaid or any of them.

It will be observed that all of the defendants were enjoined. In dealing with the argument of counsel for the defendants that no case was made for enjoining the defendant unions the learned trial judge, after suggesting that the known facts might support an inference that the unions had authorized the cessation of work, continued as follows:

> Since the unions now claim to have disapproved of the work stoppage, it is no hardship for them to be included in the list of those who are enjoined since, without being named, they are forbidden by law to aid or abet those who are enjoined from committing a breach of the injunction.

All of the defendants appealed to the Court of Appeal and in that Court there were differences of opinion. Monnin J.A., with whom Schultz J.A. agreed, held that the appeal of the Plumbers' Union should be allowed as there was no collective agreement in existence between it and any of the plaintiffs but that the appeal of Knight, its business agent, should be dismissed because of his personal participation in the matter and that as to all the other appellants the order of Bastin J. should be affirmed. Freedman J.A., dissenting in part, would have dismissed the appeal of Ruben but would have allowed the appeals of all the other appellants, including the Glass Workers' Union. There is no cross-appeal to this Court in regard to the Plumbers' Union.

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At the opening of the argument of the appeal in this Court counsel for the respondents moved to quash the appeal on the grounds, (i) that the injunction granted by Bastin J. is spent and the question whether or not it should have been granted has become academic and (ii) that this Court has no jurisdiction to hear the appeal because the judgment sought to be appealed does not come within the words "any final or other judgment" in s. 41(1) of the *Supreme Court Act*.

This motion was dismissed without the Court calling upon counsel for the appellants.

As to the second ground we were all of opinion that the words of s. 41(1) are wide enough to embrace any judgment of the Court therein referred to pronounced in a judicial proceeding and that the respondents' argument that the Court can grant leave to appeal only in respect of a final judgment or an "other judgment akin to a final judgment" should be rejected.

As to the first ground, it is not questioned that Bastin J. correctly stated the facts existing on March 16, 1967, when in dismissing an application by the plaintiffs to dissolve the injunction he said:

> The building, the construction of which was allegedly being impeded by defendants' actions, has long since been fully completed. There is nothing to be enjoined. By passage of time and the happening of events defendants are no longer prevented by the injunction from doing anything. The injunction is spent and without further effect.

In such circumstances the well-settled practice of this Court has been to refuse to entertain an appeal; it is necessary to refer only to *Sun Life Assurance Company of Canada v. Jervis*[1], *The King ex rel. Tolfree v. Clark et al.*[2] and *Coca-Cola Company of Canada Ltd. v. Mathews*[3]. However, these authorities and others to the same effect were stressed during the argument on the motion for leave to appeal and, as I understand it, leave was granted because it was urged that a question of law of great and nation-wide importance was involved as to which there was a difference of opinion in the Courts below and, from the nature of things, it was unlikely that unless leave were granted in this or a similar case it would ever be possible to bring that question before this Court for determination.

[1] [1944] A.C. 111.
[2] [1944] S.C.R. 69.
[3] [1944] S.C.R. 385.

In this state of affairs, it appears to me that we ought not to concern ourselves with the question whether the inferences of fact drawn by the learned judge of first instance and the majority of the Court of Appeal were warranted by the evidence. The view of the facts on which the majority in the Court of Appeal proceeded does not constitute a final finding as between the parties as to those facts; at the trial they may be found differently. It appears to me that our proper course is to endeavour to state and to answer the question of law which arises on the facts as found by the majority.

There was no difference of opinion in the Courts below as to whether Ruben was properly enjoined. He has not appealed to this Court but the Glass Workers' Union has. As that union was enjoined on the ground that in the opinion of the majority, Ruben should, for the purposes of their decision only, be assumed to have been its agent and acting for it it is necessary to consider whether the decision that he should be enjoined was right. In my opinion it was and I do not find it necessary to add anything to what has been said in the Courts below as to his conduct and the propriety of enjoining it.

Had I been dealing with the matter at first instance, I might well have been of the same opinion as Freedman J.A. that the material filed, particularly in view of the form of the proceedings, did not warrant the drawing of the inference that in doing the wrongful acts which he did Ruben was acting as agent of the Glass Workers' Union in the course of his agency but I do not think we should dissent from the finding of Bastin J. concurred in by the majority in the Court of Appeal that he was so acting. It follows that I would dismiss the appeal of the Glass Workers' Union.

We come now to the serious question of law which was ably and vigorously debated before us. The operative portions of the order of Bastin J. have already been quoted and the main question is whether on the facts as found he was right in law in ordering in para. 1 that the defendants be

> enjoined and restrained until the trial or other final disposition of this action, from declaring, authorizing, counselling, aiding or engaging in or conspiring with others either direct or indirectly to bring about or continue an unlawful strike with respect to the employment of employees

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with the plaintiff Poole Construction Limited or its subcontractors in combination or in concert or in accordance with a common understanding.

It will be observed that this wording restrains the defendants from engaging in an unlawful strike of employees of Poole or its subcontractors. As a matter of syntax I think it clear that the concluding words of the paragraph, "in combination or in concert or in accordance with a common understanding", qualify, *inter alia*, the words "engaging in an unlawful strike". However this is of little importance since the existence of the element of acting in combination or in concert or in accordance with a common understanding is necessary to constitute a strike.

Freedman J.A. would have set aside this part of the injunction order on two main grounds. The first of these was that the evidence was insufficient to show that in refusing to work the defendants were acting in concert. As to this I have already indicated my view that we should not depart from the view of the facts taken concurrently in both Courts below.

The second ground on which the learned Justice of Appeal proceeded was expressed by him as follows:

> But there is a second objection to this aspect of the injunction of even greater weight. What precisely is the effect of an injunction restraining these workmen from continuing an unlawful strike at the Royal Bank site? The order in essence tells these men that they must not strike—that is to say, that they must continue to work on the Royal Bank job. Such an order is contrary to a well-founded policy of the courts not to direct what is in effect specific performance of a contract for personal service. I am far from saying that the conduct of these men may not have been wrongful or in breach of contract. If it was, other forms of redress are open to the employer and indeed are being so claimed in this action. I say only that an injunction compelling continuance on the job is not a proper remedy.

Having discussed the case of *Winnipeg Builders' Exchange et al. v. Operative Plasterers and Cement Masons International Association et al.*[1] and found it distinguishable from the case at bar, he continued:

> Nor, in my view, is the covenant that the union or the men would not participate in a strike the kind of 'express negative covenant' the breach of which should give rise to an order of injunction as was here granted. Such a negative covenant arises, for example, where a person binds himself to serve the other party to the contract exclusively during its term. If in breach of this covenant he seeks to work for someone else,

[1] (1964), 50 W.W.R. 72, 48 D.L.R. (2d) 173.

say a competitor of his employer, he can be restrained. But the effect of the injunction in such a case may be described thus: 'You have agreed not to work for anyone other than your employer, A, during the period of the contract. So you must not work for B.' The important thing to note is that the injunction does *not* say: 'You must continue to work for A', for that would in effect be ordering specific performance of a contract for personal service. Cases like *Lumley v. Wagner* (1852), 1 De G.M.&G. 604; 42 E.R. 687, and *Warner Bros. Pictures Inc. v. Nelson*, [1936] 3 All E.R. 160; 106 L.J.K.B. 97, illustrate the nature and scope of an injunction which is granted to restrain the breach of an express negative covenant of that character. These cases show that the injunction is limited in the manner I have indicated.

It would be a strange thing if it were otherwise. An injunction to restrain improper picketing is one thing. An injunction in effect to compel workmen to continue to work for a particular employer, on pain of going to jail for its breach, is quite another. Such an injunction is so far reaching in its consequences that occasions for resort to it are likely to be rare indeed.

In these passages the learned Justice of Appeal appears to me to enunciate as a principle of law that when a group of employees engage in concert in an illegal strike, forbidden alike by statute and by the terms of the collective agreement by which their employment is governed, the courts must not enjoin them from continuing the strike; that the employer must resort to forms of redress other than an application for an injunction.

The question which we are called upon to decide is whether the principle so enunciated is a correct statement of the law. In my respectful opinion it is not.

There is no doubt that it has been repeatedly held in cases of high authority that the courts will not issue an injunction if it will result in the enforcement *in specie* of a contract not otherwise specifically enforceable and that a contract for personal services such as an agreement for hiring and service constituting the common relation of master and servant will not be specifically enforced. The cases that so decide are collected and discussed in Cheshire and Fifoot on Contract, 6th ed., 1964, at pp. 533 to 535.

In rejecting the appellants' argument based on the cases last mentioned and referring particularly to that of *Lumley v. Wagner*[1], Monnin J.A. observed that "the complexity of labour-management relations in a highly industrialized civilization was presumably not even thought of" by the Lord Chancellor when that case was decided.

[1] (1852), 1 De G. M. & G. 604.

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 2085 *et al.* *v.* WINNIPEG BUILDERS' EXCHANGE *et al.*

Cartwright J.

In *Winnipeg Builders' Exchange et al. v. Operative Plasterers and Cement Masons International Association et al., supra,* the granting of an interim injunction which, *inter alia,* restrained the defendants from engaging in an unlawful strike was upheld in a unanimous judgment of the Court of appeal for Manitoba after a full consideration of the submission that the Court ought not to affirm an order which had the effect of compelling employees to return to work. The proposition of law which appears to me to be stated by Freedman J.A. would have been a bar to the continuation of the injunction and must therefore have been rejected by the Court of Appeal. In my opinion the judgment of the Court of Appeal in that case correctly states the law.

One of the main purposes of *The Labour Relations Act,* R.S.M. 1954, c. 132, is to achieve and maintain harmonious relations between employers and employees and to avoid the loss caused to the parties directly involved and to the public at large by work stoppages caused either by strikes or lockouts. Procedure is provided for arriving at collective agreements. A collective agreement duly entered into is made binding upon the employer and upon every employee in the unit for which the bargaining agent has been certified, s. 18(1). During the term of a collective agreement the employer is forbidden to declare or cause a lockout, s.22(1)(*a*), and employees are forbidden to go on strike, s.22(1)(*b*). Attention has already been called to the fact that under the terms of the collective agreements existing in the case at bar it was expressly provided that there should be no strike during the life of the agreements.

In my view the purposes of the *Labour Relations Act* would be in large measure defeated if the Court were to say that it is powerless to restrain the continuation of a strike engaged in in direct violation of the terms of a collective agreement binding on the striking employees and in breach of the express provisions of the Act. The *ratio* of such decisions as *Lumley v. Wagner, supra,* does not, in my opinion, require us so to hold. There is a real difference between saying to one individual that he must go on working for another individual and saying to a group bound by a collective agreement that they must not take concerted action to break this contract and to disobey the statute

law of the province. Undoubtedly, as Freedman J.A. points out, an effect of the order which has been upheld by the Court of Appeal in the case at bar was to require the striking employees to return to work. In my opinion that constituted no error in law; to hold otherwise would be to render illusory the protection afforded to the parties by a collective agreement and by the statute. It is true that an employer whose operations are brought to a standstill by an illegal strike or a union whose employees are rendered idle by an illegal lockout may bring an action for damages or seek to invoke the penal provisions of the *Labour Relations Act* but the inevitable delay in reaching a final adjudication in such procedures would have the result that any really effective remedy was denied to the injured party.

As I have already expressed my opinion that, for the purposes of this appeal, we should accept the view of the facts on which the Courts below have proceeded it follows that I would dismiss the appeal.

Before parting with the matter, I wish to stress, perhaps unnecessarily, that all that we are deciding is that on the facts as they were assumed by them to exist the Courts below did not err in law in continuing the injunction. The action has yet to go to trial and there on a fuller investigation the facts may be found to be different.

I would dismiss the appeal with costs, including the costs of the motion for leave to appeal; the appellants are entitled to the costs of the motion to quash which was dismissed at the hearing of the appeal.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Tallin, Kristjansson, Parker, Martin & Mercury; Bowles, Pybus, Gallagher & Company; and Mitchell, Green & Minuk, Winnipeg.

Solicitors for the plaintiffs, respondents: Thompson, Dilts & Company, Winnipeg.

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*Feb. 1, 2
June 26

BROWN & ROOT LIMITED (*Defendant*) APPELLANT;

AND

CHIMO SHIPPING LIMITED (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Carriage—Contract—Damages—Verbal agreement to dismantle cargo of heavy machinery so that no single article would be in excess of 30 tons—Heavier pieces offered and accepted by ship's captain—Damage to ship's lifting tackle—Authority of captain to vary agreement—Remoteness of damages.

By a verbal contract of carriage, it was stipulated that no single piece of cargo tendered for carriage by the plaintiff's ship would exceed 30 tons—any piece in excess was to be reduced to that weight. The defendant's agent at the port of loading had not been advised of that stipulation. The ship's captain, when told that some pieces of equipment to be transported weighed in excess of the 30-ton limit, claimed that the ship's derrick would have no problem in handling those pieces of equipment. The ship's loading equipment was damaged. The trial judge maintained the action taken by the ship's owners. The defendant appealed to this Court.

Held: The appeal should be allowed.

The action of the master of the plaintiff's vessel appears to have been the effective cause of the damage for which the ship claimed. The master's lack of authority to alter the terms of the contract of carriage could not have the effect of transferring the responsibility for this action to the defendant. Even on the assumption that there was a breach of contract, it would not afford any ground for the recovery of the damage to the ship's loading equipment which was sought in this action.

Navigation—Transport—Contrat—Dommages—Entente verbale que toute machine pesante serait démontée de telle sorte qu'aucun article excéderait le poids de 30 tonnes—Articles excédant ce poids offerts et acceptés par le capitaine du navire—Dommages causés à l'appareil de levage du navire—Autorité du capitaine de changer les termes du contrat—Degré éloigné des dommages.

Par un contrat de transport fait oralement, il a été stipulé qu'aucune pièce de cargaison offerte pour être transportée sur le navire de la demanderesse excéderait le poids de 30 tonnes—toute pièce excédant ce poids devant être réduite à la limite. L'agent de la défenderesse au port d'embarcation n'a pas été avisé de cette stipulation. Le capitaine du navire, lorsqu'on lui présenta des articles à être transportés ayant un poids excédant la limite de 30 tonnes, affirma que la grue du navire n'aurait aucune difficulté à manipuler ces articles. L'appareil de levage du navire fut endommagé. Le juge au procès a maintenu l'action prise par les propriétaires du navire. La défenderesse en appela devant cette Cour.

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*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

Arrêt: L'appel doit être maintenu.

L'acte du capitaine du navire de la demanderesse semble avoir été la cause réelle du dommage réclamé par les propriétaires du navire. Le manque d'autorité de la part du capitaine pour varier les termes du contrat de transport ne peut pas avoir eu l'effet de transférer sur les épaules de la défenderesse la responsabilité pour cet acte du capitaine. Même en assumant qu'il y avait eu violation des termes du contrat, cela ne serait pas un motif pour que les dommages à l'appareil de levage du navire qui sont recherchés dans cette action puissent être recouvrés.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada dans une action pour dommages causés à un navire. Appel maintenu.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada in an action for damages to a vessel. Appeal allowed.

L. Lalande, Q.C., for the defendant, appellant.

G. B. Knox, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a decision of Mr. Justice Dumoulin of the Exchequer Court of Canada sitting as a judge in Admiralty by which he found the appellant responsible for damage to certain lifting tackle owned by the respondent and installed on the respondent's motor vessel *Sir John Crosby* when it was employed to lift the appellant's crane which was being loaded for shipment from Baie Verte, Newfoundland, to Montreal, Quebec, aboard the respondent's vessel on November 27, 1962.

No Bill of Lading covering the shipment was executed by the parties until after the vessel had returned to Montreal on December 2 and all arrangements between the parties for the carriage of these goods were made verbally in Montreal in telephone conversations between Samuel Stobo, the appellant's traffic manager, and Captain Jorgensson who was the respondent's marine superintendent.

The learned judge concluded that these telephone conversations constituted an agreement based "on the under-

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standing that each shovel, crane or piece of machinery would be reduced in weight by the servants, preposes or agents of the defendant (appellant) so that the heaviest piece to be lifted by the said derrick and boom on the forecastle deck of the *Sir John Crosby* would not weigh in excess of 30 tons". This is the allegation contained in paragraph 4 of the respondent's Statement of Claim, and the trial judge's conclusion is based on the following evidence of Stobo and Jorgensson. In the course of his examination-for-discovery Stobo gave the following evidence:

Q. Would you still recollect...what the terms of the contract were?
A. Well, to the best of my knowledge—bearing in mind that three (3) years have passed...
Q. Yes?
A. Captain Jorgensson told me that the capacity of this *Sir John Crosby* was thirty (30) long tons; and that at that time we both agreed over the telephone that this approximated thirty-three (33) short tons—two-thousand-pound tons.
Q. When you speak of the capacity, you mean...
A. The lifting capacity of the gear of the vessel.
Q. Of the derrick or the gear?
A. Correct.

* * *

A. I said that I would pass this along, which I did, to Mr. Gordon Lindsay.
Q. To Mr. Gordon Lindsay in Montreal, your superior?
A. The project engineer; and he in turn said that he would notify the job site to try to meet this weight.

Captain Jorgensson gave the following account of the conversation:

Q. Did he (Stobo) give you this list by telephone or otherwise, by mail?
A. By telephone; and I took a note of it and I quoted him a price of carrying it and the conditions we would carry it on, which were to load at Baie Verte. They had to bring the cargo alongside the ship; and we would load it, carry it to Montreal and discharge it at Montreal.

And he was later asked:

Q. Now, was there any other condition of the contract in relation to any particular piece of machinery which had to be loaded in Baie Verte and taken to Montreal?
A. Yes, in the list given to us there was a crane; and it was agreed that this crane weighed over thirty (30) tons—thirty (30) long tons; and it would have to be reduced to the capacity of the ship's gear which was thirty (30) long tons.

It is to be noted that it was part of the agreement that the respondent would be responsible for loading the cargo at Baie Verte.

When the *Sir John Crosby* reached Baie Verte, Axel Anderson, the Captain, found that there was a 50-ton crane to be shipped for the account of the Dominion Structural Steel and a 45-ton crane to be shipped for the appellant's account. He said that there had been some conversations between himself and Captain Jorgensson before sailing from Montreal about these cranes being over the capacity of the ship's derrick and to the effect that they were to be stripped down so that no single piece should weigh more than 30 tons.

Mr. William Nye, the appellant's agent in Newfoundland, had not been notified by Mr. Gordon Lindsay that there was any necessity to reduce the weight of the crane before loading and he says that when he asked the ship's master, Captain Anderson, about the capacity of the ship's derrick he told him that there would be no problem about handling a piece of machinery weighing "a minimum of 42 tons" and that "he gave two indications of the capacity of the equipment on board the ship":

> One was that he said his gear had been tested to sixty-five (65) tons by the builders of the ship; and the second reference to the capacity of it was that he pointed out that they had off-loaded the pressure casting for Advocate Mines and that they had weighed—the casting had weighed ninety-seven thousand, five hundred (97,500) pounds. Those were the only two (2) references that he made to the capacity of the ship's gear.

It is apparent that the learned trial judge believed Nye's version of these conversations and rested his decision on the theory that the appellant's agent was bound by the terms of the undertaking made by telephone in Montreal not to offer cargo over 30 tons for hoisting with the ship's derrick. In this regard, the learned judge says:

> Captain Anderson's bragging about the feats of strength accomplished by his vessel's derrick savours of silliness, admittedly; but would, in all likelihood, have remained of no avail on a prudent employee, duly instructed by his principals to carry out a formal undertaking not to offer for hoisting any cargo in excess of 30 tons. Had this been done, then the justifiable presumption flows that Nye would attach greater importance to the directives imparted by his superior, Lindsay, than to Anderson's idle talk. His duty was not to Anderson but to Lindsay, had the latter only told Nye what was expected of him. It is, therefore, my humble opinion

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that Lindsay's breach of contract was, essentially, the cause of this mishap, and the master's uncalled for statements a fortuitous consequence thereof.

Mr. Justice Dumoulin quotes at length from various text writers on the law of shipping to sustain the principle that "if the owners have themselves made a contract for the employment of their ship, the master cannot annul the contract and substitute another for it". The only case which the learned judge cites in support of this proposition is *Grant v. Norway*[1] and in my respectful opinion, this case is illustrative of the type of situation to which the text writers were referring.

In *Grant v. Norway*, a Bill of Lading had been signed by the master for 12 bales of silk, none of which had ever been shipped; it was held that transferees of the Bill of Lading, who had given value for it on the faith of the representation contained in it, had no claim against the ship owners because the master had no authority to give a Bill of Lading for goods which had not been shipped. In the course of his reasons for judgment, Jervis C. J. said:

> If, then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case must be considered as if the party taking the bill of lading had notice of express limitation of the authority, and in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed when the goods therein were never shipped.

While this line of cases and the commentaries made thereon by the various text writers may support the proposition that the master is not clothed with authority to alter the terms of a contract of carriage made between the owners and the shippers, they do not, in my opinion, afford any basis for contending that the owner is relieved of responsibility for damage which it has suffered through the misuse of its own equipment by the master who was employed, amongst other things, to supervise the use of that equipment.

In the present case the evidence appears to me to be uncontradicted to the effect that Captain Anderson knew or ought to have known that the weight of the appellant's crane when it was brought alongside the respondent's vessel for loading was likely to be in excess of the capacity of

[1] (1851), 20 L.J.C.P. 93.

the vessel's loading equipment. Instead of refusing to load the crane until it had been "reduced to the capacity of the ship's gear", Captain Anderson told the appellant's agent that "there would be no problem in handling it" as his gear had been tested to 65 tons and he proceeded to supervise the attachment of the ship's tackle to the heavy crane and gave the order for the use of the ship's derrick to lift it although he knew that this would be likely to put too great a strain on that equipment. This action of the master of the respondent's vessel appears to me to have been the effective cause of the damage for which the respondent now claims, and as I have indicated, I do not think that the master's lack of authority to alter the terms of the contract of carriage can have the effect of transferring the responsibility for this action from the respondent to the appellant.

In my view, the conversations which took place by telephone in Montreal between Stobo and Jorgensson constituted nothing more than an agreement to the effect that the appellant's crane would be accepted for loading at Baie Verte and shipped to Montreal on the respondent's vessel which carried loading equipment with a maximum hoisting capacity of 30 tons. This was communicated to Mr. Lindsay, the branch supervisor, but he did not consider it necessary to pass on the information concerning the capacity of the ship's lifting gear to his agent, Nye, at Baie Verte. I think that Mr. Lindsay was entitled to assume that the respondent's vessel would not accept any single piece of machinery for loading which had not been stripped to a weight of less than 30 tons and it does not seem to me to be at all unreasonable that he should have contemplated that the question of trimming the cargo to the capacity of the ship's loading gear was one which would be settled between his agent and the ship's master at the dockside, and that the master would know the capacity of his own equipment and would act accordingly.

I do not think that Mr. Lindsay's conduct constituted a breach of a basic condition of the contract, but assuming that Mr. Justice Dumoulin was correct in his finding in this regard, it nevertheless does not appear to me that such a breach would make the appellant liable for the damage to the ship's derrick which was occasioned by the fault of

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the master. It has never been seriously questioned since the case of *Hadley v. Baxendale*[1] that damages for breach of contract are limited to the ordinary consequences which would follow in the usual course of things from such breach or for the consequences of the breach which might reasonably be supposed to have been in contemplation of both parties at the time they made the contract. Article 1074 of the *Civil Code* is to the same effect.

The ordinary consequences of the breach which was here alleged would have been the refusal of the vessel's master to put its lifting tackle on the appellant's crane until it was reduced in weight with the result that if the crane could not have been reduced it would either have been left at Baie Verte or put on board by the appellant's own means, as was in fact done. If the crane had been left at Baie Verte and no other cargo had been obtained to replace it, the measure of damages would have been the freight which the respondent could have earned by carrying the crane, but even on the assumption that there was a breach of contract, it would not afford any ground for the recovery of the damage to the respondent's crane which is sought in this action.

In view of all the above I would allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Lalande, Brière, Reeves & Paquette, Montreal.

Solicitors for the plaintiff, respondent: Beauregard, Brisset & Reycraft, Montreal.

[1] (1854), 9 Exch. 341, 156 E.R. 145.

HER MAJESTY THE QUEEN (*Defendant*) ..... APPELLANT;

AND

EDWIN J. PERSONS (*Plaintiff*) ..... RESPONDENT.

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*Feb. 27, 28
*Mar. 1
June 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Contract—Construction of landing strip for airport—Work to be completed by certain date—Clause in contract providing for the cancellation—Whether cancellation justified.

The plaintiff, a contractor, was the successful bidder for the construction of a landing strip for an airport in the province of Quebec. The contract between the plaintiff and the defendant contained a clause for the cancellation of the contract by the Crown for a number of causes and upon notice. The plaintiff commenced work in June 1960 and proceeded until December 1960, when work was suspended because of winter conditions. The work was to be resumed in the spring as soon as the ground was ready to be worked. During the fall of the year 1960, the plaintiff and his employees had been in almost constant state of disagreement with the departmental officers and employees. In the spring of the second year, the plaintiff failed to resume work after receiving a notice to do so. The contract was cancelled and the work was terminated by another contractor. The plaintiff filed a petition of right in which he claimed for work done under the contract and for damages. The Crown filed a cross-demand for the excess over and above the contract price paid to the second contractor to complete the work. The trial judge allowed the petition of right and dismissed the cross-demand. The Crown appealed to this Court.

Held: The appeal should be allowed and the cross-demand should be returned to the Exchequer Court to ascertain the damages to be allowed to the Crown.

The trial judge was in error in his finding that there had been no proper cancellation of the contract in accordance with the provisions thereof and that the purported cancellation had been a breach of the contract.

It was not necessary to express any opinion as to whether the purported assignment by the plaintiff of the benefit of the contract to a bank had deprived him of his right to bring action.

Couronne—Contrat—Construction d'un terrain d'atterrissage pour aéroport—Les travaux devant être terminés à une certaine date—Clause dans le contrat prévoyant la résiliation—La résiliation était-elle justifiée.

Le demandeur, un entrepreneur, a obtenu le contrat pour la construction d'un terrain d'atterrissage pour un aéroport dans la province de Québec. Le contrat entre le demandeur et la défenderesse contenait

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Hall and Spence JJ.

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une clause prévoyant la résiliation du contrat par la Couronne pour de nombreuses causes et après avis. Le demandeur a commencé les travaux en juin 1960 et les a continués jusqu'en décembre 1960, alors que les conditions d'hiver en ont forcé la suspension. Les travaux devaient être recommencés au printemps aussitôt que la terre serait en état d'être travaillée. Durant l'automne de 1960, le demandeur et ses employés ont été en désaccord presque continuellement avec les officiers et les employés de la défenderesse. Au printemps de la seconde année, le demandeur n'a pas recommencé les travaux après avoir reçu un avis de le faire. Le contrat a été résilié et les travaux ont été terminés par un autre entrepreneur. Le demandeur a produit une pétition de droit dans laquelle il réclamait pour les travaux faits en vertu du contrat et pour des dommages. La Couronne a produit une demande reconventionnelle pour le montant qu'elle a payé au second entrepreneur en excédent du montant prévu au contrat. Le juge au procès a maintenu la pétition de droit et a rejeté la demande reconventionnelle. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et la demande reconventionnelle doit être renvoyée à la Cour de l'Échiquier pour la détermination des dommages qui doivent être accordés à la Couronne.

Le juge au procès a erré lorsqu'il a conclu qu'il n'y avait pas eu une vraie résiliation du contrat selon les termes de ce contrat et que la prétendue résiliation avait été une violation des termes du contrat.

Il n'est pas nécessaire d'exprimer une opinion sur la question de savoir si la prétendue cession par le demandeur des bénéfices du contrat à une banque l'avait privé de son droit d'action.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel maintenu.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], on a petition of right. Appeal allowed.

Louis M. Bloomfield, Q.C., P. M. Ollivier, Q.C. and *D. Miller,* for the defendant, appellant.

Alexander Stalker, Q.C., and *Robert J. Stocks,* for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from a judgment rendered by Noël J. in the Exchequer Court of Canada[1] on November 2, 1965. By that judgment the learned Exchequer Court Judge allowed the petition of right filed by the suppliant awarding damages of $33,094.10 and allowed the

[1] [1966] Ex. C.R. 538.

petitioner his costs including the sum of $5,000 to cover the value of engineering and accounting work done prior to the trial. The learned Exchequer Court Judge dismissed the cross-demand filed by Her Majesty the Queen with costs, providing, however, that only one counsel fee at trial should be taxed.

The Crown appealed to this Court from the judgment of the Exchequer Court by notice of appeal which reads as follows:

NOTICE OF APPEAL

TAKE NOTICE that Her Majesty the Queen intends to appeal and does hereby appeal to the Supreme Court of Canada from a part of the Judgment of Mr. Justice Noël of the Exchequer Court of Canada dated the second day of November 1965;

AND FURTHER TAKE NOTICE that Her Majesty the Queen intends to limit Her appeal, and does hereby limit Her appeal to that part of the judgment of Mr. Justice Noël

(a) finding that the assignment executed by the Respondent in favour of the Royal Bank of Canada on March 19th, 1962 was ineffective in law so as to deprive the Respondent of the whole or of a part of the relief sought by its Petition of Right and

(b) finding that in taking the contract work out of the Respondent's hands, Appellant failed to bring Herself within the terms of clause 18 of the contract, thereby committing a breach going to the root of the contract.

When the appeal came on for hearing, the members of this Court expressed grave doubt as to the propriety and effectiveness of this form of notice of appeal. It will be noted that there is no reference therein to the dismissal by the learned Exchequer Court Judge of the Crown's cross-demand and counsel for the respondent in this Court took the position that that dismissal should have been the subject of a specific notice of appeal. It would appear that the notice of appeal filed was one which purports to appeal from the reasons and not from the judgment of the Exchequer Court.

After some consideration of the matter, this Court determined to construe the document as if it were an appeal from the whole judgment of the Exchequer Court except in so far as that judgment fixed the damages of the suppliant at $33,094.10, and that the lettered paragraphs in the said notice of appeal were in fact merely reasons for the appeal. The first of those lettered paragraphs dealing

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with the effect of the purported assignment by the respondent-suppliant to the Royal Bank of Canada is dealt with hereafter in these reasons.

The respondent-suppliant had been the successful bidder for the construction of a landing strip for an airport at Three Rivers in the Province of Quebec. The respondent's tender was for $469,983.50 and was almost exactly $100,000 lower than the second lowest tender.

The learned Exchequer Court Judge noted that the departmental officers were of the opinion that the respondent had made an error in his calculations and conferred with the respondent even going so far as to suggest that he should withdraw his tender and review all the prices and then return to submit a revised tender. The respondent, however, insisted on leaving the tender as filed and the respondent was awarded the contract. This contract was produced at trial and marked as Exhibit S-1. It is a document dated August 5, 1960, and is in very considerable detail occupying in the printed record some 17 pages of close printing.

The respondent commenced work in June 1960 and proceeded until December 1960, when work was suspended because of winter conditions to be resumed in the spring as soon as the ground was ready to be worked. During late fall of the year 1960, the respondent and his employees had been in a well-nigh constant state of disagreement with the departmental officers and employees, both those in Ottawa and those on the site. It would appear that one of the main causes of the contentions between the parties was the desire of the respondent to reduce his costs by utilizing as granular material to be laid over the sub-base to the depth of 22″ a mixture composed of 65 per cent of material coming from the site and 35 per cent from material obtained at a gravel pit known as the Paquette pit, some distance away from the scene.

On November 21, 1960, the resident engineer, Mr. Corish, informed the respondent in writing that the material from this gravel pit had been tested and that in his opinion the contractor's proposed method of blending of a part thereof with the material from the site would not satisfy the contract requirements. This decision by the resident engineer was the subject of bitter complaint by the

respondent and conferences followed. At such conferences, a compromise was reached whereby the respondent would be permitted to lay a 6″ layer of the granular material over the sub-grade and then this 6″ layer would be tested to determine to what extent, if any, it could be blended with the material taken from the airport site.

The 6″ layer of granular material was laid by the respondent early in December 1960. At that time the ground was frozen. The sub-base had not yet been fully compacted to the extent required by specifications and it was agreed that this sub-base would be compacted in the spring by using a 50-ton roller right over the six inches of granular material which covered it.

During the time when work was suspended after winter had set in, complaints, particularly as to the attitude and conduct of the resident engineer of the appellant, the said Mr. Corish, continued to be urged by the respondent and his employee Mr. Leonard. In order to resolve the difficulties, a meeting was held on April 14, 1961, attended by the respondent and his representatives and by officials of the department. The decisions made at such conference are not relevant to this appeal except that the respondent alleges that the officers of the appellant had agreed to give to the respondent a schedule of work prior to the recommencement of the performance of his contract in the spring of 1961.

In the opinion of the officers of the appellant, the ground was ready to work in early May of 1961. Several attempts were made to get in touch with the respondent in order to determine when he would start work. Such attempts were not successful and answers which the said officers received when they spoke to the persons in the employment of the respondent were, to put it conservatively, evasive. Finally, on June 1, 1961, Mr. H. J. Connolly forwarded to the respondent the following notice:

> Pursuant to clause 18 of the contract in writing between HER MAJESTY THE QUEEN IN RIGHT OF CANADA, represented by the Minister of Transport, and E. J. PERSONS, doing business under the firm name and style of E. J. PERSONS CONSTRUCTION of Sweetsburg, in the Province of Quebec, dated August 5, 1960, bearing No. 64840 in the records of the Department of Transport, being in respect of the construction of a Runway 6,000′ x 150′, a Parking area 300′ x 300′, a connecting Taxiway and Access Road at Three Rivers Airport, Three

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Rivers, Province of Quebec, I hereby give you notice that I require you to put an end to your default and delay in diligently executing the works to be performed under the said contract.

And I have to advise you that in the event of failure on your part to comply with this notice on or before June 12, 1961, the works will be taken out of your hands and will be completed by the Department as may seem fit, and, in this connection, your attention is called to Clause 18 under which you will have no claim for any further payment, but you will be chargeable with and shall remain liable for all loss and damage suffered by Her Majesty and to clauses 48 and 50 under which the security deposit made by you will be forfeited.

(sgd.) H. J. Connolly,
Director, Construction Branch,
Department of Transport.

The respondent replied to this notice by his solicitor's letter dated June 7 which read as follows:

H. J. Connolly, Esq.,
Director of Construction Branch,
Department of Transport,
OTTAWA, Ontario.

RE: THREE RIVERS AIRPORT—E. J. PERSONS, CONTRACTOR:
YOUR FILE NO. 2R-93

Dear Sir:

On behalf of our client, Mr. E. J. Persons, we wish to acknowledge your notice of June 1st 1961 concerning the commencement of work in respect of the above noted Contract, by June 12th, 1961.

As you are undoubtedly aware, due to weather conditions and soil conditions, it was impossible up until a few days ago, for our client to commence work and be certain that it would be done to the proper standards. We wish to advise you that our client intends to commence work on or before the 12th June 1961.

It is our understanding that it was agreed at our last meeting, between yourself and members of your Department, with our client and ourselves, that when Mr. Persons recommenced work in respect of the above contract, you would send a new engineer on the job and so would our client. When our client commences work he will have a new engineer on the job and we presume that your Department will also present a new engineer. If this is not so, we would appreciate hearing from you in this regard on or before the 12th June 1961.

Yours truly,

HJS:LHP

"H.S. McD."

The Fidelity Insurance Company of Canada which had received a copy of Mr. Connolly's communication of June 1, replied thereto by letter of the same date, June 7, which included a statement "and we have been assured he will be on the site to resume work on Monday, June 12th".

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The respondent himself telegraphed to Mr. R. L. Davies, Regional Construction Engineer, of the Department of Transport at Montreal on June 8 in the following words:

> Re Three Rivers Airport please be advised that our engineer Mr. Mike Skinners is now at Airport stie (sic) will be ready to resume work monday june twelfth

On June 14, 1961, Mr. Connolly, Director of the Construction Branch of the appellant in Ottawa, prepared a notice in the following terms:

> Reference is made to my notice of June 1, 1961, addressed to E. J. Persons Construction giving notice pursuant to clause 18 of the above mentioned contract to put an end to the default and delay in diligently executing the works to be performed under the said contract.
>
> In view of the fact that the work covered by Contract No. 64840 has not been proceeded with pursuant to my notice, aforesaid, of June 1, 1961, I have to advise E. J. Persons Construction that the Department is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely, H. J. O'Connell Limited, to complete the work covered by the said contract.

He signed this notice and took it with him leaving it in the Montreal office of the Department with instructions that it should be held to be dealt with in accordance with orders which he would communicate to the office by telephone. He proceeded from that office to the site with officials of the department. His purpose was to determine whether the respondent was complying with the notice of June 1 which I have recited above. Arriving at the site, he found a Mr. Shinners, a young man who was the representative of the respondent on the job and who was evidently the "Mr. Skinners" referred to in the telegram from the respondent which I have recited above. Mr. Connolly testified that Mr. Shinners told him he had no instructions at all and further that there was only one machine operating pushing stumps off the runway and someone was working on an old building off to one side. A little Wobbly wheel roller was present but there was no sign of any 50-ton roller. Mr. Connolly telephoned to the Montreal office and his notice dated June 14, 1961, which I have recited above was dispatched. H. J. O'Connell Limited came on the job and completed the work covered by the contract.

The respondent filed his petition of right in which as suppliant he claimed an amount of $492,397.59 of which $180,397.59 was for work allegedly completed prior to

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December 31, 1960, and $312,000 was for damages allegedly sustained as the result of the appellant cancelling the contract. The respondent later produced an incidental demand claiming additional damages in the amount of $152,800.

The appellant filed a cross-demand claiming from the respondent the sum of $131,495.45 made up as follows:

Net amount paid to Cross-Defendant (Suppliant) is $167,600 less hold back of $16,700	$150,840.00	
Total amount paid or payable to H. J. O'Connell for completion of the project	440,209.31	
Total	$591,049.31	
If Cross-Defendant had proceeded with the project to completion, total cost according to Cross-Defendant's unit price	$459,553.86	
		$131,495.45

Noël J., in elaborate and very carefully worked out reasons held for the respondent granting judgment as I have set out above. He came to this conclusion for the following reasons, apart from the assignment to the Royal Bank of Canada with which I shall deal hereafter:

(1) That the notice threatening cancellation of the contract given by the appellant on June 1 was not sufficiently detailed and explicit.

(2) The respondent was justified in not complying with that notice and getting on with the work by June 12, 1961, as he was awaiting a schedule of work from the appellant and he was entitled to await such schedule of work.

(3) That the schedule of work when it was given to the respondent's representative on the site on June 12 superseded the notice of June 1, 1961.

(4) That the cancellation of the contract by the notice of June 14, 1961, was premature in view of the terms of the notice of June 1, 1961.

(5) That the contract was not cancelled by the Minister as required by the provisions thereof.

I shall deal with these reasons seriatim.

Firstly, as to the sufficiency of the notice dated June 1, 1961, Article 18 of the Contract between the parties (Ex. S-1) provides, in part:

> In case the Contractor shall make default or delay in commencing or in diligently executing, any of the works or portions thereof to be performed, or that may be ordered under this Contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been given by the Engineer to the Contractor, or should the contractor make default in the completion of the works, or any portion thereof, within the time limited with respect thereto in or under this contract, or should the Contractor become insolvent, or abandon the work, or make an assignment of this contract without the consent required, or otherwise fail to observe and perform any of the provisions of this contract then, and in any such case, the Minister for and on behalf of Her Majesty, and without any further authorization, may take all the work out of the contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works...

It would seem apparent, therefore, that the contract requiring only a general notice, there could be no validity to the submission that the letter of June 1, 1961, was not sufficiently detailed. In addition to that ground in law, the respondent himself took no such position on receipt of the notice dated June 1 either personally or through his solicitor. On the other hand, I have quoted his telegram and his solicitor's letter, and in both documents the respondent simply undertook to comply with the notice.

I am in agreement with the submission made by counsel for the appellant that the respondent at all times was himself the best judge of what he was and was not doing. As the learned Exchequer Court Judge found on the basis of the evidence adduced at trial he would have been prepared to hold that the appellant's engineers were entitled to assume, from the inactivity of the respondent on the site of the work in the spring of 1961, that he was not diligently prosecuting the work and that there was great doubt that he would have completed the job on time, it would appear that the respondent's default has been established.

Secondly, as counsel for the appellant points out, the respondent was the only person who testified that there was any agreement that the respondent should be supplied with a schedule of work before he commenced the carrying

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out of the contract in the spring of 1961, although Mr. Davies for the appellant recalled that the matter of written instructions had been discussed.

Section 5 of the contract between the parties provided, in part:

> The work shall be commenced, carried on and prosecuted to completion by the Contractor in all its several parts in such manner and at such points and places as the Engineer shall, from time to time, direct, and to his satisfaction, but always according to the provisions of this contract, and if no direction is given by the Engineer, then in a careful, prompt and workmanlike manner.

It would appear, therefore, that there was no right in the respondent to require a schedule of work and that failing the receipt of one he was under a duty to carry out the contract in a fashion which the learned Exchequer Court Judge found he had failed to do. The conference at which it was alleged this agreement to supply the respondent with a schedule of work was reached took place on April 14, 1961. On April 24, 1961, Mr. Connolly reported to the Assistant Deputy Minister for Air upon the Three Rivers Airport construction contract. In para. 4 thereof he recited that a meeting had been held and in para. 5 reported:

> 5. We were not able to obtain from the Contractor a schedule of operations for the coming year that he would follow to complete the work by the completion date of the contract which is the end of October, 1961. At first his reluctance to provide this information was said to be due to his inability to plan until he was assured of payment of his claim for additional quantities of excavation, etc. Needless to say we could not agree to this with so much in dispute.

On May 18, 1961, Mr. Connolly wrote a letter to the E. J. Persons Construction Company, the last paragraph of which reads as follows:

> Our Regional Construction Engineer will be communicating with you in the next few days requesting a schedule of your operations for this coming construction season showing the dates for completion of the various phases of the work, but it must be kept in mind that there will be no extension in time for the completion of the contract.

Therefore, quite plainly, two weeks before the respondent received the notice of June 1, he had had notice in writing that it was not the appellant's officers' duty to produce the schedule of work which he alleges he was promised on April 24 but that it was his own duty. That letter of May 18 apparently went unanswered.

With respect, therefore, I cannot agree with the learned Exchequer Court Judge in his comments that the respondent was justified in not getting on with the work by June 12 as demanded in the letter of June 1 because he was entitled to wait for a schedule of work. The so-called schedule of work in writing was delivered by Mr. Corish to Mr. Shinners on June 12. Mr. Corish, in his evidence, recounts the circumstances surrounding its delivery. When he was asked whether he prepared the documents at the request of Mr. Shinners, he replied:

> A. No, I did on my own initiative and for the record, because at the time I had been able to contact the RCE (Regional Construction Engineer), he was up here and he said he had been instructed and I was awaiting instructions other than what he told.

He continued:

> A. Mr. Shinners had appeared on the 8th, and as I said, I was acquainted with the boy and I told him, well, if you want any information, or note—that is why my reference is as is—that he did not even read the specifications. The man himself he was only a graduate engineer of that spring; he had been on the site the previous summer as a student engineer and an employee of Mr. Persons, but mainly, for the record, as far as resident engineer was concerned, there were no other body available. He was the representative of the contractor and this is dated four days after I met him. But, you must understand, I had no office help and it was typed by myself with just one or two fingers and consequently, for me to produce a letter which I wanted for the record, I would draft it and redraft it and study it, because I was afraid what is happening now would happen. I wanted a record for my own personal benefit.

Mr. Corish testified that he did not believe he was aware at that time that Mr. Connolly had given the respondent the notice of June 1 although he was aware of it subsequently. It is difficult, therefore, to understand how the supplying of this document by Corish to Shinners on June 12 could be taken to have superseded Mr. Connolly's notice of June 1. Mr. Connolly's notice was delivered by virtue of the powers set out in art. 18 which I have quoted above, in part. Such a notice was to be given by the engineer, and Mr. Corish, being merely the appellant's superintendent on the job, was certainly not the engineer. "Engineer" was defined exactly in art. 1 of the contract and Mr. Connolly was the officer so defined. No superintendent on the job could effectively countermand a notice delivered by such engineer acting under a specific power granted to him on the contract.

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Moreover, it will be seen that the contents of the document presented by Mr. Corish to Mr. Shinners, produced at trial and marked Exhibit S-8, chiefly consists of requests by Mr. Corish for information as to details which should be supplied by the respondent and in the second request is set out in para. 2(*b*) thereof as follows:

> ask your principal to disclose to me his complete schedule of work, sources and samples of all materials he has contracted to supply to this project.

Therefore, on considering all the circumstances and the actual terms of the document (Ex. S-8), I am unable to concur in the view that it would have any effect of superseding the exact terms of the notice dated June 1. Therefore, with respect, I must disagree with the learned Exchequer Court Judge.

The learned Exchequer Court Judge in his reasons for judgment said:

> Clause 18 provides that if default or delay continues for six days after notice has been given, then the Minister can take all of the work out of the contractor's hands. In the present case, however, the Department's engineer having chosen to specify a date or a deadline for the commencement of the work and having granted a specific delay for compliance with the notice dated June 1, 1961 (Ex. S-9) namely that work was to be commenced on or before June 12, 1961, and not having simply required the contractor to get on with the work, in which case the six days' delay would have commenced when the notice was given, i.e., June 5, 1961, the delay here would have started running only on June 12, 1961, and the six days continuance of such default could not, therefore, have been completed until the end of June 17, 1961. Thus until June 17, 1961, as urged by counsel for the Suppliant, the Minister had no power under the contract to take the work out of the contractor's hands, and, therefore, the steps taken by the Department of Transport on or around June 14, 1961, were premature, not in accordance with the terms of the contract, and the work was illegally and improperly taken out of the Suppliant's hands.

This Court, on the hearing, was unanimously of the view that art. 18 of the contract and the terms of the notice dated June 1 could not support such an interpretation. By art. 18 of the contract all the engineer for the Department had to do was to give six days' notice requiring curing of the default. If he chose to allow twelve days then there cannot be any justification for adding the six days required by the contract to the twelve days granted by the engineer. It is quite plain that in the notice which I have recited

earlier in these reasons the respondent was required to comply with the notice on June 12, 1961, and not six days thereafter.

The learned Exchequer Court Judge held that the notice of cancellation delivered on June 14, 1961, and signed by H. J. Connolly, Director of the Construction Branch, was not a valid cancellation of the contract under the provisions of art. 18 thereof which I have cited earlier in these reasons and which read, in part,

> . . . the Minister for and on behalf of Her Majesty and without any further authorization may take all the work out of the contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works . . .

In view of the definition of the word "Minister" in art. 1 of the contract, as follows:

> "Minister" shall mean the person holding the position, or acting in the capacity, of the Minister of Transport, for the time being, and shall include the person holding the position, or acting in the capacity, of the Deputy Minister of Transport, for the time being.

and the fact that at the relevant times the Honourable Mr. Balcer was the Minister and Mr. John Baldwin was the Deputy Minister, he held that a notice of cancellation signed by Mr. Connolly was without any validity.

It must be noted that under the provisions of art. 18, the Minister was empowered not to deliver a notice but to take all work out of the contractor's hands, and so long as the decision was made by a person within the definition of "Minister" in the contract, i.e., by either the Minister or the Deputy Minister, then it would be of no importance who wrote the actual formal document notifying the respondent of the decision of such Minister or Deputy Minister.

The evidence shows quite clearly that the Minister was fully cognizant of the problems which had arisen in the completion of this contract. Marked as Exhibit R-8 at the trial was a memorandum from the Director of the Construction Branch to the Assistant Deputy Minister (Air). The penultimate paragraph of that memorandum reads as follows:

> 8. On receipt of his recommendation it is the intention to advise the Contractor of the amount of money due to him for work done to date and instruct him to proceed and complete his contract. If he refuses the

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settlement it will be necessary to have our Legal Branch prepare an order to the Contractor instructing him to commence work within the specified time, failing which the Bond Company will be asked to take over.

Produced as part of the same exhibit was a memorandum from the Deputy Minister, J. R. Baldwin, to the Director of the Construction Branch, dated April 27, 1961, which reads as follows:

> The Minister is generally satisfied with your report hereunder but would like to be kept informed when you send specific instructions in writing to the contractor.

I have perused the evidence of the Minister who was called by the suppliant as a witness at the trial of the action and I think the inference is proper that Mr. Connolly had the Minister's authority to go to Three Rivers and to determine for himself what progress had been made and if the progress was not in accordance with that demanded then to take the action set out in the said para. 8 of the memorandum which I have quoted above.

Therefore, I am of the opinion that when Mr. Connolly delivered the notice dated June 14 to the respondent he was only notifying the respondent of an action taken by the Minister and which the Minister was entitled to take under the provisions of art. 18 of the contract. I am also in agreement with the alternative submission of counsel for the appellant that the Minister, when he wrote to the respondent's solicitors on July 17, 1961, was certainly aware of the action which had been taken and confirmed it giving thereby any ratification required. Such ratification would be effective as of the date of the action taken, i.e., June 14, 1961.

For these reasons, I have come to the conclusion, with respect, that the learned Exchequer Court Judge was in error in his finding that there had been no proper cancellation of the contract in accordance with the provisions thereof, and therefore that the purported cancellation was a breach of the contract.

As I have said, the Crown filed a cross-demand to the suppliant's petition in which the Crown claimed the sum of $131,495.45. That cross-demand was disposed of by the learned Exchequer Court Judge in these words:

> The suppliant was unsuccessful in his incidental demand and it will be rejected with costs; the Respondent was unsuccessful in Her cross-demand and it also will be rejected with costs.

At the hearing of the appeal, counsel for the appellant stated that if the appellant were to succeed in this Court then the action should be referred back to the Exchequer Court for the determination of the quantum of the cross-demand and that the parties had so agreed. Counsel for the respondent, after some discussion with the Court, agreed that there was no defence to the cross-demand if the termination of the contract had been valid and effective, subject, however, to proper assessment of the amount thereof. I am of the opinion that this Court, therefore, should direct that the petition be returned to the Exchequer Court for ascertainment of the proper damages to be allowed to the appellant on the cross-demand.

In view of the conclusion to which I have arrived as to the validity of the termination of the contract, I do not find it necessary to express any opinion as to whether the purported assignment of the benefit of the contract to the Royal Bank of Canada was effective so as to deprive the respondent of any cause of action which he could assert in this petition.

The appellant is entitled to Her costs here and in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the defendant, appellant: E. A. Driedger, Ottawa.

Solicitors for the plaintiff, respondent: Howard, Stalker, McDougall, Graham & Stocks, Montreal.

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*Sept. 26, 27, 28
1967
June 26

THE GENERAL TIRE & RUBBER COMPANY (*Plaintiff*) ..... APPELLANT;

AND

DOMINION RUBBER COMPANY LIMITED and PHILLIPS PETROLEUM COMPANY (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Conflict proceedings—Rights of three applicants for patents of similar invention—Whether invention—First to invent—Patent Act, R.S.C. 1952, c. 203, s. 45(8).

These actions arose out of a conflict under s. 45 of the *Patent Act*, R.S.C. 1952, c. 203, between patent applications of the three parties of these appeals. The conflict concerned three claims identified as C4, C5 and C6 relating to a synthetic rubber known as cold rubber. The Commissioner of Patents ruled that the respondent Dominion Rubber Co. was entitled to claims C5 and C6. The Exchequer Court held that none of the parties was entitled to claim C4 and that Dominion Rubber Co. was entitled to claims C5 and C6. There is no appeal from the decision in respect to claim C4. Phillips Petroleum Co. took no part in the hearing in this Court. The appellant contends that there was a lack of patentability having regard to the state of art and what Doctor Howland for Dominion Rubber Co. did, when he conceived and disclosed the idea in December 1947, was an obvious user of a process then well known in the art. It is conceded that Phillips Petroleum Co. could not have made any invention prior to January 19, 1948, and General Tire & Rubber Co. prior to April 14, 1949.

Held: The appeal should be dismissed.

The inventor, Howland, applied a known method, not previously used for that purpose to a known substance with a new compound at the time in the process of making cold rubber which resulted in a finished product being available to the market. The trial judge was right in finding that this was an invention and the evidence supports his finding.

Brevets—Conflit de demandes—Droit de trois demandeurs de brevets pour la même invention—Y a-t-il invention—Qui fut le premier—Loi sur les brevets, S.R.C. 1952, c. 203, art. 45(8).

Ces actions résultent d'un conflit sous l'article 45 de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, entre les demandeurs de brevets des trois compagnies dans ces appels. Le conflit se rapporte à trois revendications, C4, C5 et C6, concernant un caoutchouc synthétique connu sous le nom de «cold rubber». Le Commissaire des Brevets a jugé que

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

l'intimée, Dominion Rubber Co. avait droit aux revendications C5 et C6. La Cour de l'Échiquier a jugé qu'aucune des compagnies avait droit à la revendication C4 et que Dominion Rubber Co. avait droit aux revendications C5 et C6. Il n'y a pas eu d'appel de la décision concernant la revendication C4. La compagnie Phillips Petroleum Co. n'a pas pris part à l'audition devant cette Cour. L'appelante soutient qu'il y avait un manque d'invention vu l'état de l'art et que ce que le Docteur Howland, pour Dominion Rubber Co., a fait, lorsqu'il a conçu et dévoilé l'idée en décembre 1947, était un usage manifeste d'un procédé bien connu dans l'art. Il est admis que Phillips Petroleum Co. ne peut pas avoir fait l'invention avant le 19 janvier 1948, et General Tire & Rubber Co. avant le 14 avril 1949.

Arrêt: L'appel doit être rejeté.

L'inventeur, Howland, a appliqué une méthode connue, non préalablement utilisée pour cette fin, à une substance connue avec un composé nouveau à une période de la fabrication du «cold rubber» qui a eu comme résultat de mettre un produit fini sur le marché. Le juge au procès a eu raison de conclure que ceci était une invention et la preuve supporte sa conclusion.

APPELS de deux jugements du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière de brevets. Appels rejetés.

APPEALS from two judgments of Gibson J. of the Exchequer Court of Canada[1], in a patent matter. Appeals dismissed.

Christopher Robinson, Q.C., and *James D. Kokonis*, for the plaintiff, appellant.

Gordon F. Henderson, Q.C., and *David Watson*, for the defendant, respondent, Dominion Rubber Co.

Ross G. Gray, Q.C., for Phillips Petroleum Co.

The judgment of the Court was delivered by

HALL J.:—The events leading up to this litigation and their chronological sequence are set out at length in the reasons for judgment of the trial judge[1], Gibson J. In summary these are appeals arising out of two actions in the Exchequer Court, Numbers A-169 and A-1178 which were tried together and in which Gibson J. gave common reasons, but in respect of which there were separate formal judgments.

[1] [1966] Ex. C.R. 1164, 31 Fox Pat. C. 20, 48 C.P.R. 97.

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GENERAL TIRE & RUBBER CO. v. DOMINION RUBBER CO. LTD. *et al.*

Hall J.

The actions arose out of a conflict in the Patent Office under s. 45 of the *Patent Act* between patent applications of the three parties to these appeals, the appellant being hereafter referred to as General and the two respondents respectively as Dominion and Phillips. The patent applications in question were:

(a) Canadian Patent Application 611,684 by The General Tire & Rubber Company, filed February 14, 1951;

(b) Canadian Patent Application 626,519 by Phillips Petroleum Company, filed February 5, 1952;

(c) Canadian Patent Application 636,139 by Dominion Rubber Company Limited, filed September 10, 1952.

The conflict concerned three claims identified as C4, C5 and C6. The Commissioner of Patents decided that Dominion was entitled as against the other two parties to claims C5 and C6. General then instituted in July 1961 the first of the two actions (A-169) naming Dominion as defendant. In March 1963 Phillips instituted the other action (A-1178) naming Dominion and General as defendants. Ultimately the pleadings in both actions were amended by consent so that they corresponded in substance and raised the same issues, and the actions were tried together.

The position of General was that none of the parties was entitled to any of the conflicting claims C4, C5 and C6. The position of Phillips was that it was entitled as against the other parties to all three of the claims, though at the trial it withdrew its assertion of entitlement to claims C5 and C6. The position of Dominion was that both actions should be dismissed, with the result that it would remain, under the Commissioner's decision, entitled to all three of the claims. The judgments were that none of the parties was entitled to claim C4 and that Dominion was entitled as against General and Phillips to claims C5 and C6. There is no appeal from the judgments in respect of claim C4. Phillips took no part in the hearing in this Court.

Action No. A-169 in which General was plaintiff was dismissed. It was adjudged that Dominion was entitled as against General and Phillips to the issue of a patent including claims C5 and C6 on its Canadian application 636,139 and it was further adjudged that none of the parties was entitled to a patent containing claim C4.

Action No. A-1178 in which Phillips was plaintiff was also dismissed. It was adjudged that Dominion was entitled as against General and Phillips to the issue of a patent including claims C5 and C6 on its Canadian application 636,139, that none of the parties was entitled to the issue of a patent containing claim C4, that the counterclaim of General was otherwise dismissed and that claim C9 submitted by General in the preliminary proceedings to the trial was unpatentable. An application to vary the minutes by deleting the reference to claim C9 was dismissed.

Claims C5 and C6 which were awarded to Dominion relate to the inclusion of oil in cold high Mooney rubber by the latex blending of oil and rubber. The trial judge considered that claims C5 and C6 related to an invention but that claims C4 and C9 differed from C5 merely by referring to specific amounts of oil and precise Mooney measurements. He reached the conclusion that there was nothing inventive in the selection of these precise amounts of oil or Mooney measurements and that C4 and C9 were therefore not inventively distinguishable from claim C5 and were therefore unpatentable.

The said claims C4, C5, C6 and C9 read as follows:

C4. The method of making a mass of polymeric material vulcanizable to a rubber-like state comprising forming an emulsion of monomeric material comprising at least one conjugated diolefin; polymerizing said monomeric material in said emulsion at a temperature below 15°C.; the resulting polymer having a raw Mooney value (ML-4) of at least 90; adding to a latex of said polymer a hydrocarbon softener as a dispersion in water, said softener being added in an amount of between 15 and 50 parts by weight per 100 parts by weight of rubber; and recovering resulting softened polymer.

C5. The process of making a mixture comprising a synthetic rubber and a processing oil which comprises coagulating and drying the coagulum of an aqueous mixture containing dispersed particles of a rubber processing oil and a synthetic rubber latex which has been emulsion polymerized at a temperature between —40°F. and —60°F. and the rubber content of which has an ML-4 Mooney viscosity in the range of 75 to 200.

C6. A mixture of a low temperature, viz., —40°F. to —60°F. aqueous emulsion polymerized synthetic rubber having an ML-4 Mooney viscosity in the range of 75 to 200, and a rubber processing oil, said processing oil having been co-coagulated with the synthetic rubber from a mixture comprising an aqueous dispersion of particles of the processing oil and synthetic rubber latex.

C9. The method of making a mass of polymeric material vulcanizable to a rubber-like state comprising forming an emulsion of monomeric material comprising at least one conjugated diolefin; polymerizing said

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monomeric material in said emulsion at a temperature below 15°C.; the resulting polymer having a raw Mooney value (ML-4) of at least 90; adding to a latex of said polymer a hydrocarbon *mineral oil* softener as a dispersion in water, said softener being added in an amount of between *20* and 50 parts by weight per 100 parts by weight of rubber; and recovering resulting softened polymer.

It will be seen that claims C4 and C9 are very similar, differing only in the words underlined in C9 above.

We are here concerned with whether the addition of the oil softener by a particular method, namely, by latex masterbatching, also known as co-coagulation, was an invention within the meaning of the *Patent Act*. The respondent says that it was and Gibson J. so held. The appellant contends that there was a lack of patentability having regard to the state of the art and what Dr. Howland (Dominion's alleged inventor) did was an obvious user of a process then well known in the art.

It is beyond doubt that Gibson J. was right in his finding that the process known as latex masterbatching was a well-known process at all times material to this litigation. However, it is equally clear that this particular process had not been used in respect of high Mooney cold rubber. It had been used experimently with what is known as GRS rubber by which is meant Government Rubber Styrene, a synthetic product produced by a hot process and the method was not adopted by the trade because of certain economic disadvantages not present in the methods then being used, namely, by milling or in the Banbury machine or by solution incorporation.

High Mooney cold rubber is a synthetic product which was not generally available in late 1947 and certainly not in the latter part of 1946 or early 1947 as found by Gibson J.

Dr. Howland conceived and disclosed as of December 12, 1947, the idea of combining high Mooney cold rubber, carbon black and oil through the method of latex masterbatching (co-coagulation). In a report he prepared and sent to Rubber Reserve on that date he said in part:

> 3. A 3-component masterbatch (polymer, black and softener) has been made with suitable cure rate for the first time, using X-384 latex. The high Mooney of this material may be responsible for the improved cure over similar trials with normal Mooney latex.
>
> * * *

MASTERBATCHES

A successful 3-component masterbatch has been made with X-384 latex (high Mooney redox polymer made at Institute). Our tests have since indicated that the cure is satisfactory. The physical tests obtained by us are given below.

		X-384 with regular Para-flux milled in	X-384 with treated Para-flux milled in	7 pts Para-flux added as emul-sion	50 pts EPC black in X-384 latex master-batch	50 pts EPC black 7 pts Para-flux X-384 latex master-batch
X-384		100	100			
J-830-1				100		
J-820					100	
J-793						100
Black		50	50	50	50.3*	50.4*
Paraflux		7	7	7*	7	7*
Zinc oxide		5	5	5	5	5
MBT		2	2	2	2	2
Sulfur		1.5	1.5	1.5	1.5	1.5
Comp'd Mooney		94**	94**	168	146	160
Modulus 300%	30′	560	780	600	540	780
	60′	1320	1380	1430	1370	1640
	90′	1550	1560	1940	1580	2190
	120′	1730	1730	2100	1900	2350
Tensile	30′	3260	4010	4200	3860	4210
	60′	4150	4090	3840	3570	3240
	90′	3840	3750	3750	3350	3170
	120′	3490	3450	3720	2860	2830
Elongation	30′	910	860	830	675	740
	60′	685	665	550	575	505
	90′	590	570	490	485	430
	120′	540	530	440	400	365
Set	30′	32.5	30	35	20	20
	60′	20	25	10	20	17
	90′	15	20	10	22.5	10
	120′	17.5	15	10	10	10

*Added to latex
**Small rotor

An explanation as to why a good cure was obtained with J-793 while we have not yet been able to obtain a satisfactory cure with a 3-component masterbatch of normal GR-S is that the high Mooney of the X-384 latex used in the preparation of J-693 causes a greater amount of work to be done on the masterbatch in compounding so that a better dispersion is obtained.

It is conceded that Phillips could not have made any invention relevant to the questions in issue here prior to January 19, 1948, and General prior to April 14, 1949.

We, therefore, have the situation where an alleged inventor has used a known method, latex masterbatching,

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not previously used for that purpose to soften a known product high Mooney cold rubber with oil. Latex masterbatching had been used to combine other ingredients. Oil had been widely used to soften GRS and to soften high Mooney cold rubber but by milling or in the Banbury machine or by solution incorporation. Was what Dr. Howland did a patentable invention?

Gibson J. dealt with the problem as follows:

> In my opinion, the concept of using high amounts of softener and incorporating the same in high Mooney cold rubber, was not inventive. *Instead, as stated, what was inventive was the idea at the material time to combine the softener with the high Mooney cold rubber in a particular way, namely, by latex masterbatching.*
>
> In this, clearly on the evidence, Dominion, through Howland, was first.

(The italics are mine.)

The essence of Howland's invention, if it was an invention, was the use of a known process, masterbatching, to combine an oil softener with high Mooney polymer and carbon black in the making of synthetic rubber at a stage in the process before the solution was separated and became a solid mass. The product which emerged from the process was high Mooney cold rubber with the oil softener as an integral element of the final product as it came from the manufacturer. This result was a very beneficial one economically as it was no longer necessary to put the synthetic rubber through the milling process or the Banbury machine or in any other way prior to being able to use it in the manufacture of tires and other products.

Gibson J. found that what Howland did was not obvious to persons skilled in the art. He deals with this point as follows:

> Phillips, in the period 13 October to 17 November, 1947, in Tire Test 123 which was the last practical tire test made prior to the alleged invention of Dominion, employed all the elements set out in all the conflict claims, and the specific amounts of the alleged important elements of conflict claim C-4 (namely, high Mooney cold rubber mixed with amounts of oil softener in excess of 15 parts per 100 parts of rubber) and incorporated the same in a Banbury, but not by latex masterbatching. It probably did this, it may be inferred from the evidence, because incorporating softener into GRS rubber up to that material time had proved to have disadvantages. It is therefore a reasonable inference from this evidence alone that those skilled in the art employed by Phillips, which personnel had very considerable capacity, did not consider it obvious to incorporate the oil into this new rubber namely, cold rubber, by way of latex masterbatching.

Many cases were cited by counsel dealing with the question of inventiveness through the use of a known process with known materials to produce a hitherto unknown or unexpected result. I do not think it is necessary to go beyond the decision of this Court in *Commissioner of Patents v. Ciba Limited*[1]. Martland J. in *Ciba*, speaking for the Court, had to deal with such a situation on an appeal from the Exchequer Court[2] which reversed the Commissioner of Patents who had refused to grant a patent because the process defined in the process claims was not new. After considering the authorities and in particular the judgment of Jenkins J. in *In re May and Baker Limited and Ciba Limited*[3], Martland J. said:

> . . . To constitute an invention within the definition in our Act the process must be new and useful. There is no question as to the process here being useful, as it produces compounds which have been admitted to be both new and useful.
>
> Is it a new process? Is the element of novelty precluded because it consists of a standard, classical reaction used to react known compounds? In my opinion the process in question here is novel because the conception of reacting those particular compounds to achieve a useful product was new. A process implies the application of a method to a material or materials. The method may be known and the materials may be known, but the idea of making the application of the one to the other to produce a new and useful compound may be new, and in this case I think it was.

In the present case Howland applied the known method of masterbatching to a known substance, an oil softener, with a new compound, high Mooney cold rubber, at a time in the process of making high Mooney cold rubber which resulted in the finished product being available to the market and immediately ready for processing into tires. Hitherto the tire manufacturer had had to soften his synthetic rubber whether GRS or the new high Mooney cold rubber in the Banbury machine or by one of the other two methods previously described.

In my opinion Gibson J. was right in finding that this was an invention and the evidence supports his finding.

There is one other aspect of the appeal to be dealt with. The appellant has asked that the judgments be varied by deleting therefrom the paragraph which reads:

> THIS COURT DOTH FURTHER DECLARE THAT claim C9 submitted by General in the preliminary proceedings to this trial is unpatentable.

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[1] [1959] S.C.R. 378, 19 Fox Pat. C. 18, 30 C.P.R. 135, 18 D.L.R. (2d) 375.

[2] (1957), 27 C.P.R. 82, 17 Fox Pat. C. 3.

[3] (1948), 65 R.P.C. 255.

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In his reasons for judgment Gibson J. dealt with this matter as follows:

> I am therefore of opinion that claim C-4 is not inventively distinguishable from claim C-5 and therefore it contains "substantially the same invention" and is "so nearly identical" with claim C-5 within the meaning respectively of section 45(1)(*a*) and section 45(3) of the *Patent Act*.
>
> Claim C-4 is unpatentable therefore, in my opinion.
>
> I am also of the opinion that the proposed substitute claim C-9 submitted by General in the preliminary proceedings to this trial is also unpatentable, because it also is not inventively distinguishable from claim C-5.

One has but to compare claims C4 and C5 with C9 to see that Gibson J. was right in holding that C9 was not "inventively distinguishable" from C5. The contention that General should, after this prolonged litigation in which C9 was necessarily in issue, be free to start conflict proceedings all over again because the pleadings do not specifically refer to C9 by that number is wholly untenable.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent, Dominion Rubber Co.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1967

*May 9
July 11

NICKEL RIM MINES LIMITED (*Appellant*) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL FOR ONTARIO (*Respondent*) ..... APPELLANT.

ON APPEAL FROM THE REGISTRAR

Practice and procedure—Costs—Taxation—Provincial Attorney General awarded costs of appeal—Attorney General represented on appeal by salaried solicitor—Whether entitled to allowance for counsel fee and preparation of factum—Supreme Court Act, R.S.C. 1952, c. 259, ss. 104, 105—Interpretation Act, R.S.C. 1952, c. 158, s. 15.

*PRESENT: Spence J. in Chambers.

The change from the Common Law rule that it was improper to allow counsel fees in respect of services rendered by salaried officers representing the Crown on the taxation of costs awarded in favour of the Crown, brought about by s. 105 of the *Supreme Court Act*, R.S.C. 1952, c. 259, applies as much to the Crown in the right of a Province as to the Crown in the right of Canada. Consequently, the Registrar of this Court, in taxing the costs of a provincial Attorney General to whom costs of an appeal have been awarded by this Court, should allow proper counsel fee and proper fee for the preparation of factum, although the Attorney General was represented on the appeal by lawyers on salary in the Department of the Attorney General.

APPEAL by the Attorney General for Ontario from a decision of the Registrar of this Court on the taxation of the costs of the appeal[1] in this case. Appeal allowed.

A. E. Charlton, for the Attorney General for Ontario.

Brian Crane, for Nickel Rim Mines Ltd.

The following judgment was delivered by

SPENCE J. (*in Chambers*):—This is an application by way of appeal from the decision of the Registrar who, by his Allocatur dated May 3, 1967, taxed the costs of the respondent, the Attorney General for Ontario, at the sum of $442.50. The Registrar, in his written reasons, disallowed items claimed by the respondent, the Attorney General for Ontario, of $650 for counsel fee and $150 for costs of preparation of factum. The Registrar expressed the view that the Attorney General for Ontario could not claim profit costs for services performed by lawyers on salary in the Department of the Attorney General for Ontario.

The common law rule as to costs payable to the Crown under the Order of this Court was settled in *Hamburg-American Packet Co. v. The King*[2], where Maclennan J., in Chambers, disallowed such a claim relying on *Jarvis v. The Great Western Railway Co.*[3] and *The Charlevoix Election case: Valin v. Langlois,* Cassels Digest (2nd ed.), 677.

The problem is whether the provisions of s. 105 of the *Supreme Court Act* have wrought an alteration in the law as set out in the said decision. Section 105 of the *Supreme Court Act* reads as follows:

105. In any proceeding to which Her Majesty is a party, either as represented by the Attorney General of Canada or otherwise, costs

[1] [1967] S.C.R. 270, 60 D.L.R. (2d) 576.
[2] (1907), 39 S.C.R. 621.
[3] (1859), 8 U.C.C.P. 280.

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Spence J.

adjudged to Her Majesty shall not be disallowed or reduced upon taxation merely because the solicitor or the counsel who earned such costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered, and the costs recovered by or on behalf of Her Majesty in any such case shall be paid into the Consolidated Revenue Fund.

This section was enacted in 1917. The provisions which now appear as ss. 104 and 106 had been enacted in the year 1887.

The learned Registrar in his reasons relied on the wording of s. 104 of the statute to indicate that the provisions of s. 105 of the statute were restricted to the cases of the Crown in the right of Canada and particularly the reference to the Minister of Finance and to the Consolidated Revenue Fund of Canada in s. 104 and in s. 106(2). It must be observed, however, that the words which appear in s. 105 are not "The Consolidated Revenue Fund of Canada" but merely "The Consolidated Revenue Fund". Neither the *Supreme Court Act* nor the *Interpretation Act* bear any definition of the words "The Consolidated Revenue Fund" but the *Financial Administration Act*, R.S.C. 1952, c. 116, in s. 2(*e*) provides:

> 2. In this Act,
>
> * * *
>
> (*e*) "Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

Therefore, plainly, of course, in that statute but not elsewhere the words "The Consolidated Revenue Fund" even without the addition of the words "of Canada" refer to the federal Crown. As I shall indicate hereafter, I am of the opinion that the point is not material.

There is only one Crown although there are two separate statutory purses: *In re Silver Brothers*[1]. In determining whether s. 105 applies in favour of the Crown in the right of the province as well as the Crown in the right of Canada, one should have in mind the provisions of s. 15 of the *Interpretation Act*, R.S.C. 1952, c. 158, which are as follows:

> 15. Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of

[1] [1932] A.C. 514, 2 D.L.R. 673, 1 W.W.R. 764, 53 Que. K.B. 418, 13 C.B.R. 223.

any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

In *A.G. for Quebec v. Nipissing Central Railway Co. & A. G. of Canada*[1], the Judicial Committee considered section 189 of the *Railway Act* of 1919 which, in subs. (1) provided:

(1) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.

and, in subs. (2), provided that any railway company might, with such consent, take for the use of its railway so much of the lands of the Crown lying in a certain area.

The Judicial Committee held that the section of the said federal statute authorized the railway company to take with the consent of the Governor in Council lands held by the Crown in the right of the Province of Quebec. Viscount Cave, L.C., said at pp. 720-721:

Their Lordships do not feel any doubt that s. 189 of the *Railway Act* applies, according to its true construction, to lands belonging to the Crown in right of a Province. The section applies in terms to all "lands of the Crown lying on the route of the railway", no distinction being made between Dominion and Provincial Crown lands. It is true that the only consent required by the section is that of the Governor in Council; but if any executive consent was to be required to the taking of Crown lands for the purposes of a Dominion railway, it was to be expected that the consent required would be that of the Dominion Government, for otherwise the construction of the railway would be dependent upon the consent of the Government of each Province through which it was intended to pass. It is true also that subs. 4 of the section appears to proceed on the assumption that all compensation money for Crown lands taken will be payable to the Governor in Council, and it is suggested that this would not be the natural destination of compensation paid in respect of lands in which the beneficial interest belongs to a Province; but this sub-section is machinery only, and there is no reason why the Governor in Council should not direct any compensation moneys received in respect of Provincial Crown lands to be handed over to the Government of the Province concerned.

The construction so put upon s. 189 of the Act of 1919 is strongly supported by a reference to the history of the Railway Acts, which were carefully analysed in the judgment delivered by Newcombe J. on behalf of the Supreme Court in this case. The pre-Union Railway Act of the Province of Canada (22 Vict. c. 66) authorized the taking of any "wild lands of the Crown" situate on the route of the railway; and this expression was repeated in the Railway Act passed immediately after

[1] [1926] A.C. 715, 3 D.L.R. 545, 2 W.W.R. 552, 32 C.R.C. 96.

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Spence J.

confederation (the *Railway Act, 1868*) at a time when all such "wild lands" were necessarily Provincial Crown lands. It reappeared in the Railway Acts of 1879 and 1886, the word "wild" being omitted in the Act of 1888 and in all subsequent consolidating Acts down to and including the Act of 1919; and it is hardly conceivable that an expression which in the earlier of these statutes plainly included Provincial Crown lands was intended to have a less extended meaning in the later statutes. It is noteworthy too that the Act of 1919 was passed after it had been decided in the British Columbia case (to be hereafter referred to) that the section extended to Provincial Crown property, and without any alteration of language.

Again, in *A.G. of Alberta v. The Royal Trust Co.*[1], this Court dealt with the then s. 70 of the *Supreme Court Act* which now appears as s. 69 of the Act, R.S.C. 1952, c. 259. This Court held that the section which exempted the Crown from the provisions of the Act requiring the deposit of security for costs applied as well to the Crown in the right of Canada. The Court therefore refused to quash the appeal on the ground, inter alia, that it had not been properly instituted when no proper security had been given under the said s. 70.

I am of the opinion that the situation to which s. 105 was addressed is one equally applicable to the Provincial Crown as to the federal Crown. As directed by s. 15 of the *Interpretation Act,* I consider the provisions of s. 105 of the *Supreme Court Act* as being remedial in the case of the provincial Crown as well as the Dominion Crown. I adopt here the words of Tweedie J. in *Re Cardston U.F.A. Co-Op. Association Ltd., ex parte The King*[2]:

> It is quite true that the section is not in express words made applicable to the Crown in the right of the Province, but, if the intention of the Act as a whole is to place the Crown in regard to priorities in the same position as private creditors, then the expression "Crown" must be construed so as to include both the right of the Dominion and that of the Province.

For these reasons, I am of the opinion that the proper interpretation to be given to s. 105 of the *Supreme Court Act* is to apply it in favour of the Crown in the right of the Province of Ontario as well as the Crown in right of Canada and that the Registrar, therefore, should have allowed proper counsel fee and proper fee for preparation of factum.

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[1] [1944] S.C.R. 243, 3 D.L.R. 145.

[2] [1925] 4 D.L.R. 897 at 899, 3 W.W.R. 651, 7 C.B.R. 413.

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Spence J.

The appeal is therefore allowed with costs which by agreement of the parties are allowed at the sum of $100 and the Allocatur is referred back to the learned Registrar for amendment in accordance with these reasons. I express no view as to the quantum of the costs to be allowed for either item.

Appeal allowed with costs.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

Solicitors for Nickel Rim Mines Ltd: Day, Wilson, Campbell & Martin, Toronto.

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*June 6
June 26

WILLIAM LLOYD BOLDUC and DAVID BIRD ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Indecent assault—Doctor examining female patient in presence of friend, a layman—Friend falsely described as an intern—Whether consent given to examination—Whether consent obtained by fraud—Nature and quality of act—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 141, 230.

The two appellants, one a medical doctor and the other a layman friend of the doctor, were convicted of indecent assault, contrary to s. 141 of the *Criminal Code*. The doctor represented to a female patient that his friend was a medical intern in need of further experience and in this way obtained the patient's consent to the friend's presence in the examining room during the course of an examination of the patient's intimate parts. During the examination, the friend stood by and observed but at no time did he touch the patient. Their convictions were affirmed by the Court of Appeal. The appellants were granted leave to appeal to this Court.

Held (Spence J. *dissenting*): The appeal should be allowed and a verdict of acquittal entered for both appellants.

Per Cartwright, Fauteux, Ritchie and Hall JJ.: The appellants were not guilty of an indecent assault within the meaning of s. 141 of the *Criminal Code*. The conduct of the doctor was unethical and reprehensible in the extreme. However, the consent of the patient was not obtained by false and fraudulent representations as to the nature and quality of the act to be performed by the doctor. The fraud was as to

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*PRESENT: Cartwright, Fauteux, Ritchie, Hall and Spence JJ.

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the friend being a medical intern. His presence as distinct from some overt act by him was not an assault. The friend was acting as a "peeping tom", and such conduct is not an offence.

Per Spence J., *dissenting*: Under s. 230 of the *Criminal Code*, the application of force, however slight, is an assault when it is "without the consent of another person or with consent when it is obtained by fraud". In this case, the patient consented to be touched by the doctor in the presence of a doctor and not a mere layman. The indecent assault upon her was not the act to which she consented and therefore the two appellants were guilty under the provisions of s. 141(1) of the Code when considered with ss. 21 and 230 of the Code without recourse to the provisions of s. 141(2).

Droit criminel—Attentat à la pudeur—Docteur examinant une patiente en la présence d'un ami non du métier—Ami décrit comme étant un interne—Le consentement a-t-il été donné pour l'examen—Le consentement a-t-il été obtenu par fraude—Nature et caractère de l'acte —Code criminel, 1953-54 (Can.), c. 51, arts. 21, 141, 230.

Les deux appelants, l'un un médecin et l'autre un ami non du métier, ont été trouvés coupables d'attentat à la pudeur, le tout contrairement à l'art. 141 du *Code criminel*. Le docteur a représenté à une patiente que son ami était un interne ayant besoin de plus d'expérience et de la sorte a obtenu le consentement de la patiente à ce que l'ami soit présent à la salle d'examen lors d'un examen des parties intimes de la patiente. Durant l'examen, l'ami se contenta de se tenir là et d'observer, mais à aucun moment a-t-il touché la patiente. Les verdicts de culpabilité ont été confirmés par la Cour d'Appel. Les appelants ont obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et un verdict de non culpabilité doit être rendu en faveur des deux appelants, le Juge Spence étant dissident.

Les Juges Cartwright, Fauteux, Ritchie et Hall: Les appelants n'étaient pas coupables d'attentat à la pudeur dans le sens de l'art. 141 du *Code criminel*. La conduite du docteur était moralement répréhensible à l'extrême. Cependant, le consentement de la patiente n'a pas été obtenu par de fausses et frauduleuses représentations sur la nature et le caractère de l'acte devant être posé par le docteur. La fraude avait rapport à la description de l'ami comme étant un interne. Sa présence en tant qu'elle est distincte d'un acte positif n'était pas un assaut. L'ami a agi comme un «peeping tom», et une telle conduite n'est pas une offense.

Le Juge Spence, *dissident*: En vertu de l'art. 230 du *Code criminel*, l'application de la force, si minime soit-elle, est une attaque lorsqu'elle est appliquée «sans le consentement d'autrui ou avec son consentement s'il est obtenu par fraude». Dans le cas présent, la patiente a consenti à ce que le docteur la touche en présence d'un docteur et non pas d'une personne qui n'était pas du métier. L'acte auquel elle a donné son consentement n'était pas l'attentat à la pudeur et par conséquent, sans avoir recours aux dispositions de l'art. 141(2) du Code, les deux appelants étaient coupables sous l'art. 141(1) lorsqu'on le considère avec les arts. 21 et 230 du Code.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique[1], confirmant un verdict de culpabilité pour attentat à la pudeur. Appel maintenu, le Juge Spence étant dissident.

APPEAL from a judgment of the Court of Appeal of British Columbia[1], affirming the appellants' conviction for indecent assault. Appeal allowed, Spence J. dissenting.

Neil M. Fleishman, for the appellant Bird.

Thomas R. Braidwood, for the appellant Bolduc.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Cartwright, Fauteux, Ritchie and Hall JJ. was delivered by

HALL J.:—The facts and circumstances relative to this appeal are fully set out in the judgment of my brother Spence. The question for decision is whether on those facts and in the circumstances so described the appellants Bolduc and Bird were guilty of an indecent assault upon the person of the complainant contrary to s. 141 of the *Criminal Code* which reads:

> 141. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.
>
> (2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

With respect, I do not agree that an indecent assault was committed within the meaning of this section. What Bolduc did was unethical and reprehensible in the extreme and was something no reputable medical practitioner would have countenanced. However, Bolduc's unethical conduct and the fraud practised upon the complainant do not of themselves necessarily imply an infraction of s. 141, *supra.* It is common ground that the examination and treatment, including the insertion of the speculum were consented to by the complainant. The question is: 'Was her consent obtained by false and fraudulent representations as to the nature and quality of the act?' Bolduc did exactly what

[1] [1967] 2 C.C.C. 272, 59 W.W.R. 103, 61 D.L.R. (2d) 494.

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Hall J.

the complainant understood he would do and intended that he should do, namely, to examine the vaginal tract and to cauterize the affected parts. Inserting the speculum was necessary for these purposes. There was no fraud on his part as to what he was supposed to do and in what he actually did. The complainant knew that Bird was present and consented to his presence. The fraud that was practised on her was not as to the nature and quality of what was to be done but was as to Bird's identity as a medical intern. His presence as distinct from some overt act by him was not an assault. However, any overt act either alone or in common with Bolduc would have transposed the situation into an unlawful assault, but Bird did not touch the complainant; he merely looked on and listened to Bolduc's comments on what was being done because of the condition then apparent in the vaginal tract. Bird was in a sense a "peeping tom". Conduct popularly described as that of a "peeping tom" was not an offence under the *Criminal Code* nor was it an offence at common law: *Frey v. Fedoruk et al*[1]. Since the decision in *Frey v. Fedoruk, supra,* the *Code* was amended by the inclusion of s. 162 which first appeared in the 1955 *Code*. That section reads:

> 162. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

The act of 'peeping' is not of itself made an offence, but it is the loitering or prowling at night near a dwelling house without lawful excuse that is made unlawful.

This case differs from *Rex v. Harms*[2] where the accused was charged with rape following carnal knowledge of an Indian girl, her consent to the intercourse having been obtained by false and fraudulent misrepresentations as to the nature and quality of the act. In that case Harms falsely represented himself to be a medical doctor, and although the complainant in that case knew that he was proposing sexual intercourse, she consented thereto because of his representations that the intercourse was in the nature of a medical treatment necessitated by a condition which he said he had diagnosed. Harms was not a medical man at all. He had no medical qualifications. The

[1] [1950] S.C.R. 517, 97 C.C.C. 1, 10 C.R. 26, 3 D.L.R. 513.
[2] [1944] 1 W.W.R. 12, 81 C.C.C. 4, 2 D.L.R. 61.

Court of Appeal affirmed the conviction by the jury that the Indian girl's consent had been obtained by false and fraudulent representations as to the nature and quality of the act.

The question of fraud vitiating a woman's consent in the case of rape or indecent assault was fully canvassed by Stephen J. in *The Queen v. Clarence*[1] and by the High Court of Australia in *Papadimitropoulos v. The Queen*[2] where the Court, in concluding a full review of the relevant law and cases decided up to that time, including the *Harms* case, *supra*, said:

> To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality . . .

The complainant here knew what Bolduc was proposing to do to her, for this was one in a series of such treatments. Her consent to the examination and treatment was real and comprehending and it cannot, therefore, be said that her consent was obtained by false or fraudulent representations as to the nature and quality of the act to be done, for that was not the fraud practised on her. The fraud was as to Bird being a medical intern and it was not represented that he would do anything but observe. It was intended that the examination and treatment would be done by Bolduc and this he did without assistance or participation by Bird.

I would, accordingly, allow the appeal, quash the conviction and direct that a verdict of acquittal be entered for both appellants.

SPENCE J. (*dissenting*):—These are appeals by each accused from the judgment of the Court of Appeal of British Columbia[3] pronounced on February 6, 1967 whereby that Court dismissed the appeals of the accused from their convictions by His Honour Judge Ladner on November 24, 1966, of charges of indecent assault contrary to the provisions of s. 141 of the *Criminal Code*. The appeals were argued together.

[1] (1889) 22. Q.B.D. 23.
[2] (1957), 98 C.L.R. 249.
[3] [1967] 2 C.C.C. 272, 59 W.W.R. 103, 61 D.L.R. (2d) 494.

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The circumstances are as follows. Bolduc was a physician and surgeon licensed to practice in the Province of British Columbia. In the course of such practice he was treating the complainant Diana Elizabeth Osborne for an erosion of the cervic uteri. During the course of treatment, after necessary examinations, he had on several occasions cauterized the affected parts. On a Saturday morning in the month of October or November 1965, Mrs. Osborne attended Dr. Bolduc's office for another examination and treatment, if the latter were required.

The accused Bird was a professional musician in a night club. He had been for some time a personal friend of the accused Bolduc. He had obtained an honours degree in chemistry from the university and he swore that "I was very seriously considering returning to university to go to medical school".

On Mrs. Osborne's attendance at the office, the receptionist prepared her for the examination and/or treatment and then attended the accused Bolduc in his office to inform him that his patient was ready. Present in the office with Bolduc was the accused Bird and upon noticing that Bolduc was not alone the receptionist simply informed Bolduc that his patient had been prepared and requested him to notify her when he was ready to proceed. In a few moments the receptionist was recalled into the office and Bolduc instructed her to get a white lab coat, such as commonly worn by doctors, so that Bird might use the same stating to her that Bird was an intelligent young man and that he intended to pass Bird off as a doctor or medical intern, adding "this was a good way to learn the facts of life". The receptionist protested at what she considered such unethical conduct and declined to bring the lab coat. Bolduc himself obtained the coat for Bird and requested that the receptionist give her stethoscope to Bird. The receptionist simply dropped the instrument in the office and returned to the examining room.

Bolduc and Bird then entered the room together. Bird was wearing the white lab coat and had in his possession a stethoscope. Bolduc introduced Bird to Mrs. Osborne as "Dr. Bird", told Mrs. Osborne that Bird was a medical intern who had not obtained practical experience of this type of thing during his internship and asked if she would mind if Dr. Bird were present during the examina-

tion. Mrs. Osborne replied in the negative because he was an intern, that she didn't mind—"this is fine".

I have above summarized the evidence of the receptionist which was accepted by the learned trial judge.

The examination proceeded with Bolduc, the physician, sitting on a stool at the end of the examining table. He then proceeded to examine carefully and to touch Mrs. Osborne's private parts, and during the course of the treatment he inserted a speculum in the vaginal canal. Throughout this, the accused Bird stood to one side of Bolduc about a foot or eighteen inches away from him and Bolduc made comments as to the patient's treatment, progress, her condition, and also on the prevalence of such condition amongst female patients. Bird simply answered by nods and did not touch the patient at all. It is, of course, the question for decision whether or not the conduct of Bolduc in the circumstances constituted the offence of indecent assault.

Before the Court of Appeal and in this Court, it was immediately admitted, and it could not be otherwise, that if Bolduc's conduct did amount to indecent assault Bird was also guilty under the provisions of s. 21 of the *Criminal Code* despite the fact that he did not touch the patient at any time. Section 141(1) of the *Criminal Code* provides:

> 141. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.

Section 230 of the Criminal Code provides:

> 230. A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud,
>
> (*a*) he applies force intentionally to the person of the other, directly or indirectly, or

It is, of course, trite law that the force applied may be of very slight degree, in fact, may be mere touching.

The courts below were concerned with the provisions of s. 141(2) of the *Criminal Code* which provides:

> (2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

Much argument was directed in this Court to whether the admittedly fraudulent and false representation made to Mrs. Osborne was as to "the nature and character of the

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act" so that the consent would be vitiated by the provisions of the said subsection.

I am of the opinion that this Court need not be concerned directly with the provisions of s. 141(2). Under s. 230 the application of force, however slight, is an assault when it is "without the consent of another person or with consent when it is obtained by fraud". Let us examine for a moment what was the consent obtained from Mrs. Osborne. Surely upon the evidence to which I have referred above, it was a consent to the examination by Bolduc of her private parts and the touching of them in the course of treatment in the presence of a doctor, and not a mere medical student or a mere layman who was in some vague fashion considering becoming a medical student.

There was no evidence whatsoever that Mrs. Osborne knew the accused Bird at all. The name Bird meant nothing to her. She only gave this consent to such a serious invasion of her privacy on the basis that Bird was a doctor intending to commence practice and who desired practical experience in such matters as Bolduc was proposing to engage in. That was the consent which Mrs. Osborne granted. The indecent assault upon her was not the act to which she consented and therefore I am of the opinion that the two accused were guilty under the provisions of s. 141(1) when considered with s. 230 and s. 21 of the *Criminal Code* without recourse to the provisions of s. 141(2). This makes it unnecessary, in my view, to consider the many authorities cited in the most able argument of counsel for the accused and which dealt with the problem of the nature and character of the act under the provisions of the latter subsection.

I would dismiss both appeals.

Appeal allowed and verdict of acquittal ordered, SPENCE J. dissenting.

Solicitor for the appellant Bird: N. M. Fleishman, Vancouver.

Solicitor for the appellant Bolduc: T. R. Braidwood, Vancouver.

Solicitor for the respondent: The Attorney General for British Columbia.

J. D. STERLING COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

A. JANIN COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

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*Dec. 14, 15
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ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Damages—Construction of sewer—Two contractors having separate contracts from city—Works of one contractor flooded by installations of the other—Liability—Quantum of damages—Civil Code, arts. 1053, 1054.

The two parties to this appeal were engaged in performing contracts with the city of Montreal to build an underground covered collector sewer running parallel to a stream. By erecting certain culverts in the stream, the defendant caused the flooding of the works being executed by the plaintiff, thereby causing damages to the works and also the immobilization for some days of the heavy equipment being used by the plaintiff. The trial judge found for the plaintiff and awarded damages in the sum of $52,000. The Court of Appeal, by a majority judgment, reduced the damages to the sum of $31,916. The plaintiff appealed to this Court and the defendant cross-appealed. The question of liability was not in issue in this Court, where only two questions were raised: (1) the quantum of damages and (2) whether the right of action belonged to a company known as Miron Co. Ltd. and not to the plaintiff. This second submission was rejected unanimously in the Courts below and, at the hearing, this Court expressed the opinion that it had rightly been rejected.

Held: The appeal should be allowed and the cross-appeal dismissed.

The amount of damages awarded by the trial judge and upheld by the reasons of the minority in the Court of Appeal was supported by the evidence and should not have been disturbed.

Dommages—Construction d'un égout—Deux entrepreneurs ayant contracté séparément avec la cité—Travaux d'un des entrepreneurs inondés par les installations faites par l'autre—Responsabilité—Quantum des dommages—Code Civil, arts. 1053, 1054.

Les deux parties dans cet appel étaient à construire pour la cité de Montréal un égout collecteur souterrain le long d'une petite rivière. Certaines installations faites par la défenderesse ont eu pour résultat d'inonder les travaux exécutés par la demanderesse, causant ainsi des dommages à ces travaux et en plus l'immobilisation pendant quelques jours de l'équipement lourd employé par la demanderesse. Le juge au procès se prononça en faveur de la demanderesse et lui accorda des dommages au montant de $52,000. La Cour d'Appel, par un jugement majoritaire a réduit les dommages à la somme de $31,916. La

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

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demanderesse en appela devant cette Cour et la défenderesse a produit un contre-appel. La question de responsabilité n'était pas en jeu devant cette Cour, où deux questions seulement ont été soulevées: (1) le quantum des dommages et (2) la question de savoir si le droit d'action appartenait à une compagnie connue sous le nom de Miron Co. Ltd. et non pas à la demanderesse. Cette seconde prétention a été rejetée unanimement par les Cours inférieures et, lors de l'audition, cette Cour s'est déclarée d'accord avec le juge de première instance qui l'avait rejetée.

Arrêt: L'appel doit être maintenu et le contre-appel rejeté.

Le montant des dommages accordé par le juge au procès et confirmé par les juges formant la minorité dans la Cour d'Appel était supporté par la preuve et n'aurait pas dû être changé.

APPEL et CONTRE-APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], réduisant les dommages accordés par le Juge Batshaw. Appel maintenu et contre-appel rejeté.

APPEAL and CROSS-APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reducing the amount of damages awarded by Batshaw J. Appeal allowed and cross-appeal dismissed.

Jacques Leduc, Q.C., for the plaintiff, appellant.

Walter C. Leggat, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side)[1] which, by a majority, allowed an appeal from a judgment of Batshaw J. to the extent of reducing the amount of damages awarded to the appellant from $52,000 to $31,916. Choquette and Badeaux JJ. dissenting would have dismissed the appeal.

In this Court, the appellant asks that the judgment at trial be restored; the respondent asks that the appeal be dismissed and by way of cross-appeal asks that the action be dismissed with costs or, alternatively, that a new trial be ordered to assess the damages, if any, to which the appellant is entitled.

The action arose from the fact that while the parties were engaged in performing contracts with the City of Montreal to build an underground covered collector sewer

[1] [1966] Que. Q.B. 85.

running parallel to a stream known as the "Little Rivière St. Pierre" the respondent, by the erection of certain culverts in the stream, caused the flooding of the works being executed by the appellant damaging the works and causing the immobilization for some days of the heavy equipment being used by the appellant.

At the trial the respondent denied liability, but in this Court only two points were raised, first, the quantum of damages and, second, the submission made by the respondent that if damages had been caused for which the respondent was responsible the right of action for those damages was that of a company known as Miron Company Limited and not of the appellant. This second submission was rejected unanimously in the Courts below and at the conclusion of the argument of counsel for the appellant in this Court, counsel for the respondent was informed that we were all of opinion that it was rightly rejected for the reasons given by Batshaw J. and that he need not deal with it.

The claim for damages was itemized in the Declaration and totalled $110,600. This was slightly amended at the trial and, as amended was as follows:

(1) Travaux d'assèchement, de pompage et de protection de l'équipement et de la machinerie se trouvant sur les chantiers	$30,254.00
(2) Installation et enlèvement de barrages temporaires	4,104.00
(3) Construction d'un talus étanche et nettoyage et assèchement des tranchées d'excavation	6,208.00
(4) Pour immobilisation d'équipement et retards dans l'exécution des travaux	52,634.00
(5) Déboursés divers pour travaux spéciaux requis ..	5,676.00
(6) Augmentation de frais généraux et perte de bénéfices	11,800.00
	$110,676.00

After setting out the itemized claim as above the learned trial judge continued:

> The interruption of the Plaintiff's work caused by the flood lasted for a period which it was difficult to determine precisely since resumption of the operations could only be effected on a gradual basis. The estimates varied from 7 to 15 days; R. F. Bird, the Executive Vice-President for Sterling, who was its principal witness as to the damages, affirmed that it lasted for about 8 days. To be conservative however, the Plaintiff based its claim on a period of 5.2 days which seems to the Court not to be unwarranted.

This finding was not challenged.

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The learned trial judge disallowed item 6 and in this Court no argument was advanced against his having done so.

The learned trial judge then pointed out that of the remaining amount of $98,876 a sum of $84,812 represented the daily rental value of the equipment claimed on the basis of the calculation explained by the appellant's witness Bird, and the balance of $14,064 represented the total of items 1, 2, 3 and 5 excluding therefrom the portions of those items made up of rental value of equipment. That this is so appears clearly from Exhibit P-14. The amount of damages to be assessed for the claims totalling this $14,064 was fixed by the learned trial judge at $12,000 and no ground has been shewn from disturbing this figure.

There remains the item of $84,812 for which the learned trial judge allowed $40,000. As to this item the evidence of the witness Bird supported the claim of $84,812 while that of the respondent's witness Rousseau was to the effect that the amount should be $19,916. The learned trial judge did not accept either of these figures and gave reasons for his refusal to do so. His reasons for not accepting Rousseau's figure were concurred in by Badeaux J. with whom, as already mentioned, Choquette J. agreed.

With respect, I am unable to discern any sufficient reason for reversing the conclusion of the learned trial judge that he should not accept Rousseau's evidence in toto, nor am I able to say from a perusal of the record that his estimate of $40,000 for this item was erroneous. While always hesitant to differ from the judgment of a majority in the Court of Appeal in fixing damages the amount of which is not susceptible of precise arithmetical calculation, it does appear that in the reasons of the majority there was a misapprehension of the basis on which the learned trial judge had proceeded.

As already pointed out, the award of the learned trial judge was made up of two items: (i) $12,000 allowed in respect of a claim of $14,064 (being the total of items 1, 2, 3 and 5 excluding the sum of $32,178 charged in those items for the rental value of equipment) and (ii) $40,000 allowed in respect of a claim of $84,812 (being the total of item 4 and the above sum of $32,178). That this is so is

made clear in the reasons of the learned trial judge when, after dealing with the claim for $84,812 and giving his reasons for allowing $40,000 in respect thereof, he says:

> Having dealt with the $84,812.00, part of Plaintiff's claim of $98,876.00 referred to above, there remains the difference of $14,064.00 which represents miscellaneous items of damages other than for rental value of equipment contained in paragraph 29 sub-paragraphs 1, 2, 3 and 5 of the declaration. It was conceded that this figure could not be ascertained with mathematical accuracy and represented a rough estimate of the damages involved. In the opinion of the Court this part of the claim could reasonably be assessed at $12,000.00.

Casey J., however, says at the opening of his reasons:

> This claim was for $110,600.00 divided into six items. The trial judge disallowed No. 6 ($11,800.00) and allowed $40,000.00 for No. 4 ($56,400.00 claimed) and $12,000.00 for nos. 1, 2, 3 and 5 ($42,400 claimed).

No doubt Rousseau's figure of $19,916 was intended by that witness to represent the amount which in his opinion should have been allowed in respect of the total of $84,812 claimed for rental value of equipment; but I think it probable that Casey J. might not have adopted that figure if he had realized that the appellant's claim in regard to this item, supported as it was by Bird's evidence, was not for $56,400 but for the much larger sum of $84,812. Be that as it may, I have reached the conclusion that the figure arrived at by the learned trial judge and upheld by the reasons of the minority in the Court of Queen's Bench was supported by the evidence and should not have been disturbed.

I would allow the appeal with costs in this Court and in the Court of Queen's Bench (Appeal Side) and restore the judgment of the learned trial judge. I would dismiss the cross-appeal with costs.

Appeal allowed with costs; cross-appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Birtz & Leduc, Montreal.

Attorneys for the defendant, respondent: Foster, Watt, Leggat & Colby, Montreal.

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LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC et L'HONORABLE BERNARD PINARD ..... APPELLANTS;

AND

CYPRIEN HÉBERT ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Expropriation—Indemnity fixed by Public Service Board—Increase granted by Court of Appeal—Value of servitudes—Code of Civil Procedure, arts. 1066a et seq.

By a notice of expropriation given in August 1961, the appellants expropriated a property belonging to the respondent, situated in the city of Dummondville, P.Q., and forming part of a property purchased by the respondent in 1945 for the price of $2,200. The deed of sale to the respondent contained restrictive conditions and created certain servitudes. The right to expropriate was not contested. The Public Service Board valued the land at 55¢ per square foot and fixed the indemnity at $5,065.50. That decision was homologated by the Superior Court. The Court of Appeal fixed the commercial value of the land taken at $1.25 per square foot and awarded an indemnity of $20,512.50. The expropriators appealed to this Court.

Held: The appeal should be allowed.

The finding of the Court of Appeal that the commercial value of the land taken was $1.25 per square foot should not be disturbed. However, the 20-foot strip along St. Joseph Boulevard which the respondent was obligated, under this deed of acquisition, to cede free of charge to the city, if required to do so, had no commercial value to the respondent and therefore, contrary to what the Court of Appeal decided, the respondent was not entitled to compensation for that portion of the land taken. As to the servitude of non-access, the Court of Appeal erred in awarding compensation. That servitude caused no appreciable inconvenience to the owner of the property and the respondent, therefore, was not entitled to compensation under this head. In the result, the respondent was entitled to a compensation of $11,512.50.

Expropriation—Indemnité fixée par la Régie des services publics—Augmentation accordée par la Cour d'Appel—Valeur de certaines servitudes—Code de Procédure Civile, arts. 1066a et seq.

Par un avis d'expropriation daté du mois d'août 1961, les appelants ont exproprié un immeuble appartenant à l'intimé, situé dans la cité de Drummondville, P.Q., et formant partie d'un terrain acheté par l'intimé en 1945 au prix de $2,200. L'acte de vente en faveur de l'intimé contenait des conditions restrictives et créait certaines servi-

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Martland JJ.

tudes. Le droit d'exproprier n'a pas été contesté. La Régie des services publics a évalué la terre à 55c le pied carré et a fixé l'indemnité à $5,065.50. Cette décision de la Régie fut homologuée par la Cour supérieure. La Cour d'Appel a établi la valeur commerciale de la terre expropriée à $1.25 le pied carré et a accordé une indemnité de $20,512,50. Les expropriants en appelèrent devant cette Cour.

Arrêt: L'appel doit être maintenu.

La conclusion de la Cour d'Appel à l'effet que la valeur commerciale de la terre expropriée était de $1.25 le pied carré ne doit pas être changée. Cependant, la lisière de 20 pieds le long du boulevard St-Joseph que l'intimé était obligé, en vertu de son acte d'achat, de céder gratuitement à la cité, s'il en était requis de le faire, n'avait aucune valeur commerciale pour l'intimé et en conséquence, contrairement à ce que la Cour d'Appel en a décidé, l'intimé n'avait pas droit à une compensation pour cette partie de la terre expropriée. Quant à la servitude de non accès, la Cour d'Appel a erré en accordant une indemnité. Cette servitude ne causait pas d'inconvénients appréciables au propriétaire du terrain et l'intimé n'avait donc pas droit à une indemnité pour cet item. Comme résultat, l'intimé a droit à une indemnité de $11,512.50.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], variant l'indemnité accordée à un exproprié. Appel maintenu.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], varying the compensation awarded for the expropriation of a property. Appeal allowed.

Laurent E. Bélanger, Q.C., and *Marcel Nichols*, for the appellants.

Gaston Ringuet, Q.C., and *Jules Saint-Pierre, Q.C.*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a unanimous judgment of the Court of Queen's Bench of the Province of Quebec[1] rendered on September 23, 1965, allowing an appeal from a judgment of the Superior Court rendered on August 2, 1963, which homologated a decision of the Public Service Board of the Province of Quebec fixing the compensation to be paid to respondent for property expropriated by the appellants.

[1] [1956] Que. Q.B. 1029.

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PROCUREUR GÉNÉRAL DE QUÉBEC *et al.* *v.* HÉBERT

Abbott J.

The right to expropriate was not contested, and following proceedings under arts. 1066a et seq. of the *Code of Civil Procedure*, the Public Service Board, as arbitrator, fixed at $5,065.50 the compensation allowed to respondent for the property expropriated by appellants.

On appeal to the Court of Queen's Bench that amount was increased to $20,512.50. In this Court the appellants ask that the award of the Public Service Board be restored.

The relevant facts are set out in detail in the reasons of Rinfret J., in the court below, and in the Order of the Public Service Board. They are not now seriously in issue and for the purposes of the present appeal can be shortly stated.

The property in question is situated at the corner of St. Pierre St. and St. Joseph Boulevard West in the City of Drummondville. It forms part of an emplacement purchased by respondent on September 11, 1945, from Southern Canada Power Company Ltd. for the price of $2,200. The deed of sale from the power company contained restrictive conditions and created certain servitudes in the following terms:

> RESERVATIONS AND SERVITUDES
>
> The Vendor reserved as perpetual servitudes on the property above sold and described in favour and for the benefit of the Vendor on the residue of said lot No. 151, and in favour of part of lot 152, of the South-Ward and of lots Nos. 3 and 4 of the West-Ward of Drummondville being properties of the Vendor, the following rights and restrictions, all undertaken and agreed to by the Purchaser.
>
> 1. To run or place overhead or underground electric transmission and telephone line or lines which may already be constructed or which may be constructed in future on or across said sold property, including the right to place or construct thereon poles and anchors towers supports, structures guy wires, etc.
>
> 2. To run a duct line or lines and pipes over and under said property.
>
> 3. No structure of any sort shall be erected and no tree or trees shall be planted in near or within falling distance of the said transmission lines. The Vendor shall have the right to trim and cut any trees thereon and to do other such acts as may be necessary for the full operation of said transmission and telephone lines and duct or pipe lines and their maintenance in good order, including the right of ingress and egress for employees and employees' vehicles at all time on said property sold for the construction, operation and maintenance of said lines, the whole without any compensation therefor.

4. No structure shall be erected and no trees shall be planted on or along a strip of the hereby sold property, twenty-five feet wide adjacent to the present north-east limit of the third range (St. Joseph Boulevard) and parallel to it.

5. Should the City of Drummondville require land along the said third range road, to increase the width of said road by a maximum of twenty feet, the Purchaser agrees to cede to the said City of Drummondville, free of charge, a strip of land along the hereby sold property, wide enough for such purpose.

Notice of expropriation was given on August 10, 1961, and a technical description of the property, prepared on behalf of appellants, is dated October 5, 1961. The property and rights expropriated are concisely described by Rinfret J., as follows:

La description technique du 5 octobre 1961—

(1) décrit le terrain à acquérir comme contenant une superficie de 14,810 pieds carrés, soit 97 pieds dans la ligne nord, le long du chemin St-Georges (rue St-Pierre), dans la ligne est 41.5 pieds, dans la ligne nord-est 26 plus 202 pieds; dans la ligne sud-est 52 pieds et dans sa ligne sud, 294 pieds.

En somme l'expropriation couvrait une lisière de 52 pieds sur toute la largeur du lot, longeant le boulevard St-Joseph.

(2) elle prévoit une servitude de non-accès s'étendant sur une distance de 26 pieds sur la rue St-Pierre ainsi que sur le boulevard St-Joseph et sur une distance de 41.5 pieds dans la ligne courbe contournant l'encoignure;

(3) elle établit une servitude d'une largeur de 10 pieds pour le passage d'une ligne de transmission de la Southern Canada Power, le long du boulevard;

(4) elle décrétait l'établissement et le maintien d'une zone libre de construction sur une distance additionnelle de 8 pieds, soit en tout de 18 pieds, parallèle au boulevard.

Comme résultat net de cette description technique, l'appelant perdait une lisière de terrain de 52 pieds et se voyait privé de construire sur une lisière additionnelle de 18 pieds une tranche de 70 pieds sur la profondeur de 114 pieds que contenait son immeuble.

As above stated, the superficial area of the land expropriated was 14,810 square feet of which 5,600 square feet represented the area comprised in the 20-foot strip, which, under his deed of acquisition, respondent was obligated to convey to the City of Drummondville for the widening of St. Joseph Boulevard.

The Public Service Board held that by reason of the stipulations contained in his deed of acquisition, which I have just referred to, the respondent was not entitled to compensation for the taking of a 20-foot strip along St. Joseph Boulevard. It valued the land expropriated at 0.55

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cts. per square foot and applying that figure to the remainder of the area expropriated, namely 9,210 square feet, it fixed the indemnity payable at $5,065.50.

Having held that by reason of the servitudes and restrictions imposed on the property by the power company in 1945, the land taken had very little commercial value the Board added that in fixing the value at 0.55 cts. per square foot, "ce prix tient également compte de la possibilité pour l'exproprié d'obtenir de la Southern Canada Power la libération éventuelle des servitudes qui l'affectaient". The Board also found that the respondent was not entitled to any compensation for the servitude of non-access or for injurious affection to the remainder of his property.

The Court of Queen's Bench held that the Board had erred in considering that the limitation of its servitude by the power company was a mere possibility. After discussing the evidence on this point, Rinfret J. said:

> De ces témoignages il faut, je crois, dégager que la disparition des servitudes de la Southern Canada Power, sur le terrain de M. Hébert, était plus qu'une possibilité; plus qu'une probabilité, c'était une certitude sujette à une condition suspensive: la fixation par le gouvernement de la location exacte du boulevard St-Joseph.
>
> On avait assuré M. Hébert que main-levée serait donnée sur le résidu de son terrain aussitôt que le gouvernement indiquerait l'emplacement du boulevard.

I am in respectful agreement with that finding. In fact by a letter dated March 29, 1962, addressed to respondent, the power company did agree to limit its servitude to a strip along the new line of St. Joseph Boulevard and this was confirmed by a notarial deed executed May 24, 1962. Both these documents were filed with the Board before it made its award.

Having carefully reviewed the evidence, Rinfret J. (with whom Taschereau, Owen and Rivard JJ. concurred) fixed the commercial value of the land taken at $1.25 per square foot, and that finding should not be disturbed. He also held that the respondent was entitled to compensation for all the land taken—including the 20-foot strip above referred to—and fixed the indemnity at $18,512.50, together with a sum of $2,000 as indemnity for the servitude of non-access making a total of $20,512.50. In all other respects the

findings of the Board were confirmed. Montgomery J., while of opinion that the Board may have been right in taking into account the undertaking to transfer the 20-foot strip to the City free of charge, considered that the value of remainder of the property expropriated justified the proposed award of $20,512.50.

As I have said, under his deed of acquisition from the power company, respondent was obligated if required to do so, to cede a 20-foot strip free of charge to the City of Drummondville for the widening of St. Joseph Boulevard. Moreover, under clause 4 of the said deed, no structure could be erected or trees planted on the said strip. It is true that expropriation proceedings were initiated by the Provincial Government and the cost of the expropriation borne by it. The expropriation however, was for the joint benefit of the Province and the City, and under the provisions of the *Roads Act,* now 1964 R.S.Q., c. 133, s. 98, the land when taken vested in the City and became part of St. Joseph Boulevard West. With great respect, in my opinion the Board was justified in finding as it did that the land comprised in the said strip had no commercial value to respondent and that he was not entitled to compensation for that portion of the land taken. It follows therefore that the amount of $18,512.50 established by the court below should be reduced to $11,512.50.

In awarding an amount of $2,000 as compensation for the servitude of non-access, the Court below seems to have proceeded on the assumption that this servitude covered all the remaining frontage on St. Pierre St. of the property purchased by respondent from the power company. In fact this is not the case. As counsel for appellants pointed out in the argument before us, from a plan produced by respondent, dated October 2, 1961, and bearing the number 85 3-D, it appears that the property had a frontage on St. Pierre St. of approximately 148 feet. Of that frontage 97 feet were expropriated and a servitude of non-access imposed with respect to an additional 26 feet making a total of 123 feet. This left a frontage of approximately 25 feet on St. Pierre St., over which access to the property was unrestricted. So far as St. Joseph Boulevard is concerned, after the expropriation, access remained unrestricted along a frontage of 202 feet.

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With respect to this servitude of non-access, the Public Service Board said:

> CONSIDÉRANT QUE les régisseurs ont visité le terrain en question à plusieurs reprises, aussi bien avant qu'après l'enquête;
>
> CONSIDÉRANT QUE le résidu de la partie expropriée du lot 151 a une superficie de 10,800 pieds carrés, soit une superficie suffisante pour y ériger une station de service, selon les normes usuelles et suivant les prétentions des experts de l'exproprié, pourvu que la forme de cette superficie s'y prête;
>
> CONSIDÉRANT QUE la servitude de non-accès placée au coin du boulevard St-Joseph et du chemin St-Georges, sur une longueur globale de 138½ pieds également répartie entre les deux rues, n'a pas pour effet de rendre l'exploitation du résidu impossible, car même si la servitude n'existait pas, la disposition des rues d'où provient la clientèle l'empêcherait de faire usage du secteur clôturé, du moins dans une très large mesure;
>
> CONSIDÉRANT QUE les clients éventuels peuvent entrer sur le terrain et en sortir sans inconvénients appréciables.

It held that the respondent was not entitled to compensation for the creation of such servitude.

As pointed out in the Court below, the servitude of non-access extends over 93.5 feet not 138.5 feet as stated by the Board, but obviously this error does not affect its findings that such servitude caused no appreciable inconvenience to the owner of the property and that consequently he was not entitled to compensation under this head. I am in agreement with these findings.

In the result, therefore, I would allow the appeal, modify the judgment in the court below and substitute the sum of $11,512.50 for the sum of $20,512.50 therein mentioned. The appellants are entitled to their costs in this Court.

Appeal allowed with costs.

Attorneys for the appellants: Nichols & Pinard, Drummondville.

Attorneys for the respondent: Ringuet & Saint-Pierre, Drummondville.

LUCIEN TREMBLAY AND OTHERS (*Plaintiffs*)	APPELLANTS;	1966 *Dec. 12 1967 Oct. 3
AND		
LA COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC (*Defendant*)	RESPONDENT;	
AND		
LA FÉDÉRATION DES TRAVAILLEURS DU QUÉBEC *et al.*	MIS-EN-CAUSE.	

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Labour—Constitutional law—Validity of provincial legislation—Labour Relations Board—Power to dissolve employees' association dominated by employer—Whether statute ultra vires in view of s. 96 of the B.N.A. Act—Labour Relations Act, R.S.Q. 1941, c. 162A, ss. 20, 50 [now R.S.Q. 1964, c. 141, ss. 11, 132]—Professional Syndicates Act, R.S.Q. 1941, c. 162 [now R.S.Q. 1964, c. 146]—B.N.A. Act, 1867, s. 96.

Pursuant to s. 50 of the *Labour Relations Act*, R.S.Q. 1941, c. 162A, the appellant associations, some of which had been incorporated under the *Professional Syndicates Act*, R.S.Q. 1941, c. 162, were brought before the Labour Relations Board where it was asked that they be dissolved on the ground that they had become dominated by the employer contrary to the provisions of s. 20 of the *Labour Relations Act*. The appellants obtained from the Superior Court the issue of a writ of prohibition asking that s. 50 be declared *ultra vires* because it purported to confer upon the Board powers which are exercisable only by a Court, the members of which are appointed pursuant to s. 96 of the *B.N.A. Act*. The Board filed a total inscription in law which was maintained in the Superior Court and by a majority judgment in the Court of Appeal. The appellant associations were granted leave to appeal to this Court. The Attorney General for Canada intervened to support the arguments of the appellants, and the Attorneys General for Quebec and Ontario intervened to support those of the Board.

Held: The appeal should be dismissed.

Section 50 of the *Labour Relations Act*, which empowers the Board to dissolve employees' associations dominated by an employer, including a professional syndicate incorporated under the *Professional Syndicates Act*, is not *ultra vires* the Quebec legislature. Section 50 does not confer upon the Board judicial powers that can be exercised only by a Superior, District or County Court within the meaning of s. 96

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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of the *B.N.A. Act*. The power given to the Board is a limited and discretionary power. It is purely incidental to the accomplishment of the Board's primary purposes, namely the maintenance of industrial peace. There can be no valid analogy between that power and the general power to dissolve corporations conferred upon the Superior Court by the provisions of the *Code of Civil Procedure*.

Travail—Droit constitutionnel—Validité d'une législation provinciale —Commission des Relations de Travail—Pouvoir de prononcer la dissolution des associations de salariés dominées par un employeur —La loi est-elle ultra vires vu les dispositions de l'art. 96 de l'Acte de l'Amérique du Nord britannique—Loi des Relations Ouvrières, S.R.Q. 1941, c. 162A, arts. 20, 50 [maintenant S.R.Q. 1964, c. 141, arts. 11, 132]—Loi des Syndicats professionnels, S.R.Q. 1941, c. 162 [maintenant S.R.Q. 1964, c. 146]—Acte de l'Amérique du Nord britannique, 1867, art. 96.

Conformément aux dispositions de l'art. 50 de la *Loi des relations ouvrières*, S.R.Q. 1941, c. 162A, les associations appelantes, dont plusieurs avaient été incorporées sous la *Loi des syndicats professionnels*, S.R.Q. 1941, c. 162, ont été citées devant la Commission des relations de travail où il a été demandé que leur dissolution soit prononcée pour le motif qu'elles étaient devenues dominées par leur employeur contrairement aux dispositions de l'art. 20 de la *Loi des relations ouvrières*. Les appelantes ont obtenu de la Cour supérieure l'émission d'un bref de prohibition demandant que l'art. 50 soit déclaré *ultra vires* parce qu'il prétend attribuer à la Commission des pouvoirs qui ne peuvent être exercés que par une Cour dont les membres ont été nommés conformément à l'art. 96 de l'*Acte de l'Amérique du Nord britannique*. La Commission a produit une inscription en droit totale qui a été maintenue par la Cour supérieure et par un jugement majoritaire de la Cour d'Appel. Les associations appelantes ont obtenu la permission d'en appeler devant cette Cour. Le procureur général du Canada est intervenu pour supporter le plaidoyer des appelantes, et les procureurs généraux de Québec et d'Ontario sont intervenus pour supporter celui de la Commission.

Arrêt: L'appel doit être rejeté.

L'article 50 de la *Loi des relations ouvrières*, qui donne à la Commission le pouvoir d'ordonner la dissolution des associations de salariés dominées par un employeur, y compris un syndicat professionnel incorporé sous la *Loi des syndicats professionnels*, n'est pas *ultra vires* de la législature de Québec. L'article 50 ne confère pas à la Commission des pouvoirs judiciaires qui peuvent être exercés seulement par une Cour supérieure, de district ou de comté dans le sens de l'art. 96 de l'*Acte de l'Amérique du Nord britannique*. Le pouvoir donné à la Commission est un pouvoir limité et discrétionnaire. Il est purement incident à l'accomplissement de l'objet primordial de la Commission, à savoir le maintien de la paix industrielle. Il ne peut y avoir d'analogie valide entre ce pouvoir et le pouvoir général d'ordonner la dissolution de corporations, conféré à la Cour supérieure par les dispositions du *Code de Procédure Civile*.

APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Sabourin qui avait maintenu une inscription en droit. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Sabourin J. which had maintained an inscription in law. Appeal dismissed.

Maurice Chevalier and *F. Vincent Garneau,* for the plaintiffs, appellants.

Laurent E. Bélanger, Q.C., for the defendant, respondent, and for the Attorney General for Quebec.

Rodrigue Bédard, Q.C., for the Attorney General for Canada.

Frank W. Callaghan, Q.C., for the Attorney General for Ontario.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1], dated May 14, 1965, confirming a judgment of the Superior Court which had maintained respondent's inscription-in-law and dismissed appellants' petition for a writ of prohibition to prevent the Respondent Board from exercising jurisdiction accorded it under s. 50 of the *Labour Relations Act,* R.S.Q. 1941, c. 162A.

In March 1962, the mis-en-cause applied to the Labour Relations Board (hereinafter called the Board), under the said s. 50, asking that the appellant associations be dissolved on the ground that they had become dominated by employers contrary to the provisions of s. 20 of the *Labour Relations Act.* It appears that some of the said associations had been incorporated or had applied for incorporation under the *Professional Syndicates Act,* R.S.Q. 1941, c. 162. Others appear to be unincorporated groups of the class contemplated by s. 2(*d*) of the said Act.

[1] [1966] Que. Q.B. 44, 55 D.L.R. (2d) 632.

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On February 19, 1964, shortly before the hearing by the Board on the said application, the appellants applied for, without prior notice, and obtained from the Superior Court, the issue of a writ of prohibition asking that s. 50 of the *Labour Relations Act* be declared *ultra vires* the Quebec Legislature because it purports to confer upon the Board powers which are exercisable only by a court, the members of which are appointed pursuant to s. 96 of the *British North America Act*.

On February 25, 1964, the Board filed a total inscription-in-law which was maintained in the Superior Court and by the judgment in the Court below.

Various procedural questions appear to have been argued in the Courts below, in addition to the constitutional one. Before this Court, however, the sole question in issue is whether s. 50 is invalid because it confers upon the Board judicial powers that can be exercised only by a superior, district or county court within the meaning of s. 96 of the *British North America Act*. The Attorney General for Canada intervened to support the arguments for appellants, and the Attorneys General for Quebec and Ontario to support those for the Board.

Sections 20 and 50 of the *Labour Relations Act* to which I have referred read as follows:

> 20. No employer, nor person acting for an employer or an association of employers, shall in any manner seek to dominate or hinder the formation or the activities of any association of employees.
>
> No association of employees, nor person acting on behalf of any such association, shall belong to an association of employers or seek to dominate or hinder the formation or the activities of any such association.
>
> 50. If it be proved to the Board that an association has participated in an offence against section 20, the Board may, without prejudice to any other penalty, decree the dissolution of such association after giving it an opportunity to be heard and to produce any evidence tending to exculpate it.
>
> In the case of a professional syndicate, an authentic copy of the decision shall be transmitted to the Provincial Secretary who shall give notice thereof in the Quebec Official Gazette.

These two sections have been replaced by ss. 11 and 132 of the new *Labour Code*, R.S.Q. 1964, c. 141, which came into force on September 1, 1964. The texts are substantially the same.

The *Labour Relations Act* and the *Professional Syndicates Act* are included in a group of statutes enacted by

the Quebec Legislature which, generally speaking, have a common purpose. That purpose is to ensure industrial peace and to establish and protect the right of employers and employees to associate and to bargain collectively.

These are matters which clearly are within the legislative competence of the Province. To administer and enforce the provisions of these labour laws, the Legislature has created a special tribunal—the Labour Relations Board. Similar boards have been set up in other jurisdictions and since the decision of the Judicial Committee in *Labour Relations Board of Saskatchewan v. John East Iron Works*[1], it is well established that such tribunals may exercise judicial functions as well as purely administrative ones.

As I have said, the narrow question in issue here is whether the Board, in ordering the dissolution of an association which has been given corporate status under the *Professional Syndicates Act,* is exercising a jurisdiction which belongs exclusively to a s. 96 Court.

The *Professional Syndicates Act* authorizes groups of employers and employees to form an association or professional syndicate and s. 6 states that such groups shall have as their object "the study, defence and promotion of the economic, social and moral interests of their members". The Provincial Secretary is empowered, at his discretion, upon compliance with the requirements of the statute, to grant corporate status to such bodies. Their powers, however, are limited and they are subject to the control and supervision of the Provincial Secretary. The status and related privileges are conferred, primarily, for the purpose of promoting employer and employee agreements by the process of collective bargaining.

Collective bargaining becomes meaningless if either of the parties to that process is dominated by the other. For that reason, the Legislature saw fit (1) to enact the prohibition contained in s. 20 and (2) to provide in s. 50 that, in the case of a breach of s. 20, in addition to any other penalty, the Board may order the dissolution of the offending association.

The power given to the Board under s. 50 is a limited and discretionary power. It is purely incidental to the accomplishment of one of the primary purposes for which

[1] [1949] A.C. 134, [1948] 2 W.W.R. 1055, [1948] 4 D.L.R. 673.

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the association was granted corporate status, namely the maintenance of industrial peace. In my view, there can be no valid analogy between that power and the general power to dissolve corporations conferred upon the Superior Court under arts. 978 et seq. and 1007 et seq. of the *Code of Civil Procedure*. These articles—which are substantially the same as those contained in the first *Code of Civil Procedure* adopted in 1867—operate in the broad area of termination of corporate status, at the instance of the Attorney General, on grounds of usurpation of corporate rights, or fraud and mistake in obtaining letters patent. They do not contemplate any such matter as a violation of the provisions of the *Labour Relations Act*.

It follows that in my opinion s. 50 of the *Labour Relations Act* does not confer upon the Board judicial powers that can be exercised only by a superior, district or county Court within the meaning of s. 96 of the *British North America Act*.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the plaintiffs, appellants: M. Chevalier, Montreal.

Attorney for the defendant, respondent: L. E. Bélanger, Montreal.

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ATTORNEY GENERAL OF BRITISH COLUMBIA ... APPELLANT;

AND

DAVID LORNE SMITH ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Juvenile Delinquents Act—Whether criminal law—Whether invading field reserved to provinces—Juvenile Delinquents Act, R.S.C. 1952, c. 160—Motor Vehicle Act, R.S.B.C. 1960, c. 253—Summary Convictions Act, R.S.B.C. 1960, c. 373.

Pursuant to the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, the respondent, a juvenile, was tried in ordinary Court for an offence under the *Motor Vehicle Act*, R.S.B.C. 1960, c. 253. He was found

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland, Ritchie, Hall and Spence JJ.

guilty and was sentenced to pay a fine of $400 and in default to be imprisoned for a term of 60 days. He applied to the Supreme Court of British Columbia for an order of *certiorari* to quash the conviction on the ground that the magistrate acted without jurisdiction or exceeded its jurisdiction in dealing with the case in that manner rather than pursuant to the provisions of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160. The writ was issued and the conviction quashed. This decision was affirmed by a majority judgment in the Court of Appeal. The Attorney General for British Columbia was granted leave to appeal to this Court. Leave to intervene was granted to the Attorney General for Canada, who supports the validity of the *Juvenile Delinquents Act*, and to the Attorneys General for Ontario and Quebec, who challenge it.

One of the questions in issue in this appeal was as to whether the *Juvenile Delinquents Act* was *intra vires* as criminal legislation or *ultra vires* as legislation in relation to the welfare of children and as infringing, by ss. 2(1)(*h*), 3(1) and 4, the right of the provinces to punish breaches of provincial laws; the other question was as to whether s. 4 of the Act, assuming its validity, operates to prevent a juvenile from being prosecuted under the *Summary Convictions Act* for an offence under the *Motor Vehicle Act* or any other offences validly created in the province.

Held: The appeal should be dismissed.

The *Juvenile Delinquents Act* was *intra vires* the Parliament of Canada and the respondent should have been tried under the provisions of that Act. In its true nature and character, the *Juvenile Delinquents Act*, far from being legislation adopted under the guise of criminal law to encroach on subjects reserved to the provinces, is genuine legislation in relation to criminal law in its comprehensive sense.

It matters not that there be a lack of uniformity in the application or operation of the *Juvenile Delinquents Act* either (i) *ratione loci*, or (ii) *ratione materiae*, or (iii) *ratione personae*. Furthermore, the contention that, in pith and substance, the *Juvenile Delinquents Act* is legislation in relation to the welfare and protection of children within the purview of the *Adoption Act* case, [1938] S.C.R. 398, could not be accepted.

Section 39 of the *Juvenile Delinquents Act* has no application in this case because the *Motor Vehicle Act* is not a statute of the class of statutes to which s. 39 is directed, namely, statutes intended for the protection or benefit of children. The *Juvenile Delinquents Act* and the *Motor Vehicle Act* cannot operate side by side, for their provisions clash at the level of law enforcement and to this extent, the latter statute is inoperative according to the rule that a legislation of Parliament which strictly relates to subjects of legislation expressly enumerated in s. 91 of the *B.N.A. Act* is of paramount authority, even though it trenches upon matters assigned to the provincial legislature by s. 92 of the *B.N.A. Act*.

Droit constitutionnel—Loi sur les jeunes délinquants—Est-ce une législation criminelle—Est-ce que la loi empiète sur le domaine réservé aux provinces—Loi sur les jeunes délinquants, S.R.C. 1952, c. 160—Motor Vehicle Act, R.S.B.C. 1960, c. 253—Summary Convictions Act, R.S.B.C. 1960, c. 373.

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Conformément aux dispositions du *Summary Convictions Act*, S.R.B.C. 1960, c. 373, l'intimé, un enfant, a été poursuivi devant les Cours ordinaires pour une offense sous le *Motor Vehicle Act*, S.R.B.C. 1960, c. 253. Il a été trouvé coupable et condamné à payer une amende de $400 et à défaut d'être emprisonné pour un terme de 60 jours. Il a présenté une requête à la Cour suprême de la Colombie-Britannique pour obtenir un bref de *certiorari* pour faire annuler le verdict de culpabilité, pour le motif que le magistrat avait agi sans juridiction ou avait excédé sa juridiction en prenant connaissance de cette cause de cette manière plutôt que selon les dispositions de la *Loi sur les jeunes délinquants*, S.R.C. 1952, c. 160. Le bref a été émis et le verdict a été annulé. Ce jugement a été confirmé par un jugement majoritaire de la Cour d'Appel. Le procureur général de la Colombie-Britannique a obtenu permission d'en appeler devant cette Cour. La permission d'intervenir a été accordée au procureur général du Canada, qui soutient la validité de la *Loi sur les jeunes délinquants*, et aux procureurs généraux de l'Ontario et du Québec, qui la disputent.

Une des questions dans cet appel était de savoir si la *Loi sur les jeunes délinquants* était *intra vires* comme étant une législation criminelle ou *ultra vires* comme étant une législation se rapportant au bien-être des enfants et aussi comme empiétant, par le jeu des arts. 2(1)(*h*), 3(1) et 4, sur les droits des provinces de punir les infractions aux lois provinciales; la deuxième question était de savoir si l'art. 4 de la Loi, en assumant sa validité, a pour effet d'empêcher de poursuivre un enfant sous le *Summary Convictions Act* pour une offense commise sous le *Motor Vehicle Act* ou pour toute autre offense validement créée par la province.

Arrêt: L'appel doit être rejeté.

La *Loi sur les jeunes délinquants* est *intra vires* du Parlement du Canada et l'intimé aurait dû être poursuivi sous les dispositions de cette loi. Loin d'être une législation adoptée sous les apparences du droit criminel pour empiéter sur les matières réservées aux provinces, la *Loi sur les jeunes délinquants*, de par sa nature et son caractère, est une législation authentique se rapportant au droit criminel au sens très large.

Peu importe qu'il existe un manque d'uniformité dans l'application de la *Loi sur les jeunes délinquants* soit (i) *ratione loci*, ou (ii) *ratione materiae*, ou (iii) *ratione personae*. De plus, la prétention que la *Loi sur les jeunes délinquants*, dans son essence et sa substance, est une législation se rapportant au bien-être et à la protection des enfants selon les vues exprimées dans la cause *Adoption Act*, [1938] R.C.S. 398 ne peut pas être acceptée.

L'article 39 de la *Loi sur les jeunes délinquants* n'a pas d'application dans cette cause parce que le *Motor Vehicle Act* n'est pas un statut de la classe des statuts auxquels l'art. 39 s'adresse, à savoir, les statuts pour la protection ou le bénéfice des enfants. La *Loi sur les jeunes délinquants* et le *Motor Vehicle Act* ne peuvent pas fonctionner côte à côte, parce que leurs dispositions viennent en conflit au niveau de leur application et dans cette mesure, ce dernier statut est inopérant en vertu de la règle qu'une législation du Parlement qui se rapporte strictement à ces sujets de législation expressément énumérés à l'art. 91 de l'*Acte de l'Amérique du Nord britannique* a primauté, même si ce statut empiète sur les matières attribuées à la législature provinciale par l'art. 92.

APPEL d'un jugement majoritaire de la Cour d'Appel de la Colombie-Britannique[1], confirmant l'annulation d'un verdict de culpabilité. Appel rejeté.

APPEAL from a majority judgment of the Court of Appeal for British Columbia[1], affirming the quashing of the appellant's conviction. Appeal dismissed.

W. G. Burke-Robertson, Q.C., and *M. H. Smith*, for the appellant.

F. S. Perry, for the respondent.

D. H. Christie, Q.C., and *C. D. MacKinnon*, for the Attorney General for Canada.

F. W. Callaghan, Q.C., and *Collin McNairn*, for the Attorney General for Ontario.

Laurent E. Bélanger, Q.C., for the Attorney General for Quebec.

The judgment of the Court was delivered by

FAUTEUX J.:—While a child, within the meaning of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, respondent was, in July 1964, at the city of Prince George, B.C., tried, as though he were an adult, by magistrate G. O. Stewart, in the ordinary courts and pursuant to the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, for an offence under the *Motor-Vehicle Act*, R.S.B.C. 1960, c. 253, to wit, driving a motor vehicle at a speed exceeding the prescribed limits. In fact, before proceeding with the case, the magistrate was fully aware that respondent was a *child*; considering, however, the latter's prior convictions for similar offences, he deemed it to be in his best interest to deal with the case in the ordinary way rather than under the provisions of the *Juvenile Delinquents Act* and considered that such an alternative course was authorized under s. 39 thereof. Having then found respondent guilty, he disposed of the case, again as if the accused were an adult, by sentencing him to pay a fine of $400 and in default to be imprisoned for a term of 60 days.

[1] (1965), 53 W.W.R. 129, 53 D.L.R. (2d) 713, [1966] 2 C.C.C. 311.

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Respondent then applied to the Supreme Court of British Columbia for an order of *certiorari* to quash the conviction on the ground that the magistrate acted without jurisdiction or exceeded his jurisdiction in dealing with the case in the manner aforesaid rather than pursuant to the provisions of the *Juvenile Delinquents Act*. The application was heard by Brown J. who ordered the writ to issue and quashed the conviction. His decision was subsequently affirmed by a majority judgment of the Court of Appeal of British Columbia[1], then constituted of Davey, Norris, Lord, Sullivan and Bull JJ.A. The latter three members of the Court, forming the majority, rejected the contention of the Attorney General of the province that the *Juvenile Delinquents Act* was *ultra vires* in whole or in part and that even if *intra vires*, the Act could not operate to prevent a child from being prosecuted in the ordinary courts, pursuant to the *Summary Convictions Act, supra*, for an offence against the *Motor-Vehicle Act, supra*. Dissenting, and accepting as well-founded the submissions of the Attorney General, Davey and Norris JJ.A. would have allowed the appeal and restored the conviction.

Leave to appeal to this Court was then sought and obtained by the Attorney General of the province and leave to intervene was granted to the Attorney General of Canada, who supports the validity of the Act, and to the Attorneys General of Ontario and Quebec, who challenge it.

The constitutional problem arising in this case stems from the provisions of ss. 2(1)(*h*), 3(1) and 4 of the *Juvenile Delinquents Act:*

2.(1)(*h*). 'juvenile delinquent' means any child who violates any provision of the Criminal Code or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute;

3(1). The commission by a child of any of the acts enumerated in paragraph (*h*) of subsection (1) of section 2, constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

(2) ...

4. Save as provided in section 9, the Juvenile Court has exclusive jurisdiction in cases of delinquency including cases where, after the committing of the delinquency, the child has passed the age limit mentioned in paragraph (*a*) of subsection (1) of section 2. 1929, c. 46, s. 4.

[1] (1965), 53 W.W.R. 129, 53 D.L.R. (2d) 713, [1966] 2 C.C.C. 311.

Section 9, referred to in s. 4, provides for an exceptional procedure when the act complained of is an indictable offence and, as will appear hereafter, has here no relevancy.

Collectively, ss. 2(1)(*h*), 3(1) and 4 operate to prescribe, *inter alia,* that a juvenile who violates any provision, not only of a Dominion statute, but also of a provincial statute or of any by-law or ordinance of a municipality, be, if and when his act is complained of, dealt with in accordance with the *Juvenile Delinquents Act.*

The questions in issue, in this appeal, may then be concisely and fairly stated as follows:

> (i) Whether the *Juvenile Delinquents Act* is *intra vires* of Parliament, as being legislation under head 27 of s. 91, *B.N.A. Act,* to wit, legislation in relation to *The Criminal Law...including the Procedure in Criminal Matters* or *ultra vires,* either on the ground that it is legislation related to the *Welfare of children* within the purview of the *Adoption Act* case (1938) S.C.R. 398, or on the ground that collectively sections 2(1)(*h*), 3(1) and 4 infringe the right of a provincial legislature, under head 15, s. 92, *B.N.A. Act* to impose punishment for enforcing any law made in the province in relation to any matter within the scope of its legislative competency;
>
> (ii) Whether or not, even if the Act is *intra vires* in its entirety as being legislation under head 27, s. 91, *B.N.A. Act,* s. 4 of the *Juvenile Delinquents Act* operates to prevent a juvenile from being prosecuted under the provisions of the *Summary Convictions Act* (supra) for an offence under the *Motor-Vehicle Act* (supra) or any other offences validly created in the province.

Dealing with the first question:—The principles governing as to the extent and limitation of the power of Parliament to legislate in relation to *The Criminal Law...including Procedure in Criminal Matters* have been stated at length in the various reasons for judgment, in the court of appeal, and need not be repeated here. Sufficient it is to point out concisely the following which, in my view, have a particular relevancy in this case, namely:—that, properly interpreted, the words *criminal law* in head 27 of s. 91, *B.N.A. Act,* mean criminal law in its widest sense: *A.-G. of Ontario v. Hamilton Street Railway*[1]; that the power assigned to Parliament in the matter includes the power to make new crimes: *Proprietary Articles Trade Association v. A.-G. of Canada*[2], as well as the power to enact legislation designed for the prevention of crime: *Goodyear Tire*

[1] [1903] A.C. 524 at 528-9, 2 O.W.R. 672, 7 C.C.C. 326.
[2] [1931] A.C. 310 at 334, 1 W.W.R. 552, 55 C.C.C. 241, 2 D.L.R. 1.

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& Rubber Co. of Canada et al. v. The Queen[1]; that it is the function of Parliament and not of the courts to decide what legislation is necessary for the efficient exercise of this plenary jurisdiction over the criminal law: *Regina v. Goodyear Tire & Rubber Co. of Canada et al.*[2]; and that, though such legislation may incidentally affect the provincial legislative jurisdiction, it is not *ultra vires* of Parliament if its subject matter, purpose or object is, in its true nature and character, legislation genuinely enacted in relation to criminal law and not legislation adopted under the guise of criminal law and which, in truth and in substance, encroaches on any of the classes of subjects enumerated in s. 92: *A.-G. for British Columbia v. A.-G. for Canada et al.*[3].

The primary legal effect of the *Juvenile Delinquents Act*,—hereafter also referred to as the Act,—is the effective substitution, in the case of juveniles, of the provisions of the Act to the enforcement provisions of the *Criminal Code* or of any other Dominion statute, or of a provincial statute validly adopted, under head 15 of s. 92, by a legislature for the enforcement of any law made in the exercise of its regulatory power with respect to any matters within its legislative competency which, in this case, is the control of highway traffic in the province. However, as it has often been held to be the case in the consideration of the validity of other Acts, the true nature and character of an Act cannot always be conclusively determined by the mere consideration of its primary legal effect. Indeed, a reference to the preamble, appended to the Act when originally adopted in 1908, 7-8 Edward VII, c. 40, as well as to the interpretation section and the main operative provisions of the Act, will show that this substitution of the provisions of the Act to the enforcement provisions of other laws, federally or provincially enacted, is a means adopted by Parliament, in the proper exercise of its plenary power in criminal matters, for the attainment of an end, a purpose or object which, in its true nature and character, identifies this Act as being genuine legislation in relation to criminal law.

The preamble:

> WHEREAS it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community

[1] [1956] S.C.R. 303 at 308, 114 C.C.C. 380, 26 C.P.R. 1, 2 D.L.R. (2d) 11.

[2] (1954), 18 C.R. 245 at 250, [1954] O.R. 377, 108 C.C.C. 321, 4 D.L.R. 61.

[3] [1937] A.C. 368 at 375-6, 1 W.W.R. 317, 67 C.C.C. 193, 1 D.L.R. 688.

demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts: Therefore His Majesty...

The interpretation section:

38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

The main operative provisions:

In addition to those quoted above, others provide for: the strict and complete separation of juvenile from adults, at any stage of the enforcement process; the prohibition, particularly, to confine any child, pending the hearing of his case, at any county or other gaols in which adults are or may be imprisoned; the conduct of the trials, without publicity, privately and, if possible, in the private office of the judge or in a private room; the abstention from formalities, in any proceedings under the Act, including the trial and the disposition of the case, as circumstances may permit consistently with the due administration of justice; the manner in which a child adjudged to have committed a delinquency shall be dealt with, namely: not as an offender but as one in a condition of delinquency and therefore requiring help, guidance and proper supervision; a variety of exceptional courses of action,—primarily meant to assist, help, encourage, supervise and reform the delinquent rather than to punish him,—which, upon the child being adjudged to be a juvenile delinquent, may be taken by the judge in the light of the opinion he forms as to both the child's own good and the community's best interest; the prohibition, unless special leave is granted by the court, of publication of a report disclosing or likely to disclose the identity of a juvenile concerned under the Act; the protection of juveniles against persons contributing to their delinquency; the promotion of reformation of juveniles by the establishment, *inter alia*, of Juvenile Court Committees, the appointment of probation officers and definition of the latter's duties, namely: to assist the court, represent the interest

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of the child when the case is heard and, as the court may direct or require, make investigations, furnish assistance to the child and take charge of him before and after trial.

Consistent with the declared purpose of the Act and obviously designed for its attainment, these operative provisions are still more illustrative of the true nature and character of this legislation. They are directed to juveniles who violate the law or indulge in sexual immorality or any other similar form of vice or who, by reason of any other act, are liable to be committed to an industrial school or a juvenile reformatory. They are meant,—in the words of Parliament itself,—*to check their evil tendencies and to strengthen their better instincts.* They are primarily prospective in nature. And in essence, they are intended to prevent these juveniles to become prospective criminals and to assist them to be law-abiding citizens. Such objectives are clearly within the judicially defined field of criminal law. For the effective pursuit of these objectives, Parliament found it expedient to protect these juveniles from the ill-effects of publicity, from the dangerous influences that promiscuity with criminals or association with crime engender, and deemed it necessary to create the offence of *delinquency*, an offence embracing, *inter alia*, all punishable breaches of the public law, whether defined by Parliament or the Legislatures, and to adopt, for the prosecution of this offence, an enforcement process specially adapted to the age and impressibility of juveniles and fundamentally different, in pattern and purpose, from the one governing in the case of adults. Beyond the point of law enforcement, the Act does not affect the legislation which may be enacted by Parliament or Provincial Legislatures in the exercise of their regulatory power. Briefly, and in scope, the Act deals with *juvenile delinquency* in its relation to crime and crime prevention, a human, social and living problem of public interest, in the constituent elements, alleviation and solution of which jurisdictional distinctions of constitutional order are obviously and genuinely deemed by Parliament, to be of no moment.

It matters not, in my respectful view, contrary to what was contended, on behalf of the Provincial Attorneys General, that there be a lack of uniformity in the application or operation of the Act, either:— (i) *ratione loci*, in that

ss. 42 and 43 substantially provide that the Act may be put into force, by proclamation, only in these territorial jurisdictions where the facilities for the due carrying out of its provisions are provided for, or (ii) *ratione materiae*, in that the proscribed conduct,—the holding of which constitutes, under the Act, the offence of delinquency,—may vary, throughout Canada, consequential to the lack of uniformity in provincial laws, by-laws and municipal ordinances, or (iii) *ratione personae*, in that the definition of a *child*, under s. 2(1)(*a*) may, as provided for by s. 2(2), be altered, from time to time, in any province, by proclamation of the Governor in Council. Desirable as uniformity may be in criminal law, it is not, *per se*, a dependable test of constitutionality as, indeed, is shown in the case of the *Lord's Day Act*, R.S.C. 1927, c. 123, cf. ss. 3, 7 and 15, the *Canada Temperance Act*, R.S.C. 1927, c. 196, cf. Part I, both judicially held *intra vires*, notwithstanding lack of uniformity. Lack of uniformity also appears in the *Criminal Code of Canada*, with respect to substantive law as well as to procedural matters, e.g., ss. 6, 7, 534, 541 and 552. In *City of Fredericton v. The Queen*[1], where the constitutionality of the *Canada Temperance Act* (1868) was in issue, Ritchie C.J., had this to say on the point, at p. 530:

> It has likewise been urged that this Act affects only particular districts, that it is not general legislation, and therefore is *ultra vires*. I am entirely unable to appreciate this objection. If the subject matter dealt with comes within the classes of subjects assigned to the Parliament of Canada, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.

In *Gold Seal Limited and Dominion Express Company and A.-G. for the Province of Alberta*[2], again, it was held, *inter alia*, that the Dominion Parliament can enact laws which may become operative only in certain provinces and also laws which may aid provincial legislation. Finally, in any respect in which it may be said that the Act lacks uniformity, I can find no indication suggesting that the above view, as to the true nature and character of the Act, should be varied.

[1] (1880), 3 S.C.R. 505.

[2] (1921), 62 S.C.R. 424, 3 W.W.R. 710, 62 D.L.R. 62.

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Nor am I able to accept, as being well-founded, the contention that, in pith and substance, the Act is legislation in relation to *welfare and protection of children* within the purview of the *Adoption Act* case *supra*. The true objects and purposes of the statutes considered in the latter case are quite different from the true object and purpose of the *Juvenile Delinquents Act*. They are, as pointed out by Bull J.A., directed to the control or alleviation of social conditions, the proper education and training of children, and the care and protection of people in distress including neglected children. Obviously, one can say that the Act gives a special kind of protection to misguided children and that it should incidentally operate to ultimately enhance their welfare. A similar view may also be taken of the following provisions of s. 157 of the *Criminal Code of Canada*; yet, no one has ever questioned that they were enactments in relation to criminal law.

> 157. (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) No proceedings for an offence under this section shall be commenced more than one year after the time when the offence was committed.
>
> (3) For the purpose of this section, *child* means a person who is or appears to be under the age of eighteen years.
>
> (4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court.

A very wide discretion is given to the judge, under the Act, and it is significant that, in the exercise of such discretion, the interest of the child is not the sole question to consider. On the contrary, the matters which, in principle, must receive the attention of the judge and which he must try to conciliate are the child's interest or own good, the community's best interest and the proper administration of justice. This, I think, qualifies the nature of the protection which the Act is meant to give to juveniles alleged or found to be delinquents and supports the proposition that the Act is not legislation in relation to protection and welfare of children within the meaning envisaged in the *Adoption Act* case, *supra*.

With deference to those who entertain a contrary view, I am clearly of opinion that, in its true nature and character, the Act, far from being legislation adopted under the guise of criminal law to encroach on subjects reserved to the provinces, is genuine legislation in relation to criminal law in its comprehensive sense.

Dealing with the second question:—It was submitted that assuming the Act to be valid legislation *in toto*, it does not affect the right to proceed under the *Summary Convictions Act, supra,* against a *child* for a violation of the *Motor-Vehicle Act, supra.* Section 39 of the Act, it is said, shows that Parliament intended that the Act and the *Motor-Vehicle Act* should operate side by side and that the best interests of the child be the decisive factor as to the course to be elected in any particular case. Section 39 reads as follows:

> 39. Nothing in this Act shall be construed as having the effect of repealing or over-riding any provision of any *provincial statute intended for the protection or benefit of children*; and when a juvenile delinquent who has not been guilty of an act which is, under the provisions of the Criminal Code an indictable offence, comes within the provisions of a *provincial statute,* it may be dealt with either under *such Act* or under this Act as may be deemed to be in the best interests of such child.

The French version of the section is in the following terms:

> 39. Rien dans la présente loi ne doit être interprété comme ayant l'effet d'abroger ou d'annuler quelque disposition d'*un statut provincial en vue de la protection ou du bien des enfants*; et lorsqu'un délinquant, qui ne s'est pas rendu coupable d'une infraction constituant un acte criminel aux termes des dispositions du *Code criminel,* tombe sous les dispositions d'un *statut provincial,* il peut être traité, soit en vertu de *ce statut,* soit en vertu de la présente loi, selon que le meilleur intérêt de cet enfant l'exige.

The key words in the single sentence of this section have been italicized.

In my view, this section has no application in this case, for the *Motor-Vehicle Act, supra,* is not a statute of the class of statutes to which s. 39 is directed, namely: statutes intended for the protection or benefit of children. It was not seriously contended that the *Motor-Vehicle Act, supra,* is a provincial statute of that class; such a contention is palpably untenable. What was urged is that, as a matter of construction, the words *provincial statute* and *such Act* or *statut provincial* and *de ce statut,* appearing in the latter part of the sentence, are not referable to the

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words *provincial statute intended...*or *statut provincial en vue de...*, appearing in the first part thereof, but to any provincial statute. In my opinion, the wording of the sentence does not permit this interpretation but just the opposite one and as such, shows that the will of Parliament is (i) to leave untouched the provisions of any provincial statute intended for the protection or benefit of children,—such as, e.g., *The Protection of Children Act,* R.S.B.C. 1948, c. 47,—and (ii) to authorize that a child, coming within the provisions thereof, be dealt with either under the latter or under the *Juvenile Delinquents Act,* as his best interests may be deemed to be in any particular case. Construed as suggested on behalf of appellant, s. 39 would be in conflict with the provisions of the Act which give exclusive jurisdiction to the Juvenile Court in matters of delinquency and would completely defeat the whole purpose of the Act and render it futile.

The Act and the *Motor-Vehicle Act, supra,* cannot operate side by side, for their provisions clash at the level of law enforcement and to this extent, the latter statute is inoperative according to the rule that a legislation of Parliament which strictly relates to subjects of legislation expressly enumerated in s. 91,—as the *Juvenile Delinquents Act* is assumed to be for the purpose of the second question,—is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: *A.-G. for Canada v. A.-G. for British Columbia.*[1]

With deference to those who entertain a different view, I must conclude that the majority of the Court of Appeal rightly decided that the *Juvenile Delinquents Act* is *intra vires* of Parliament and that the case of respondent Smith should have been dealt with under the provisions of this Act.

I would dismiss the appeal and make no order as to costs.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Cumming, Bird & Richards, Vancouver.

Solicitor for the respondent: F. S. Perry, Prince George.

[1] [1930] A.C. 111 at 118, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194.

BRUNO ZANINI .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*May 16
Oct. 3

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Accessory—Possession of house-breaking instruments—Actual physical possession in accused's confederates—Possession charge against confederates withdrawn—Effect on accused's conviction for possession—Whether s. 21(2) of the Criminal Code can support conviction or whether s. 3(4) exhaustive—Criminal Code, 1953-54 (Can.), c. 51, ss. 3(4), 21(2), 292(1)(b), 295(1).

The appellant drove two companions to a house and waited for them while they carried out the admitted common intention to break and enter. The two companions were arrested as they came out of the house and were found to have house-breaking instruments. The two companions pleaded guilty to a charge of breaking and entering, and a second charge of possession of the instruments was withdrawn. The appellant was acquitted of the charge of breaking and entering and stealing on a directed verdict because the property stolen could not be identified as being the property of the owner of the house. However, he was convicted of possession of the instruments. The conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the questions of law as to whether, in the circumstances, s. 21(2) of the Code could support the appellant's conviction or was the prosecution obliged to rely on s. 3(4) of the Code as being exhaustive.

Held: The appeal should be dismissed.

The Court of Appeal correctly rejected the submission that, since his confederates were not convicted of the offence of possession, the appellant could not be convicted of possession because the Crown could not appeal to s. 21(2) of the Code and was obliged to rely solely upon s. 3(4). Under s. 21(2), the appellant was a party to the commission of the offence of possession of house-breaking instruments. The fact that the charge was withdrawn against the two active principals did not affect the right of the Crown to proceed against the appellant. There is no requirement in s. 21(2) that the active participants must have been convicted of the offence. The question is whether the appellant committed the offence of possession. Furthermore, the acquittal on a directed verdict did not decide in his favour any issue in the possession charge that would be inconsistent with the finding on the evidence that the appellant had formed a common intention with two others to effect a breaking and to assist in its prosecution. It was open to the jury to find that the appellant knew or ought to have known that one of his confederates at least would of necessity be in possession of house-breaking instruments when the three men drove to the house.

The Court of Appeal was correct in maintaining that s. 21(2) of the Code may be applied where the facts warrant the inference that the accused ought to have known that the commission of the offence—possession

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

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—would be the probable consequence of carrying out the common purpose. The Crown was not limited to reliance on the provisions of s. 3(4) of the Code.

Droit criminel—Partie à une infraction—Possession d'instruments d'effraction—Possession physique actuelle des complices de l'accusé—Accusation de possession contre les accusés retirée—Effet vis-à-vis de l'accusé—L'article 21(2) du Code Criminel peut-il supporter le verdict ou l'art. 3(4) épuise-t-il les moyens contre l'accusé—Code Criminel, 1953-54 (Can.), c. 51, arts. 3(4), 21(2), 292(1)(b), 295(1).

L'appelant a conduit deux compagnons à une maison et les a attendus pendant qu'ils mettaient en exécution l'intention commune admise de s'introduire par effraction. Les deux compagnons ont été appréhendés alors qu'ils sortaient de la maison et des instruments d'effraction ont été trouvés sur eux. Les deux compagnons ont admis leur culpabilité à une accusation d'effraction, et une seconde accusation de possession des instruments a été retirée. L'appelant a été acquitté de l'accusation d'effraction et d'avoir volé, sur les instructions du juge, parce que la propriété volée ne pouvait pas être identifiée comme étant la propriété du propriétaire de la maison. Cependant, il a été trouvé coupable de possession des instruments d'effraction. Le verdict a été confirmé par la Cour d'Appel. Il a obtenu la permission d'en appeler devant cette Cour sur les questions de droit à savoir si, dans les circonstances, l'art. 21(2) du Code pouvait supporter le verdict de culpabilité ou si la Couronne était obligée de s'appuyer uniquement sur l'art. 3(4) du Code.

Arrêt: L'appel doit être rejeté.

La Cour d'Appel a rejeté avec raison la prétention que, puisqu'il n'y avait pas eu un verdict de culpabilité contre ses complices sur l'accusation de possession, l'appelant ne pouvait pas être trouvé coupable de possession parce que la Couronne ne pouvait pas faire appel à l'art. 21(2) du Code et était obligée de s'appuyer uniquement sur l'art. 3(4). Sous l'art. 21(2), l'appelant était une partie à l'infraction de possession d'instruments d'effraction. Le fait que l'accusation avait été retirée contre les deux parties principales n'affectait pas le droit de la Couronne de procéder contre l'appelant. L'article 21(2) n'exige nullement que les parties principales doivent avoir été trouvées coupables de l'offense. La question est de savoir si l'appelant a commis l'offense de possession. Bien plus, l'acquittement, en raison des instructions du juge, n'a pas eu pour effet de décider en sa faveur aucune question sur l'accusation de possession qui pourrait être incompatible avec la conclusion basée sur la preuve que l'appelant avait formé une intention commune avec les deux autres pour s'introduire par effraction et pour aider à la mise en vigueur de cette intention. Le jury pouvait trouver que l'appelant savait ou aurait dû savoir qu'au moins un de ses complices aurait nécessairement en sa possession des instruments d'effraction lorsque les trois hommes se sont dirigés vers la maison.

La Cour d'Appel a eu raison de soutenir que l'art. 21(2) du Code peut trouver son application lorsque les faits justifient une inférence que l'accusé devait savoir que la commission de l'offense—possession —serait la conséquence probable de la mise en exécution du but commun. La Couronne n'était pas limitée aux seules dispositions de l'art. 3(4) du Code.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction. Appeal dismissed.

Stanton Hogg, for the appellant.

D. A. McKenzie, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, Bruno Zanini, was convicted under s. 295(1) of the *Criminal Code* on a charge of unlawful possession of housebreaking instruments. The Court of Appeal[1] dismissed the appeal. This Court granted leave to appeal on two questions of law:

(a) whether the provisions of section 21(2) can support the conviction of the appellant when there was no conviction of his confederates for the very offence and no conviction of the accused for breaking and entering and

(b) even if these circumstances do not affect the application of section 21(2) can that provision, in any event, be invoked for a possession offence or is the prosecution obliged to rely on section 3(4) as being exhaustive for that purpose.

The facts are that on December 20, 1963, the appellant drove a car to 780 Spadina Road, Toronto. He had with him two passengers, Bailey and Hudson. Bailey and Hudson left the car, entered a house at 780 Spadina Road by forcing the back door with a screwdriver. The police arrested them as they came out of the back door and found a screwdriver and a flashlight on one of the men.

Zanini was waiting for the men with the engine of the car running. He denied knowledge of the two other men. The car belonged to one of these men, and the police a week or ten days before had observed the three men driving in the vicinity of the house and observing the house.

All three were charged under s. 292(1)(*b*) with breaking and entering and stealing four fifty-cent pieces, the property of the owner of the house, one Dr. Arnold Iscove, and they were also charged under s. 295(1) with possession of

[1] [1966] 1 O.R. 499, 47 C.R. 195, 2 C.C.C. 185.

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housebreaking instruments. Bailey and Hudson pleaded guilty to the charge of breaking and entering. The charge against them of possession was withdrawn.

Zanini pleaded not guilty to both charges. He was acquitted of the charge of breaking and entering and stealing on a directed verdict, since the four fifty-cent coins could not be identified as being the property of Dr. Iscove.

On the charge of possession of housebreaking instruments, he was found guilty. The learned trial judge instructed the jury that if they found that the appellant had formed a common intention with the other two men to effect an unlawful purpose, that is to say, break into the house, then they could find that he knew or ought to have known that as a result of such common intention he knew or ought to have known that the other men were in possession of instruments of housebreaking and therefore under s. 21 of the *Criminal Code*, the jury could find that the appellant was in possession of a screwdriver found on one of the men who entered the house.

Zanini now submits that, since his confederates were not convicted of the offence of possession, he could not be convicted of possession because the Crown could not appeal to s. 21(2) of the *Criminal Code* and was obliged to rely solely upon s. 3(4). Section 21(2) reads:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Section 3(4) reads:

> For the purposes of this Act,
>
> (*a*) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

The Court of Appeal correctly rejected this submission. Under s. 21(2) of the *Criminal Code*, Zanini was a party

to the commission of the offence of possession of housebreaking instruments. The judge's instruction to the jury given pursuant to s. 21(2) of the *Criminal Code* was correct. The fact that the charge was withdrawn against the two active principals does not affect the right of the Crown to proceed against this accused. There is no requirement in s. 21(2) of the *Criminal Code* that the active participant or participants must have been convicted of the offence. The question is whether Zanini committed the offence, i.e. the possession of instruments for housebreaking. It cannot be disputed that one of the two confederates was in fact in possession of instruments for housebreaking. In addition, it was established (and all the facts were agreed upon for the purpose of this appeal and in the Court of Appeal) that the appellant had formed an intention in common with the other two men to break and enter and assist each other for this purpose. There is no principle of law that unless there is a conviction of the confederates for the possession offence, the appellant cannot be convicted for that offence.

On the second question of law on which leave to appeal was given, in my opinion the Court of Appeal was correct in maintaining that s. 21(2) of the Code may be applied where the facts warrant the inference that the accused ought to have known that the commission of the offence, i.e., possession of housebreaking instruments would be the probable consequence of carrying out the common purpose. The Crown is not limited to reliance on the provisions of s. 3(4) of the Code above quoted. The very point was decided by the Court of Appeal of British Columbia in *Rex v. Harris*[1]. The Ontario Court of Appeal in this case followed the reasoning of the British Columbia Court of Appeal, correctly in my opinion.

I now return to the second branch of the first point of law that s. 21(2) cannot support the conviction for the possession offence when there was no conviction of the appellant for breaking and entering. I have already said that the acquittal on the charge of breaking and entering and stealing four 50-cent pieces, the property of Arnold Iscove, was the result of a directed verdict because the owner of the premises entered could not identify the coins.

This acquittal does not decide in favour of the accused any issue in the possession charge that would be inconsist-

[1] (1953), 105 C.C.C. 301.

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ent with the finding on the evidence that the accused had formed a common intention with two others to effect a break-in and to assist in its prosecution. The accused cannot assert that the effect of the acquittal on this directed verdict is equivalent to a determination in his favour that he was not there or that he had no connection with the two active participants and nothing less than this would assist him.

Notwithstanding the directed acquittal on breaking and entering, it is clear on the evidence and the admissions that the accused had formed an intention in common with the other two men to break and enter the house. The possession of housebreaking instruments was a probable consequence of the carrying out of the common purpose. The screwdriver was in fact used to break in by the back door. It was open to the jury to find that the accused knew or ought to have known that one of his confederates at least would of necessity be in possession of housebreaking instruments when the three men drove to the house. There is no "issue estoppel" here on any of these points.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: S. Hogg, Toronto.

Solicitor for the respondent: The Attorney-General for Ontario, Toronto.

1967

*June 20
Oct. 3

MARGARET I. HENWOOD (*Plaintiff*) .. APPELLANT;

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Life—Disclosure—Application for insurance requiring insured to answer certain questions—Untrue statements respecting medical consultations for nervous condition—Whether concealment "material to the insurance" within meaning of s. 149(1) of The Insurance Act, R.S.O. 1960, c. 190 [rep. & subs. 1961-62, c. 63, s. 4].

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

The plaintiff as beneficiary under a policy of insurance issued by the defendant company to her daughter sued the defendant following the death of the insured in an automobile accident. The sole defence was that certain answers by the insured in the application for insurance were not true and constituted material misrepresentations or non-disclosures which induced the defendant to issue the policy. The application form included questions as to whether the insured had ever been treated by a physician for nervous disorders, or had any known indication thereof; whether she had been in hospital, and whether she had in the past five years ever consulted or been attended or examined by any physician or other practitioner. Although the insured had undergone an emotional disturbance which lasted for more than a year and had only cleared up a few months before the application was made, this condition was not mentioned in any way in the application.

The trial judge dismissed the plaintiff's action after coming to the conclusion that the insured did consult some physicians and psychiatrists for some illness and complaints and that she failed to disclose those facts and that such information was material to the defendant in considering the application for insurance. An appeal from the trial judgment having been dismissed by the Court of Appeal, the plaintiff appealed further to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright, Martland, Judson and Ritchie JJ.: A misrepresentation is not necessarily "material to the insurance" simply because it has been elicited in answer to a question devised by the insurance company but where, as in the present case, senior officials of the company testify that untrue answers given by the insured would have affected the rate and the risk, there is evidence that these answers bore a direct relation to the acceptance of the risk by the insurer.

If the matters here concealed had been truly disclosed they would undoubtedly have influenced the defendant company in stipulating for a higher premium and there was no evidence to suggest that this was unreasonable or that other insurance companies would have followed a different course. Accordingly, on the evidence before the Court, it had been shown affirmatively that untrue answers respecting the medical advisers consulted were material to the risk. This was enough to avoid the policy.

Per Spence J., *dissenting:* The defendant failed to discharge the onus of establishing misrepresentation and its materiality. The insurer chose to discharge that onus by calling certain physicians consulted by the deceased and a nurse and then by calling two officials who were its servants. The evidence given by these officials, who not only testified as to the policy of their own company but testified that they had no knowledge of the policies of other insurers, could not be accepted as a discharge of the onus upon the insurer to prove that if the facts had been truly represented they would have caused a reasonable insurer to decline the risk or required a higher premium. If it were accepted that the defendant in reciting its policy automatically recited the policy of a reasonable insurer, then any idiosyncracy of an individual company expressed in its policy would bind the Court to hold that non-disclosure of facts which were not in accordance with that idiosyncracy was automatically material.

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[*Mutual Life Insurance Company of New York v. Ontario Metal Products Co. Ltd.*, [1924] S.C.R. 35, affirmed [1925] A.C. 344, applied; *Zurich General Accident and Liability Insurance Co., Ltd. v. Leven*, [1940] S.C. 407, distinguished.]

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Landreville J. Appeal dismissed, Spence J. dissenting.

Sanford World, for the plaintiff, appellant.

Douglas K. Laidlaw, for the defendant, respondent.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—I have had the benefit of reading the reasons for judgment prepared by my brother Spence and it is with regret that I find myself unable to agree with him.

At the time when application was made for the life insurance policy here in question, the insured, in respect of whose death the present claim is made against the respondent, appears to have been a frail young woman who was 21 years old, weighed only 102 pounds, and had, two years previously, undergone an emotional crisis caused by the breaking off of her engagement due to religious differences with her fiance. The nervous condition brought about by her unhappy love affair had resulted in consultation with the family doctor and later with psychiatrists, as a result of which various medications were prescribed. Her last visit to Dr. Murray, a psychiatrist at St. Michael's Hospital, appears to have been in June, 1962, and her mother testified that during that summer her daughter's health had not improved. She does not appear to have returned to a normal condition until September, 1962, when her mother was hospitalized for three months and she took over the household duties. By February, 1963, she was well enough to go back to a job in which she was employed at the time when she made the application for insurance.

The application for insurance required the insured to answer a number of intimate questions concerning her health. There were eighteen questions which included a query as to whether the insured had ever been treated by a physician for nervous disorders, or had any known indica-

tion thereof; whether she had been in hospital; whether she had in the past five years ever consulted or been attended or examined by any physician or other practitioner. Notwithstanding the probing nature of these questions, the answers given by the insured gave no indication whatever of her having had any medical or nervous troubles except for an X-ray of her right foot which was treated by the family physician and a check-up by an unknown doctor as a result of an automobile accident. The emotional disturbance, which had lasted for more than a year and had only cleared up a few months before the application was made, was not mentioned in any way in the application form signed by the insured which forms a part of the contract of insurance itself by virtue of the general provisions of the policy entitled "Contract" which read as follows:

> This policy is issued in consideration of the application herefor and of the payment of premiums as provided herein. The policy, together with the application, a copy of which is attached hereto and made a part hereof at issue, constitutes the entire contract. All statements made in the application will in the absence of fraud be deemed representations and not warranties, and no statement will avoid the policy or be used as a defense to a claim hereunder unless it is contained in the application.

This section of the contract must be read in light of the provisions of s. 149(1) of *The Insurance Act*, R.S.O. 1960, c. 190, as amended by 1961-62 (Ont.), c. 63, s. 4, which reads:

> 149.(1) An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within his knowledge that is material to the insurance and is not so disclosed by the other.

The unfortunate insured was killed in a motor vehicle accident on May 17, 1964, and it is not disputed that the answers which she made in the application for insurance had no bearing whatever on the circumstances of her death.

The learned trial judge, after reviewing the evidence in a manner most favourable to the appellant, was nevertheless unable to disregard the fact that the insured had consulted physicians and psychiatrists and had failed to disclose these facts. On these grounds he concluded his judgment with the following findings of fact which governed the disposition of the action and which were tacitly approved by

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the unanimous decision of the Court of Appeal for Ontario, which dismissed an appeal from his judgment without giving written reasons. The learned judge said:

> On the evidence before me, I can come to no other conclusion but that (a) the insured did consult some physicians and psychiatrist for *some illness* and complaints; (b) she failed to disclose these facts for reasons unknown to me.
>
> The defence alleges the untrue answers to have been material to the risk. It affirms it, and I have before me no evidence to contradict same. In the light of the decisions which have been quoted to me and which I have read, I must find in favor of the defendant.
>
> Had the plaintiff produced medical testimony to support the inference that the sickness was not a nervous or mental disorder; had it produced some expert evidence by some known underwriter disagreeing with the opinion of the defence of materiality of the answers, the decision might have been otherwise. I would hope to be found wrong in this decision.

I agree that untrue statements were undoubtedly made by the insured with respect to the medical advisers whom she had consulted about her nervous condition and it appears to me that the only question remaining to be determined on this appeal is whether, in making these statements, the insured was concealing from the appellant a fact or facts within her knowledge "material to the insurance" within the meaning of s. 149(1) of *The Insurance Act, supra.*

There is, in my view, no doubt that the question of materiality is one of fact and, as the learned trial judge has pointed out, no evidence was called on behalf of the appellant to contradict the categorical statement made by the respondent's own doctor to the effect that if true information had been available to the respondent, the premium rate for the policy would have been a very high one.

Dr. Roadhouse gave the following evidence in this connection:

> MR. LAIDLAW: Now, Doctor Roadhouse, I observe to you as a fact that this application form contained none of this information. That is just a statement of fact. My question is this: If you had had the information that I have now summarized for you, what action, if any, would have been taken by you in your capacity as Associate Medical Director in accepting or rejecting this application?
>
> A. We would have required a medical examination. We would have required statements from the doctors who had attended her in the past. Had we obtained the history that is now apparent, we would have issued the policy at a very high rate.

It is also apparent from Dr. Roadhouse's evidence that if he had had access to the information which would have been made available if the insured had answered the questions truthfully, the policy would not have contained any accidental death benefit provision or any provisions for non-occupational vehicle accident.

It is true that Dr. Roadhouse was employed by the respondent company and that his statements regarding the materiality of the untrue answers made by the insured are based in great measure upon his experience with that company, but I do not think that his evidence can be disregarded on this account or that his qualifications as a medical graduate of the University of Toronto are to be ignored on account of his having been the Associate Medical Director of the respondent insurance company for more than eleven years. As has been indicated, his evidence was totally uncontradicted.

The evidence of Dr. Roadhouse is in striking contrast to that given by Dr. McCullough, the insurance company doctor who testified in the case of *Mutual Life Insurance Company of New York v. Ontario Metal Products Company, Ltd.*[1] (hereinafter referred to as the *Mutual Life* case). In the latter case the insurance company relied on the defence of misrepresentation in exactly the same way as the respondent does in this case. As I have indicated, the striking difference between the two cases lies in the evidence of the company doctor. This is apparent from what is said by Lord Salvesen at p. 352 of the report of the proceedings of the Privy Council where the circumstances are described as follows:

> ... the evidence which has impressed their Lordships most is that of Dr. McCullough—a witness adduced by the appellants and who, as their medical examiner in Toronto, was the person by whom they would naturally be guided in accepting or declining the risk. Now Dr. McCullough states that if Dr. Fierheller's name had been mentioned, he would have noted it in the answer to question 18, but he also emphatically states that if he had known at the time all that Dr. Fierheller deposed to in evidence, he would still have sent up the case with a recommendation for acceptance. In other words, having, as the result of his own examination, passed Mr. Schuch [the insured] as a healthy man, his opinion would not have been altered by his prior medical history as now ascertained in great detail.

As the *Mutual Life* case is relied on by the appellant, it appears to me to be desirable to stress the distinction that

[1] [1924] S.C.R. 35, affirmed [1925] A.C. 344.

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exists between the facts there disclosed and the facts in the present case. In the *Mutual Life* case, Lord Salvesen had occasion to say, at p. 350:

> The main difference of judicial opinion centres round the question what is the test of materiality? Mignault J. thought that the test is not what the insurers would have done but for the misrepresentation or concealment, but 'what any reasonable man would have considered material to tell them when the questions were put to the insured'. Their Lordships are unable to assent to this definition. It is the insurers who propound the questions stated in the application form, and the materiality or otherwise of a misrepresentation or concealment must be considered in relation to their acceptance of the risk.

It must, of course, be recognized that a misrepresentation is not necessarily "material to the insurance" simply because it has been elicited in answer to a question devised by the insurance company but in a case where senior officials of the company testify that untrue answers given by an insured would have affected the rate and the risk, there is, in my opinion, evidence that these answers bore a direct relation to the acceptance of the risk by the insurer. The question that remains to be determined is whether, in treating the untrue answers as material, the respondent was acting as a reasonable insurer, and whether it has sufficiently discharged the burden of proving that its actions were those of such an insurer by calling its own officials to prove the company's practice.

Like the learned trial judge, I cannot escape from the fact that there is no evidence to suggest that any reasonable insurance company would have taken a different attitude, and I am also impressed by the fact that Dr. Roadhouse spoke as a medical doctor who had had 11½ years' experience in the specialized field of underwriting in his capacity as medical director of the respondent company.

Although the evidence of expert witnesses as to whether or not other insurance companies consider a question to be "material", is admissible and may be relevant in such a case as this, I do not think that when no evidence whatever has been adduced to suggest that the respondent's practice is anything but reasonable, it is seized with the burden of proving the practice of other insurers.

My brother Spence has cited an excerpt from Halsbury's Laws of England, 3rd ed., vol. 22, at p. 188, para. 360, in

which the learned authors, speaking of materiality of representations in insurance policies, say:

> ...that the test hinges on whether the representation is of such a nature as to influence the judgment of a prudent insurer, not on whether the representation influenced the particular insurer looking at the proposal.

I think it desirable to point out that the authority relied on by the authors for this proposition is *Zurich General Accident and Liability Insurance Co., Ltd. v. Leven*[1]. That was a Scottish case which was concerned with a motor vehicle liability policy in which the insured had failed to disclose a six-year-old conviction under the *Road Traffic Act* and evidence was called to show that the majority of insurance companies did not regard a conviction which was "more than five years old" as being material to the insurance. In the course of his judgment, the Lord Ordinary observed:

> The insurance companies which call for information as to convictions without any limit of time are in a small minority, but it may be that experience will prove that they alone are prudent insurers, certainly as regards convictions that are less than seven years old. In any event, it is evident from their practice in the matter, standing in contrast as it does with the well-known time-limited practice of most companies, that they regard the 'particular' as to convictions, no matter how old, as 'material'.

In the Court of Appeal Lord Moncrieff stated the matter thus:

> It seems to me that the question of what is prudent for an insurer to do must depend less upon the practice of others as to the risks they underwrite than upon the individual practice which he finds, according to the scale of his charges and his experience of insurance, to be that upon which it is profitable for himself to do business.

In the present case it is not necessary to adopt the language of Lord Moncrieff because, as I have indicated, there was no evidence here as to the practice of the other insurance companies. The determination of this appeal is to be governed by what was said by Lord Salvesen in the *Mutual Life* case at pp. 351-2 where he said:

> ...it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

If the matters here concealed had been truly disclosed they would undoubtedly have influenced the respondent

[1] [1940] S.C. 407.

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company in stipulating for a higher premium and as there is no evidence to suggest that this was unreasonable or that other insurance companies would have followed a different course, I am satisfied that, on the evidence before us, it has been shown affirmatively that untrue answers respecting the medical advisers consulted by the insured were material to the risk. This is enough to avoid the policy.

I would accordingly dismiss this appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario which by its judgment pronounced on April 14, 1966, dismissed without written reasons an appeal from the judgment of Landreville J. pronounced on November 5, 1965.

The appellant was the named beneficiary under a life insurance policy issued by the respondent to the daughter of the appellant Margaret M. Henwood. The insured was born on May 1, 1943. The policy was issued on March 18, 1963, *i.e.*, when the insured was only 19 years of age. The insured died on May 17, 1964, as a result of an automobile accident in which she, the passenger, and another person, the driver, were both killed.

It was admitted at trial and repeated in argument in this Court, that the cause of death had no relation whatsoever to any of the allegations as to misrepresentation, upon which allegations the defence of the insurance company rested. Under the provisions of s. 149(2) of *The Insurance Act*, R.S.O. 1960, c. 190, as amended by 1961-62 (Ont.), c. 63, s. 4, a failure to disclose or a misrepresentation renders the contract voidable by the insurer and, therefore, the lack of any relationship between the said failure to disclose or misrepresentation, and the cause of death is irrelevant, except, that, in my view, that circumstance certainly does not lessen the onus upon the insurer, with which I shall deal hereafter. Some of the facts are relevant.

The late Miss Henwood had left high school in January 1960 and took employment as a clerk in the office of a Toronto newspaper. She had been a practising Roman Catholic and very devout in her religious beliefs. In that year, she met a young man whose faith was that of a

Jehovah Witness. Their relationship deepened and the late Miss Henwood very seriously considered marriage to this young man but she was concerned with their varying religious faiths. Moreover, her parents objected most strenuously to the idea of marriage. There is no doubt that this personal problem and also the vague antipathy between the late Margaret Henwood and her father caused the insured a certain degree of emotional strain. It must be remembered that at this time she was a mere girl of 16 or 17 years of age. She became so worried that she stopped working feeling she could no longer face people and she even was reluctant to ride in street cars. Some of the facts showed, again in an indefinite fashion, that the insured suffered a certain amount of stomach distress, perhaps some difficulty in getting to sleep and some other vague complaints which, in my personal view, were of a very minor nature. It would appear from the evidence that this condition, and particularly the reason for it, that of the strain between religious beliefs and her romantic desires, concerned the plaintiff, her mother so that she arranged for an examination by the family physician, Dr. A. Valadka.

Apart from other unrelated complaints such as sprained ankle, etc., Dr. Valadka saw the insured on October 25, 1960, and on infrequent occasions until December 6, 1961. On the first of these occasions, the insured's complaint was as to an allergic dermatitis, which certainly could have no relationship to the misrepresentation alleged, but on March 27, 1961, the insured was complaining of tiredness, and Dr. Valadka advised her to rest and to improve her diet habits, feeling that she was underweight. On April 24, 1961, he again saw her when she complained of tiredness and general exhaustion. He had blood tests performed at St. Joseph's Hospital in Toronto which showed only that her hemoglobin count was a little below normal and he prescribed a form of iron pills described as "Palaron" and also prescribed a parstelin tablet twice a day "for her depressed condition". Dr. Valadka saw her next on May 13, 1961, but then he did not see her until December 9, 1961, when her weight had increased a few pounds to 107 but she still complained of being tired. At this time, Dr. Valadka said that he advised her to take up some sports such as swimming and to start to work. That is the last time he

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saw her or even heard of her until he was subsequently informed of her death. Dr. Valadka's summary in cross-examination and to the learned trial judge was as follows:

> Q. Doctor, there is no doubt in your mind that she had no suicidal tendencies of any sort? A. No, not at all. I never had even an impression of that.
>
> Q. Would it be fair to say that it would be virtually impossible to—impossible to accidentally take a fatal overdose of whatever you prescribed for her?
>
> HIS LORDSHIP: Iron pills?
>
> MR. WORLD: Well, she had parstelin, your lordship.
>
> A. Only twenty-four tablets for a short period of time, no.
>
> HIS LORDSHIP: How would you describe her condition generally, though? Was she a very sick girl?
>
> A. No, I had the impression she's like the normal average, teen-age girl at that age when they usually start to have some problems, discussions at home, arguments with parents, or especially father due to some disagreement about the dates and things like that, but nothing unusual.
>
> Q. Did you ever hear about her boy friend? A. She mentioned having a boy friend, and she mentioned of difficulty getting permission for dating boy friend.
>
> Q. Is it unusual for a girl of that age, at that time, to be low in hemoglobin and nervous, is that an unusual condition? A. At that age, it's quite frequent that girls are a little bit anemic, especially if they put themselves on certain diets—if they start diet for some reason.
>
> Q. She had gained three pounds, you say? A. She went from 104 in March to 107 in December; December, 1961.

I stress that this is the opinion of the general practitioner who was the family physician.

Dissatisfied with her daughter's condition, the plaintiff arranged that she should see a Dr. Blake, a psychiatrist. She saw Dr. Blake only on three occasions and discontinued the attendances because she was unable to meet the financial demands of such a course. Dr. Blake died subsequently and therefore we have no information as to what occurred on those three attendances. Again, the plaintiff arranged that her daughter, the insured, should see a person whom she chose as a Roman Catholic psychiatrist, and was recommended to a Dr. Cyril V. Murray, in the outpatients' clinic at St. Michael's Hospital, in Toronto. She attended Dr. Murray in April 1962 and in accordance with the practice in the clinic she was interviewed by Dr. James L. McIntyre, who took a history, and by a public health

nurse, Miss Dorothy M. Carr. There is little to be gained by reciting the evidence of either Dr. McIntyre or Miss Carr as it is chiefly a repetition of that set out above. Dr. Murray's consultations with the insured covered only the three months from April 1962 to June 28, 1962. Again, he repeats the two sources of emotional strain which worked upon the insured and, to the learned trial judge's question, "The main cause being what?", he replied:

> A. Well, my feeling was that the main cause was the conflict over her boy friend, and it was during this period that she first began to seek help for the condition as outlined.
>
> Q. There was no organic, of course, sickness or disease?
>
> A. Nothing organic, no, sir, no.

Cross-examined by counsel for the appellant, Dr. Murray gave his opinion definitely that there was no suicidal tendency and that the medication which he prescribed for her by name "Mellaril", a tranquilizer, could not be accidentally taken in a fatal overdose. He diagnosed the condition as a temporary one and to the learned trial judge's question:

> Q. I just haven't got a correct picture of how that girl was at that time. Would you describe—how would you describe her condition, as a slight condition of depression or anxiety, or would you describe it as medium, or grave?

he replied:

> A. I would describe it as medium or moderate.

Dr. McIntyre had given his tentative diagnosis as "endogenous depression" and added he could find no organic cause in examination. Blakiston's New Gould Medical Dictionary defines "endogenous" as being produced within; due to internal causes, but particularly in psychology, arising from within the body and directly affecting the nervous system, as a hereditary or constitutional disorder. There was no evidence whatever of any hereditary tendency to mental disorder.

As I have said, the insured did not see Dr. Murray after June 1962. The appellant, the insured's mother, swore that the reason for this was that the insured felt that she was not getting anywhere, that her problem with the young man was not solved, and "she felt she wanted to get a job". On September 10, 1962, the appellant herself became a

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patient at St. Michael's Hospital and underwent a very serious surgical operation. The appellant was discharged from the hospital on December 8, 1962. During the time the appellant was hospitalized and for a considerable time thereafter, the insured carried on all the housework. The appellant testified that that included arising at 6:30 a.m., preparing breakfast for the appellant's husband and for her sons, and two boarders, and preparing seven lunches for them to take out. She did all the cooking, all the laundry, and the management of the financial end of paying the bills and the appellant added, "she did a very fine job". The appellant was able to gradually take over from her daughter after she was released from the hospital so that in February 1963 the insured was free to take a position and did so with a hardware company in Toronto where she was a bookkeeper and where she continued to be employed until the date of her death.

One William Clark, an agent for the respondent insurance company, had issued certain policies in connection with the appellant's family and called at the house on frequent occasions to collect premiums. On March 18, 1963, *i.e.*, one month after her return to employment, he took from the insured an application for the policy in question. It is as to questions 5a, 7b, 9a, 11 and 17 that the respondent complains as to failure to disclose and misrepresentation. Those questions and answers are as follows:

5a. How much has your weight changed in the past year?

None	Gain	Loss
x		
.....	....lbs.	....lbs.

7. Have you ever been treated by any physician or other practitioner for or had any known indication of:

. . . . .

b. nervous or mental disorder, paralysis, or severe or frequent headaches?

Yes	No
	x
.....	.....

9. Have you ever:

a. been in any hospital, sanitarium, or other institution for observation, rest, diagnosis, treatment, or any operation?

Yes	No
	x
.....	.....

11. Other than as disclosed in the answers to Questions 7 through 10, have you, within the past 5 years, ever consulted or been attended by or been examined or had a *check-up* by any physician or other practitioner?

Yes	No
x	
.....	.....

17. What are the full particulars with respect to each and every part of Questions 6 through 16 to which the answer is "Yes"?

Question No.	Condition and Complications, or Other Reason (If operated, so state)	Onset Mo. Yr.	How long disabled	Full recovery Mo. Yr.	Names and Addresses of Physicians and Hospitals
1c x-ray	foot (right, sprain)	7-60	1 month	8-60	Dr. Valadka, Bloor St. W.
11	Check-up—result of car accident—x-rays taken	12-60 result-ok.			Dr. Unknown St. Joseph's Hospital

The learned trial judge disposed of 5a, the question as to change of weight in the past year, by pointing out that every human being varies in weight in any year and that the variation in the weight of the insured was of only a few pounds and therefore was negligible.

Question 9a—"Have you ever been in any hospital, sanitarium, or other institution for observation, rest, diagnosis, treatment, or any operation?" was answered in the negative. As the learned trial judge points out, the insured never was a patient in bed in a hospital although she did go to the out-patient department for her consultation with Dr. Murray.

Since *Anderson v. Fitzgerald*[1], the doctrine of *contra proferentem* has been well established in reference to the terms of an application for insurance. The words in an application should be construed in their ordinary and usual fashion, and certainly any person reading section 9a would never believe that it applied to a visit to an out-patient department of a hospital and would certainly be of the opinion that he was being asked whether he had ever been confined in bed in a hospital as a patient. I am unable to find in the insured's answer to question 9a non-disclosure or misrepresentation upon which the respondent can rely.

Questions 7b, and 17, the answers to which give the detail as to which question 11 asked only an affirmative or negative answer, must be the subject of more particular consideration.

Section 7b asks whether the insured had ever been treated by any physician or other practitioner or had any known indication of "nervous or mental disorder, paralysis, or severe or frequent headaches". There was no evidence

[1] (1853), 4 H.L.C. 484, 10 E.R. 551.

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whatsoever of paralysis or severe or frequent headaches, so the alleged non-disclosure or misrepresentation is reduced to the words "nervous or mental disorder". Again, the question must be interpreted as the words are understood in the ordinary use of the English language and, in my view, "nervous or mental disorder" means a mental illness and may well be a euphonious designation of insanity. The respondent had called as its witness the psychiatrist whom the insured consulted. The respondent was dealing with question 7 and its answer, yet counsel for the respondent never asked and may indeed be said to have refrained from asking whether there was any "nervous or mental disorder". Indeed on examination-in-chief by counsel for the respondent, Dr. Murray was not asked to give any diagnosis and his only approach to a diagnosis was an answer to a question by the learned trial judge who asked whether Dr. Murray would describe the insured's condition as a "...slight condition of depression or anxiety or would he describe it as medium or grave", to which Dr. Murray replied he would describe it as medium or grave. It is to be noted that the word "depression" was used by the learned trial judge and I am of the opinion it was not used in a technical-medical sense. Dr. Murray also stated in the answer to His Lordship's question that if things were better with her boy friend she would have recovered rapidly.

Dr. McIntyre who was not a psychiatrist, and in fact who had graduated only in 1959, the trial taking place in October 1965, gave as I have said a tentative diagnosis of "endogenous" depression. Blackiston, *op. cit.*, describes "depression" in psycho-pathology as

> A mental state of dejection usually associated with manic depressive psychosis. Mild depression with anxiety and hypochondria is frequently seen in youth of both sexes and often occurs whenever the adult sex problem becomes acute, as after engagement or marriage. Depression may also occur as a result of an external situation, being relieved when the external situation is removed.

Neither Dr. Murray nor Dr. McIntyre ever used the words "neurosis" or "psychosis" in their evidence. It is true that Dr. Roadhouse used the former word and I shall deal with his evidence hereafter.

Question No. 17 asked the full particulars in respect of each and other information; questions 6 through 16 to which the answer was in the affirmative, therefore, required the insured to give the detail in reference to

question 11 and which she had answered in the affirmative. In answer to question 17 the insured was required to recite any consultation, attendance or examination by any physician or other practitioner within the last five years. The insured gave the name of Dr. Valadka, to whom I have referred above, as to an x-ray of the right ankle for a sprain, and a check-up—the result of a car accident when x-rays were taken—the said check-up taking place at St. Joseph's Hospital and the name of the doctor not being known to the insured. In the five years previous to the date of the application, *i.e.*, March 18, 1963, the insured had consulted Dr. Valadka, Dr. Blake, Dr. McIntyre and Dr. Murray, as I have outlined above. There is, therefore, in the insured's answer to question 17 at least non-disclosure. The insured signed the declaration immediately following question 17 which read, in part, "I hereby declare that all the statements and answers to the above questions are complete and true and include full particulars..."

The respondent has not alleged that there was any fraud on the part of the insurer and has repeated that disclaimer in argument before this Court. Therefore, to effect the avoidance of the policy the non-disclosure or misrepresentation not only must be established but its materiality must be established. The onus of establishing misrepresentation and its materiality is upon the insurer: *Joel v. Law Union and Crown Insurance Company*[1]; *Ontario Metal Products Company v. Mutual Life Insurance Company of New York*[2], affirmed on appeal by the Judicial Committee *sub nom. Mutual Life Insurance Company of New York v. Ontario Metal Products Company, Ltd.*[3]

The insurer in the present case chose to attempt to discharge that onus by calling the physicians and the nurse to whom I have referred above, and then by calling two officials who were its servants—Dr. Robert Roadhouse and Miss Alice Degnan. Dr. Roadhouse was the associate medical director of the respondent. He had graduated from the University of Toronto in the year 1950 and he testified that for the 11 years previous he had occupied the aforesaid position, *i.e.*, since May 1953. If one adds to the year 1950 the inevitable one or two years internship which medical doctors are always required to undergo, it would

[1] [1908] 2 K.B. 863.
[2] [1924] S.C.R. 35.
[3] [1925] A.C. 344.

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seem that Dr. Roadhouse's reference to being in the practice of medicine for "a short time" is by no means an exaggeration. Dr. Roadhouse had listened to the evidence throughout the trial prior to the time when he was called and that evidence was summarized for him by counsel for the respondent. He testified that he would have classified the insured's condition as "severe neurosis" as it fell within the definition of such an illness in the rating manual used by the respondent company, *i.e.*, consisted of episodes of more than three months' disability or requiring shock treatments. In the first place, there is no remote suggestion that shock treatment was ever considered by any physician as being required for or beneficial to the insured. As I have said, the word "neurosis" was never used by any medical witness prior to its use by Dr. Roadhouse and he seems to have felt himself entitled to use that designation because of the attendance on two psychiatrists "plus treatment with a specific anti-depressant which was parstelin". Dr. Roadhouse testified and Miss Degnan, an underwriting consultant, confirmed that had such a situation been revealed to the respondent then the insured would have been required to have a medical examination, she would have been required to produce statements from the attending physicians, and she would have been rated as "special class 3" at least. Moreover, no accidental death benefit would have been issued. Dr. Roadhouse's cross-examination was revealing. He testified that for the purposes of medical underwriting the respondent regarded severe episodes of neurosis as involving more than three months' disability and that disability was "illness requiring an individual to either resign their job or inability to carry on in the job".

On the evidence, the insured had ceased her employment in the newspaper office in August 1961. It was not established that she was forced by her condition to resign or advised either by a physician or anyone else that she should do so but merely that she felt with her frequent absences from work "it had to be all or nothing". As I have pointed out, Dr. Valadka testified that on December 6, 1961, he advised the insured to start work. The insured had expressed the desire to work in June 1962 when she ceased to see Dr. Murray and she commenced strenuous work in September 1962 when the appellant, her mother,

was hospitalized. On this evidence, I am of the opinion that the respondent had not discharged the onus of showing that even under the respondent company's policy the insured had suffered such severe neurosis as would characterize her failure to completely answer question 17 as a material non-disclosure. In the first place, I do not see how Dr. Roadhouse was entitled to assume that the insured suffered neurosis; in the second place, I do not see how it had been proved that the insured's condition, if it amounted to neurosis, was severe.

It should be noted that Dr. Roadhouse specifically disqualified himself from expressing any opinion on psychiatric subjects and did so not once but repeatedly. It should also be noted that both he and Miss Degnan declared that their answers as to the materiality of the non-disclosure were based upon the practice of the respondent company alone and that they had no knowledge of the policy of other insurers. The test of materiality is what would influence the judgment of a prudent insurer. Halsbury, 3rd ed., vol. 22, at p. 188, para. 360, says:

> It may nevertheless be necessary or advisable to have evidence of experts as to insurance practice, seeing that the test hinges on whether the representation is of such a nature as to influence the judgment of a prudent insurer, not on whether the representation influenced the particular insurer looking at the proposal.

MacGillivray on Insurance Law, 5th ed., 1961, at p. 402, para. 827, says:

> The test is whether if the matter misrepresented had been truly represented it would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

Mutual Life Insurance Company of New York v. Ontario Metal Products Company, Ltd.[1] *per* Lord Salvesen at pp. 351-2, says:

> In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

I am of the opinion that the evidence given by Dr. Roadhouse and by Miss Degnan cannot be accepted as a discharge of the onus upon the insurer to prove that if the facts had been truly represented they would have caused a reasonable insurer to decline the risk or required a higher premium.

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Counsel for the respondent stressed that such evidence was at least some evidence upon the subject and it was not contradicted at all.

I have reached the view which I have set out, however, on the basis that these two witnesses not only testified as to the policy of their own company but testified that they had no knowledge of the policies of other insurers. This, therefore, would require the Court to hold that the respondent in reciting its policy automatically recites the policy of a reasonable insurer. If one were to arrive at such a conclusion, then any idiosyncracy of an individual company expressed in its policy would bind the Court to hold that non-disclosure of facts which were not in accordance with that idiosyncracy was automatically material. It must be remembered that if a company wishes to take the position that any non-disclosure is material to it no matter what the view of reasonable insurers, then it should put the answers of the questionnaire by the insured in the position of conditions or warranties.

As pointed out by Lord Salvesen, *supra,* the question of materiality is a question of fact. In my opinion, the learned trial judge made a direct finding on this question of fact when he said:

> I, in turn, am tempted to flatly disagree with him. In March 1963, the circumstances were vastly different. For some months Margaret had ceased going out with the young man which was the serious cause of her conflicts of emotions. She was working steadily and appeared to be a happy girl. She was frail, as she always had been, and I come to no other conclusion that her anxieties and depression had long vanished. I find much quarrel with the ambiguities and looseness of the words in the medical questions of the application form. I give the following as examples:
>
> 5a How much has your weight changed in the past year?
>
> I give it as common knowledge that one's weight is never static. Within ounces and a few pounds gained or lost, it varies in every year. Taken verbatim and accurately therefore the answer "none" would be an untrue one. I hold as a fact that Margaret varied but a few pounds one way or the other. In March 1961 she weighed 104 lbs. and on the application date, in the same month, two years later, she weighed 102 lbs.

As I have said, that was a clear finding of fact that the non-disclosure or misrepresentation was not material, and I can only conclude that the learned trial judge was misled into believing that his duty was to dismiss the action once misrepresentation or non-disclosure had been proved despite the failure to prove its materiality.

For these reasons, I would allow the appeal with costs throughout and award judgment to the appellant in the sum of $15,000 with interest at 5 per cent per annum from the date of the issuance of the writ.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiff, appellant: Olch, World & Torgov, Toronto.

Solicitor for the defendant, respondent: John J. Robinette, Toronto.

THE PROTESTANT SCHOOL BOARD OF GREATER MONTREAL ..... APPELLANT;

AND

JENKINS BROS. LIMITED ..... RESPONDENT;

AND

LA COMMISSION DES ÉCOLES CATHOLIQUES DE MONTRÉAL .... INTERVENANT.

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LES COMMISSAIRES D'ÉCOLES POUR LA MUNICIPALITÉ DE LA CITÉ DE LACHINE ..... APPELLANT;

AND

JENKINS BROS. LIMITED ..... RESPONDENT;

AND

LA COMMISSION DES ÉCOLES CATHOLIQUES DE MONTRÉAL .... INTERVENANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Schools—Valuation for purposes of school taxes—Valuation of immovable property on protestant and neutral panels in Montreal suburbs—Whether machinery should be included—Act respecting valuation for school purposes, 1961-62 (Que.), 10-11 Eliz. II, c. 17, s. 7—Cities and Towns Act, R.S.Q. 1941, c. 233, s. 488—Charter of the City of Montreal, 1959-60 (Que.), 8-9 Eliz. II, c. 102, s. 781.

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

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PROTESTANT SCHOOL BOARD OF GREATER MONTREAL v. JENKINS BROS. LTD.

COMMISSAIRES D'ECOLES POUR LA CITÉ DE LACHINE v. JENKINS BROS. LTD.

The respondent company owns and operates an industrial establishment in the city of Lachine which is within the territorial jurisdiction of the appellant Protestant Board. Its immovable property comprises lands and buildings together with machinery and equipment located thereon. The valuation of its property, for purposes of municipal taxes in the year 1963, properly included an amount as to the value of the machinery and equipment. By virtue of s. 7 of an Act respecting valuation for school purposes, 1961-62 (Que.), c. 17, the appellant Board is required to revise the valuation rolls of the municipalities within its jurisdiction if they were "not established on a basis equal to the basis of the valuation made in the city of Montreal". The respondent contends that, in determining whether the valuation of its property was made on a basis equal to the valuations made in Montreal, account must be taken of the fact that, in Montreal, machinery is not valued for municipal tax purposes. The contention of the appellants is that the obligation imposed on the Board relates only to the method of valuation and not to the property constituting the tax base. The appellant Board refused to strike out the valuation of the machinery from the valuation roll of the respondent's property. An appeal to the Magistrate's Court was dismissed. On a further appeal to the Court of Appeal, this judgment was reversed. The School Board appealed to this Court.

Held: The appeal should be dismissed.

The machinery and equipment, owned by the respondent and located on its immovable property in Lachine, are not subject to tax for school purposes. Where a tax is imposed with respect to property of a like kind and character, in the absence of a clearly expressed intention to the contrary, there is a presumption that the taxing statute is intended to operate uniformly, equally and without discrimination. There is no valid reason why the owners of immovable property in the suburbs of Montreal should be discriminated against by being assessed for school tax purposes on a less favourable basis than that applied to the owners of similar property in the city itself. It was the intention of the legislature that, so far as possible, equality should be established among the owners of properties on the Protestant and neutral panels in all territories subject to the Board's jurisdiction.

Écoles—Évaluation pour fins de taxes scolaires—Évaluation d'immeubles inscrits sur les listes protestantes et neutres dans les banlieues de Montréal—Valeur de la machinerie doit-elle être incluse—Loi concernant l'évaluation pour fins scolaires, 1961-62 (Qué.), 10-11 Eliz. II, c. 17, art. 7—Loi des Cités et Villes, S.R.Q. 1941, c. 233, art. 438—Charte de la Ville de Montréal, 1959-60 (Qué.), 8-9 Eliz. II, c. 102, art. 781.

La compagnie intimée possédait dans la ville de Lachine un établissement industriel qui était compris dans le territoire soumis à la juridiction du Bureau appelant. Ses immeubles comprenaient des terrains et des édifices ainsi que de la machinerie située dans ces édifices. L'évaluation de ses immeubles, pour fins de taxes municipales pour l'année 1963, incluait avec raison un montant se rapportant à la valeur de cette machinerie. En vertu de l'art. 7 de la *Loi concernant l'évaluation pour fins scolaires*, 1961-62 (Qué.), c. 17, le bureau appelant doit ordonner la modification des rôles d'évaluation pour les

municipalités soumises à sa juridiction s'ils n'étaient pas «établis sur une base égale à la base des évaluations faites dans la cité de Montréal». L'intimée soutient que, pour déterminer si l'évaluation de sa propriété a été faite sur une base égale à la base des évaluations faites dans Montréal, on doit tenir compte du fait que, dans Montréal, la machinerie n'est pas évaluée pour fins de taxes municipales. La prétention de l'appelant est que l'obligation imposée au Bureau se rapporte seulement à la méthode d'évaluation et non pas à la propriété constituant la base de la taxe. Le Bureau a refusé de radier l'évaluation de la machinerie du rôle d'évaluation de la propriété de l'intimée. Un appel à la Cour de Magistrat a été rejeté. Sur appel à la Cour d'Appel, ce jugement a été renversé. Le Bureau des Écoles en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La machinerie, appartenant à l'intimée et située sur sa propriété à Lachine, n'est pas sujette à la taxe scolaire. Lorsqu'une taxe est imposée relativement à des propriétés d'une espèce et d'un caractère semblables, il y a une présomption, en l'absence d'une intention clairement exprimée au contraire, que le statut imposant la taxe est censé opérer uniformément, également et sans discrimination. Il n'y a aucune raison valide pour que l'on se serve d'un procédé discriminatoire contre les propriétaires d'immeubles dans les banlieux de Montréal en établissant un impôt sur une base moins favorable que celle qui est établie pour les propriétaires d'immeubles semblables dans la cité elle-même. C'était l'intention de la législature que, en autant que possible, une égalité soit établie entre les propriétaires d'immeubles inscrits sur les listes protestantes et neutres dans tous les territoires soumis à la juridiction du Bureau.

APPELS de deux jugements de la Cour du banc de la reine, province de Québec[1], renversant un jugement de la Cour de Magistrat. Appels rejetés.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of the Magistrate's Court. Appeals dismissed.

Alexander McT. Stalker, Q.C., and *P. Graham*, for the appellant, The Protestant School Board of Greater Montreal.

Jean Martineau, Q.C., *C. A. Phelan* and *C. Goulet*, for the appellant, Les Commissaires d'Écoles pour la Municipalité de Lachine.

Pierre Cimon, Q.C., and *T. H. Montgomery, Q.C.*, for the respondent.

[1] [1967] Que. Q.B. 19.

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PROTESTANT SCHOOL BOARD OF GREATER MONTREAL v. JENKINS BROS. LTD.

COMMISSAIRES D'ÉCOLES POUR LA CITÉ DE LACHINE v. JENKINS BROS. LTD.

G. E. Leḋain, Q.C., and *Clermont Vermette*, for the invervenant.

The judgment of the Court was delivered by

ABBOTT J.:—These two appeals are from a majority judgment of the Court of Queen's Bench[1], dated February 7, 1966, which reversed a judgment of the Magistrate's Court rendered February 27, 1964. This latter judgment had dismissed an appeal whereby the respondent company sought to have set aside a resolution of the appellant Board (hereinafter referred to as the "Central Board"), regarding the valuation of its properties in the City of Lachine for school tax purposes, and to have it declared that the valuation of the said properties for such purposes was $2,146,509.

In the Courts below, the appellant in the second appeal—Les Commissaires d'Écoles pour la Municipalité de la Cité de Lachine—had intervened to support the position taken by the Central Board. Before this court, the Commissaires have taken a separate appeal, and the Commission des Écoles Catholiques de Montréal has intervened to support both appeals.

The facts are admitted. The respondent company owns and operates an industrial establishment in the City of Lachine, which is within the territorial jurisdiction of both appellants. Its immoveable property in that city comprises land and buildings together with machinery and equipment located thereon. The valuation of its property, for purposes of municipal taxes in the year 1963, included an amount of $1,564,160 as the value of the said machinery and equipment.

The sole question in issue on this appeal is one of law. That question is whether the machinery and equipment referred to are subject to tax for school purposes. The answer to that question depends upon the interpretation and effect of certain statutes applicable to the Central Board, and in particular to the provisions of s. 3 of the Act 11 Geo. VI, c. 81, as amended.

The relevant statutory provisions have been carefully reviewed in the judgments below and I need not refer to them in detail.

[1] [1967] Que. Q.B. 19.

The Central Board was incorporated in 1925 under the provisions of the Act 15 Geo. V, c. 45. Generally speaking, its jurisdiction extends to all the protestant school municipalities in the Montreal metropolitan area, including the City of Lachine. The 1925 statute was enacted, following a report made by a Royal Commission, appointed to study and report on what measures were required to improve the financial system governing the protestant school municipalities in and around the City of Montreal. As stated in the preamble, the Central Board was established, among other purposes, "to distribute evenly the cost of Protestant education among the various Protestant school municipalities in the territory affected." The major portion of the revenues of the Central Board is derived from school taxes imposed at a uniform mill rate upon (1) immoveable property owned by protestant taxpayers in the territory affected and (2) from the protestant share of taxes imposed at a uniform mill rate upon immoveable property in the said territory listed on what is known as the neutral panel and which includes the immoveable property of incorporated companies such as the respondent.

Assessment for school tax purposes is made upon the basis of the valuation rolls prepared in each local municipality for municipal tax purposes. Under the general laws applicable to the City of Lachine, and in particular under the provisions of s. 488 of the *Cities and Towns Act*, R.S.Q. 1941, c. 233, as amended, immoveable property subject to tax for municipal purposes includes land and buildings, together with machinery and equipment located thereon unless such machinery and equipment have been expressly excluded by by-law of the municipal council. No such by-law was passed by the City of Lachine. It follows, therefore, that the value of the machinery and equipment, located on the respondent company's immoveable property in Lachine, was properly included in the valuation of that property for municipal tax purposes.

The situation is different in the City of Montreal. In that municipality, under s. 781 of the City Charter, the value of machinery and equipment is not to be taken into account in establishing the real value of immoveable property for municipal tax purposes.

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In 1947, the Act 11 Geo. VI, c. 81, to which I have referred, was enacted. Sections 2 and 3 of that Act, as amended by 4-5 Eliz. II, c. 124 and 10-11 Eliz. II, c. 17, read as follows:

2. The Central Board shall examine the immoveable properties entered on the Protestant and Neutral Panels, and the valuation rolls thereof, in any municipality the territory of which is subject to the jurisdiction of the Central Board for Protestant school purposes, in order to ascertain whether the valuations in such municipality are established on a basis equal to the basis of the valuations made in the city of Montreal, and the Central Board may employ valuators and experts to make the necessary examinations and to submit reports to the Central Board; such valuators and experts shall have the powers described in section 374 of the Education Act (Revised Statutes 1941, chapter 59).

3. If the valuations, or any of them, appearing on the valuation roll of any such municipality are not established on a basis equal to the basis of the valuations made in the city of Montreal, the Protestant School Board of Greater Montreal shall, by resolution, direct amendments to the valuation roll of all or any immoveable properties entered on the protestant and neutral panels in such municipality other than the city of Montreal, and that such amended valuation roll shall replace for all purposes of assessment and collection of school taxes in respect of immoveable properties entered on the protestant and neutral panels, the valuation roll theretofore in use by such municipality.

Under the statute as originally enacted, the Central Board had only a discretionary power to revise the valuation rolls of the municipalities within its jurisdiction other than the City of Montreal. After December 1, 1962, the date on which the amendments to ss. 2 and 3, made by the Act 10-11 Eliz. II, c. 17, came into force, the Central Board was obliged to revise such rolls if they were "not established on a basis equal to the basis of the valuations made in the city of Montreal".

Respondent's position is, of course, that in determining whether the valuation of its immoveable property in Lachine was made on a basis equal to the valuations made in Montreal, account must be taken of the fact that, in Montreal, machinery and equipment are not valued for municipal tax purposes. The contention of appellants and the intervenant on the other hand is that the obligation imposed on the Central Board under s. 3 of 11 Geo. VI, c. 81, to revise the valuation rolls of municipalities other than Montreal, relates only to the method of valuation and not to the property constituting the tax base. The majority in the Court below refused to accept that interpretation and I am in respectful agreement with that finding.

As I have said, the sole question at issue in these appeals is whether machinery and equipment, owned by respondent and located on its immoveable property in Lachine, are subject to tax for school purposes. I share the view of the majority in the Court below that the answer to this question depends upon the effect to be given to s. 3 of 11 Geo. VI, c. 81, as amended, and in particular to the interpretation of the phrase "a basis equal to the basis of the valuations made in the city of Montreal". That being so I do not need to consider Mr. Cimon's argument based upon s. 16 of the Act 15 Geo. V, c. 45.

All owners of immoveable property on the protestant and neutral panels in the area, subject to the jurisdiction of the Central Board, are obliged to contribute to the cost of maintaining the protestant schools in that area. A uniform mill rate and the standard of valuation (the real value of the property) are prescribed by law.

Where a tax is imposed with respect to property of a like kind and character, in the absence of a clearly expressed intention to the contrary, there is a presumption that the taxing statute is intended to operate uniformly, equally and without discrimination. I can see no valid reason why the owners of immoveable property in the suburbs of Montreal should be discriminated against by being assessed for school tax purposes on a less favourable basis than that applied to the owners of similar property in the city itself.

I am therefore in agreement with Montgomery J. in the Court below when he said:

> It may be that the primary purpose of the Legislature, in enacting 11 Geo. VI, c. 81, was to provide additional revenues for Respondent, but it seems also to have been the intention of the Legislature to spread the burden of taxation for school purposes more evenly among the owners of properties on the Protestant and neutral panels in the various municipalities subject to Respondent's jurisdiction. This intent is particularly clear from the recent amendments to the above act made by 10-11 Eliz. II, c. 17, which in its title and preamble makes no reference to Appellant but is entitled merely "An Act Respecting Valuation for School Purposes". Before this act, Respondent had a discretionary power to revise the valuation rolls of the municipalities other than the City of Montreal. After Section 7 came into force on 1st December, 1962 (a few months before the date of the resolution in question), Respondent no longer had this discretion. It was obliged to revise these valuation rolls if they were not established on a basis equal to the basis of valuations made in Montreal, even if such revision were to its disadvantage.

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I am satisfied that it was the intention of the Legislature that, so far as possible, equality should be established among the owners of properties on the Protestant and neutral panels in all territories subject to Respondent's jurisdiction. This intention is partly defeated by giving a restricted meaning to the term "basis of the valuation", limiting it to the rules followed in determining values per square foot of land and per cubic foot of building space and ignoring the various legal provisions as to the accessories to be included in the value of the immoveable.

Both appeals and the intervention should be dismissed with costs.

Appeals dismissed with costs.

Attorneys for the appellant, The Protestant School Board of Greater Montreal: Howard, Stalker, McDougall, Graham & Stocks, Montreal.

Attorneys for the appellant, Les Commissaires d'Écoles pour la Municipalité de Lachine: Martineau, Walker, Allison, Beaulieu, Tetley & Phelan, Montreal.

Attorneys for the respondent, Jenkins Bros. Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Attorneys for the intervenant, La Commission des Écoles Catholiques de Montréal: Riel, Bissonnette, Vermette & Ryan, Montreal.

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*Feb. 7, 8, 9
June 26

RUSSELL D. HORSBURGH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Contributing to juvenile delinquency—Evidence—Accomplices—Corroboration—Character evidence—New evidence—Affidavit of trial witness contradicting previous testimony—Whether admissible on appeal—Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 33(1)(b).

The appellant, an ordained Minister, was convicted on five out of eight counts involving the commission of several acts of contributing to juvenile delinquency under s. 33(1)(*b*) of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160. The evidence which was adduced related, except as to the first count, to various acts by juveniles of sexual

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

immorality, and the case alleged against the appellant was that he had encouraged these acts. The children were in their teens; they were witnesses for the Crown and gave sworn evidence at the trial. The appellant testified to deny the children's testimony against him. Several character witnesses testified to his good character. His appeal from the convictions was dismissed, and on further appeal to the Court of Appeal, his convictions were affirmed. He was granted leave to appeal to this Court. Two affidavits were tendered before this Court, as well as before the Court of Appeal, sworn to by witnesses who had testified at the trial, both of which were to the effect that their evidence at trial was untrue.

Held (Fauteux, Judson and Ritchie JJ. dissenting): The appeal should be allowed and a new trial directed.

Per Cartwright, Martland, Hall and Spence JJ.: The charges in the present case were criminal charges, even though not laid under the *Criminal Code*. In criminal trial, it is the duty of the judge to warn the jury that, although they may convict upon the evidence of an accomplice, it is dangerous to do so unless that evidence is corroborated. The reasons of the trial judge make it clear that he did not consider it necessary, as a matter of law, to pay heed to that warning. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. The facts in this case show that there had been such participation. All the material evidence tendered to establish that the appellant aided and abetted at the commission of delinquencies was given by persons who had knowingly and wilfully committed those very delinquencies or, as in the case of one of them, had been guilty of aiding and abetting. In the circumstances of this case, the witnesses were *participes criminis* and were accomplices. Each of the witnesses whose evidence is in question here did commit an offense under the *Juvenile Delinquents Act*. When they seek to place the responsibilities for their conduct upon the appellant, there is no reason why, in relation to the charge brought against him, he is not entitled to the same protection, in relation to the evidence of accomplices, as he would be entitled to receive in respect of any other criminal charge. The reasons for such protection are certainly as valid, in relation to accomplices who are children, as they are with respect to accomplices who are adults. There was an error in law in the failure by the trial judge to take account of his duty to assess the evidence of the participants in the sexual acts as being that of accomplices and not of independent witnesses.

It was not a valid ground for the refusal to hear the evidence of the two self-contradicting witnesses that the said witnesses had testified at the trial and had been subject to cross-examination.

Per Spence J.: The view expressed by the trial judge was not only that the evidence of children, once sworn, must be received, but that it must be treated as that of a competent adult witness. This was a serious misdirection as the witnesses, despite the fact that it was properly determined that they were capable of being sworn, were nevertheless child witnesses and their testimony bore all the frailties of testimony of children. Added to this was the failure of the trial judge to give proper appreciation to the character evidence given in favour of the appellant.

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Per Fauteux, Judson and Ritchie JJ., *dissenting*: The essence of the case made against the appellant was not that certain children committed delinquencies, but that he did "an act or acts contributing" to children being or becoming juvenile delinquents or likely to make them juvenile delinquents. There was no error in law in the trial judge failing to mention, in his reasons for judgment, the danger of convicting on the uncorroborated evidence of the children, since the appellant was not charged with a sexual offence. Furthermore, the statement of the trial judge to the effect that the sworn evidence of a child witness may be received and treated as if it was the evidence of a competent adult witness, is to be taken as being confined to the competence of the child witness whose evidence was taken under oath, and is not to be construed as meaning that he ignored the special considerations which apply to the credibility of such witnesses.

Finally, the trial judge did not err in law in failing to mention the danger inherent in convicting on uncorroborated evidence of the children because their evidence was that of accomplices. The evidence of the children under 16 years of age was not the evidence of accomplices, because they were not *participes criminis* in the offence of contributing to the delinquencies of the children named in the charges. The offence of contributing to the delinquency of children as specified in s. 33(1) of the *Juvenile Delinquents Act* is not an offence which can be committed by children under 16 years of age, and therefore these children are not to be treated as accomplices. Some of the older witnesses were accomplices. However, although the trial judge made no mention of accomplices, the reasons which he assigned for his decision did not disclose any self-misdirection in this regard.

As to the affidavit evidence tendered before this Court and the Court of Appeal, it should be rejected.

Droit criminel—Contribuer à faire d'un enfant un jeune délinquant—Preuve—Complices—Corroboration—Preuve de caractère—Nouvelle preuve—Affidavit d'un témoin au procès contredisant son témoignage antérieur—Est-ce recevable en appel—Loi sur les jeunes délinquants, S.R.C. 1952, c. 160, art. 33(1)(b).

L'appelant, un ministre du culte, a été trouvé coupable de cinq chefs d'accusation sur huit comportant la commission de plusieurs actes ayant contribué à faire d'un enfant un jeune délinquant sous l'art. 33(1)(*b*) de la *Loi sur les jeunes délinquants*, S.R.C. 1952, c. 160. La preuve qui a été produite se rapportait, à l'exception de celle sur le premier chef, à plusieurs actes d'immoralité sexuelle commis par des adolescents, et ce qu'on a reproché à l'appelant c'est d'avoir encouragé ces actes. Les enfants étaient tous âgés de 13 à 20 ans; ils ont été des témoins de la Couronne et ont donné leur témoignage sous serment. L'appelant a témoigné et a nié le témoignage des enfants. Plusieurs témoins ont témoigné du bon caractère de l'appelant. Son appel à l'encontre des verdicts a été rejeté, et sur appel subséquent à la Cour d'Appel, les verdicts ont été confirmés. Il a obtenu la permission d'en appeler devant cette Cour où, ainsi que devant la Cour d'Appel, deux affidavits, assermentés par des témoins qui avaient témoigné au procès à l'effet que leur témoignage au procès n'était pas véridique, ont été présentés.

Arrêt: L'appel doit être maintenu et un nouveau procès ordonné, les Juges Fauteux, Judson et Ritchie étant dissidents.

Les Juges Cartwright, Martland, Hall et Spence: Les accusations dans la présente cause étaient des accusations criminelles, malgré qu'elles n'aient pas été portées sous le *Code Criminel*. Dans un procès criminel, il est du devoir du juge d'avertir le jury que, quoiqu'il puisse rendre un verdict de culpabilité en se basant sur la preuve d'un complice, il est dangereux de le faire à moins que cette preuve ne soit corroborée. Les notes du juge au procès démontrent clairement qu'il n'a pas jugé nécessaire, en droit, de tenir compte de cet avertissement. Ce qui est nécessaire pour devenir un complice c'est d'avoir participé au crime en question, il n'est pas nécessaire d'avoir actuellement commis ce crime. Les faits dans la cause présente démontrent qu'il y a eu une telle participation. Toute la preuve matérielle, qui a été présentée pour établir que l'appelant avait aidé et avait engagé des enfants à commettre des délits, a été donnée par des personnes qui avaient sciemment et de propos délibéré commis ces mêmes délits ou, comme dans le cas de l'un d'eux, avaient été coupables d'avoir aidé et encouragé. Dans les circonstances de cette cause, les témoins étaient des *participes criminis* et étaient des complices. Chacun des témoins dont le témoignage est en question ici a commis une offense sous la *Loi sur les Jeunes Délinquants*. Lorsqu'ils cherchent à placer la responsabilité de leur conduite sur les épaules de l'appelant, il n'y a aucune raison pour que ce dernier n'ait pas le droit, en regard de l'accusation portée contre lui, à la même protection en regard du témoignage de complices, qu'il aurait droit de recevoir en regard de toute autre accusation criminelle. Les raisons pour une telle protection sont certainement aussi valides, en regard des complices qui sont des enfants, qu'elles le sont en regard des complices qui sont des adultes. Il y a eu une erreur de droit de la part du juge lorsqu'il n'a pas tenu compte de son devoir d'évaluer la preuve des participants aux délits sexuels comme étant celle de complices et non pas de témoins indépendants.

Le fait que les deux témoins en contradiction avec eux-mêmes ont témoigné au procès et ont été contre-interrogés n'est pas un motif valide pour refuser de prendre connaissance des deux affidavits.

Le Juge Spence: Le juge a exprimé l'opinion non seulement que le témoignage des enfants, une fois assermentés, doit être reçu, mais qu'il doit être traité comme étant celui de témoins adultes compétents. Cette directive constituait une erreur sérieuse parce que les témoins, en dépit du fait qu'il a été adjugé avec raison qu'ils pouvaient être assermentés, étaient néanmoins des jeunes témoins et leur témoignage comportait toutes les faiblesses du témoignage d'un enfant. A ceci il faut ajouter que le juge au procès n'a pas donné l'appréciation voulue à la preuve de caractère qui a été faite en faveur de l'appelant.

Les Juges Fauteux, Judson et Ritchie, *dissidents*: L'essence de l'accusation établie contre l'appelant n'était pas que certains enfants avaient commis des délits, mais que l'appelant avait posé «un acte ou des actes contribuant» à faire d'enfants des jeunes délinquants ou les portant vraisemblablement à le devenir. Le juge au procès n'a pas commis d'erreur en droit en ne mentionnant pas dans ses notes de jugement, le danger de rendre un verdict de culpabilité en se basant

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sur la preuve non corroborée d'enfants, puisque l'appelant n'a pas été accusé d'une offense sexuelle. De plus, la déclaration du juge à l'effet que la preuve assermentée des enfants peut être reçue et traitée comme si elle était la preuve d'un témoin adulte compétent, doit être prise comme étant limitée à la compétence de l'enfant dont le témoignage est pris sous serment, et ne doit pas être interprétée dans le sens que le juge aurait mis de côté les considérations spéciales qui s'appliquent à la crédibilité de tels témoins.

Finalement, le juge au procès n'a pas erré en droit en ne mentionnant pas le danger inhérent à un verdict de culpabilité basé sur la preuve non corroborée d'enfants sous le prétexte qu'ils étaient des complices. Le témoignage des enfants de moins de 16 ans n'était pas le témoignage de complices, puisqu'ils n'étaient pas des *participes criminis* dans l'offense d'avoir contribué aux délits commis par les enfants nommés dans les accusations. L'offense de contribuer à faire d'enfants des jeunes délinquants, telle que spécifiée à l'art. 33(1) de la *Loi sur les jeunes délinquants* n'est pas une offense qui peut être commise par des enfants âgés de moins de 16 ans, et conséquemment ces enfants ne peuvent pas être traités comme des complices. Quelques-uns des témoins plus âgés étaient des complices. Cependant, bien que le juge au procès ne mentionne pas des complices, le raisonnement que l'on trouve dans sa décision ne montre pas qu'il s'est donné une mauvaise directive à cet égard.

Quant à la preuve par affidavit présentée à cette Cour et à la Cour d'Appel, elle doit être rejetée.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité. Appel maintenu et nouveau procès ordonné.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a conviction. Appeal allowed and new trial directed.

C. L. Dubin, Q.C., and *C. E. Perkins, Q.C.*, for the appellant.

Clay M. Powell, for the respondent.

The judgment of Cartwright, Martland and Hall JJ. was delivered by

MARTLAND J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1], which, by a majority of two to one, dismissed an appeal by the appellant from a judgment of Moorhouse J., who had dismissed the appellant's appeal from his conviction by W. H. Fox, Esq., Q.C.,

[1] [1966] 1 O.R. 739, 47 C.R. 151, 3 C.C.C. 240, 55 D.L.R. (2d) 289.

a Juvenile Court Judge, on five out of eight charges brought against him under s. 33(1)(*b*) of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160.

Section 33(1) of that Act provides as follows:

> 33. (1) Any person, whether the parent or guardian of the child or not, who, knowingly or wilfully,
>
> (*a*) aids, causes, abets or connives at the commission by a child of a delinquency, or
>
> (*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,
>
> is liable on summary conviction before a Juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

Although the charges were laid under para. (*b*) of this subsection, apart from the first one, they would, I think, more properly have been brought under para. (*a*). That paragraph makes it an offence to aid, cause, abet or connive at the commission by a child of a delinquency. "Juvenile delinquent" is defined in s. 2(*h*) so as to include a child "who is guilty of sexual immorality". The evidence which was adduced, except as to the first charge, related to various acts by witnesses of the Crown of sexual immorality, and the case alleged against the appellant was that he had encouraged these acts.

Paragraph (*b*) makes it an offence to do an act producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make a child a juvenile delinquent. The charges were framed to cover both alternatives, but the evidence, except as to the first charge, related to actual juvenile delinquency.

The facts are summarized by Laskin J.A., in his dissenting judgment in the Court below, as follows:

> Each of the eight charges alleged that the accused, during certain specified periods, which comprehensively covered the time span between July 24, 1963 and June 29, 1964 did certain acts contributing to the juvenile delinquency of (1) Susanne Westfall; (2) Robert Miller; (3) Mary Doolittle; (4) Jon Whyte; (5) Judy Kivell; (6) Glen Eldridge; (7) Brenda Wolfe; and (8) Janice Janes. Each charge or count set out the acts by which the contribution to juvenile delinquency was allegedly effected. Count 1 specified three acts; count 2 specified five acts; count 3 specified one act; count 4 specified one act; count 5 specified three acts; count 6 specified two acts; count 7 specified two acts, and count 8 specified seven acts.
>
> The accused was convicted on five counts, as follows: count 1, in respect of specified act three; count 2 in respect of specified acts one,

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three and four; count 5, in respect of specified acts one and two; count 6, in respect of specified act one; and count 8, in respect of specified acts six and seven. The convictions were registered in the following terms:

(1) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between January 1, 1964 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Susanne Westfall, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, during the Easter school vacation, 1964, attempting to induce the said child to have a relationship with Terry Lord by placing the said boy's arm around the said child and by telling the said child her boy friend would never know and that he, Russell D. Horsburgh wanted some action, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(2) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between January 1, 1964 and June 29, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Robert Miller, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, between March 13 and March 25, 1964 in the office of the said Russell D. Horsburgh, telling the said child that there was nothing wrong with the said child having intercourse; by, explaining to the said child how to have sexual intercourse without hurting the girl; by signs indicating to the said child to take the said girl to the apartment for sexual intercourse, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(5) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between December 1, 1963 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Judy Kivell, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent to wit: by, during the month of January or February, 1964, sending the said child to the apartment in the Park Street United Church Buildings, and sending Glen Eldridge there to have sexual intercourse with the said child; by asking the said child when she returned to his office, if she enjoyed herself, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(6) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between December 1, 1963 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Glen Eldridge, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, during the month of January or February, 1964, telling the said child to have sexual intercourse with Judy Kivell in the apartment in the Park Street United Church Buildings and by asking the said child how did you make out, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(8) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between July 24, 1963 and June 1, 1964 inclusive, knowingly or wilfully, did unlawfully do an act or acts contributing to Janice Janes, a child, being or becoming a juvenile delinquent, to wit: by, sending the said child to the said apartment on March 31, 1964, to see Terry Lord and his friend from Toronto where sexual intercourse took place with Terry Lord; by, between July 24, 1963

and June 1, 1964, permitting the said child on several occasions to have sexual intercourse with Jack Best in the parlour and apartment of the said Park Street United Church Buildings, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

Susanne Westfall was 14 years of age when the alleged offence against her was committed; Robert Miller was 15 years old at the material time; Judy Kivell was 14 years of age; Glen Eldridge was then 15 years of age; and Janice Janes was also 15 years of age when the alleged offence in her case was committed. Terry Lord mentioned in the conviction on count 1 did not give evidence. Susanne Westfall was the girl mentioned in the conviction on count 2 involving Robert Miller. Judy Kivell and Glen Eldridge are associated in the acts on which the convictions on counts 5 and 6 were made. Jack Best, who, in addition to Terry Lord, is associated in an act for which there was a conviction on count 8, was at the material time 19 years old, beyond juvenile age, and was a witness for the prosecution, as were Susanne Westfall, Robert Miller, Judy Kivell, Glen Eldridge and Janice Janes.

The accused is a married man, 45 years of age who has been an ordained minister since 1947, following the completion of his education at McMaster University where he earned a B.A. degree and Queen's University where he earned a divinity degree. He came to a Chatham pastorate in 1961 after previous service in Creighton Mine, Sudbury, Hamilton and Waterloo. The offences of which he was convicted had as their locale the church in Chatham at which he served, and an apartment attached to the church which was not inhabited but was used as a collection and distribution centre for used clothing available to needy persons for the taking.

The accused on coming to Chatham expanded the existing social and recreational programme carried on at the church. With the approval of a responsible church committee, he organized a senior young people's group, a Tuxis group for boys in their late teens, a Sigma-C group for boys in their early teens and, subsequently, a teen-town and youth anonymous programme. This last mentioned group was designed to attract to the church young persons who had no traditional attachment and to provide them with an opportunity to discuss personal problems on a confidential group basis. The result of this expanded programme was to keep the church buildings in constant use by a range of young people. The accused set aside, in addition, a counselling period from 4:30 to 6 p.m. for teenage persons and this was made known through church publications. There is evidence that many youngsters visited the accused in his office for general talk and that he made himself accessible to them, even lending them small amounts of money, apparently in line with a social service conception of his ministry.

The young people named in the charges brought against the accused admittedly engaged in delinquent conduct in the church premises. Neither the church nor the accused can be held responsible for this simply because they permitted access to the church unless they were, or should have been, aware of what was happening and allowed it to continue. There was evidence that the frequent dances held in the church were chaperoned, there was a janitor who serviced the premises, and the accused's secretary was there from 10 a.m. to 5 p.m. or later. What is alleged against the accused are not acts of omission but of commission, and, as already indicated, of the twenty-four acts specified in the eight counts, nine were brought home to him under five counts.

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Various grounds of appeal were submitted on behalf of the appellant, but it is only necessary for me to deal with one of them; namely, that the learned trial judge failed to apply the rule of caution as to the danger of convicting on the uncorroborated evidence of accomplices.

The learned trial judge gave detailed reasons for his judgment. He did not consider the matter of the evidence of accomplices at all, but he did deal with the requirement as to the matter of corroboration of the evidence of a complainant in relation to a sexual offence. With respect to this matter he said:

> The second observation I would like to make concerns the question of "corroboration" and the necessity for it in a case of this kind, having regard to the nature of the offences and the ages of the witnesses for the prosecution.
>
> In the first place the accused is not charged with one of the sexual offences mentioned in the Criminal Code. Therefore, the possibility of false accusations of sexual crime does not exist in this case and there is no possibility of a conviction on the uncorroborated evidence of a possible victim, with respect to a sexual crime. The accused is simply charged with contributing to Juvenile Delinquency in connection with eight different counts. Because of the nature of the offences, therefore, I do not believe that corroboration is required.

He also dealt with the need for corroboration of the evidence of a child, who has been sworn as a witness. After discussing the provisions of s. 16 of the *Canada Evidence Act*, R.S.C. 1952, c. 59, he went on to say:

> In other words, once the Judge has decided, after making due inquiry, that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness. From my reading of the law, and, in particular, those cases which have been decided under section (16) (above) notably *R. v. Antrobus* 87 C.C.C. 18 and *R. v. Sankey* (1923) S.C.R. 436 such is the law with respect to the admissibility of the evidence of a child and, in particular, the necessity of corroboration of a child's evidence — qua child.

It is clear from these passages that the learned trial judge approached the consideration of the evidence of the child witnesses on the basis that the matter of corroboration did not enter into the case at all.

It is now settled law that in a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.

The charges in the present case are criminal charges, even though not laid under the *Criminal Code*. The warn-

ing required to be given to the jury is for the purpose of ensuring that, in their consideration of the evidence, the danger involved in convicting on the uncorroborated evidence of an accomplice should always be present in their minds. The reasons of the learned trial judge make it clear that he did not consider it necessary, as a matter of law, to pay heed to that warning in weighing the evidence. If the evidence against the accused did consist of the evidence of accomplices, then there was error in law.

The question then arises as to whether or not the various children, who were parties to the sexual acts of which evidence was given, are to be considered as accomplices.

Counsel for the respondent contended that they were not, and relied upon the judgment of the House of Lords in *Davies v. Director of Public Prosecutions*[1]. At page 400 the Lord Chancellor, Lord Simonds, said:

> There is in the authorities no formal definition of the term "accomplice": and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—
>
> (1) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors). This is surely the natural and primary meaning of the term "accomplice". But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz.:
>
> (2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*Rex v. Jennings*, (1912) 7 Cr. App. R. 242: *Rex v. Dixon*, (1925) 19 Cr. App. R. 36):
>
> (3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration. (*Rex v. Farid*, (1945) 30 Cr. App. R. 168).

A little later in his reasons he went on to say that he could see no reason for any further extension of the term "accomplice".

In the *Davies* case the charge was murder, the victim having been stabbed by a knife. Davies, with other youths, including the witness Lawson, attacked, with their fists,

[1] [1954] A.C. 378.

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another group, one of whom was the victim who was stabbed. In considering whether or not Lawson was an accomplice of Davies, the Lord Chancellor said:

> Lawson, if he was to be an accomplice at all had to be an accomplice to the crime of murder. I can see no reason for any further extension of the term "accomplice". In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use. It should be borne in mind in this connexion that all suggestion of a concerted *felonious* onslaught had, by consent at the instance of counsel for the defence himself, been expunged from the Crown's case and from the issues put to the jury.

It will be seen that the issue considered was as to whether or not Lawson was "particeps criminis" in respect of the crime of murder.

It was submitted by counsel for the respondent that, to be particeps criminis, the witness in question would have to be guilty of the crime charged against the accused. On this basis, as none of the witnesses in question in this case could have been charged with the crime of which the appellant was charged under s. 33 of the *Juvenile Delinquents Act*, they could not be accomplices.

I do not agree that this result follows from the *Davies* case. Particeps criminis means one who shares or co-operates in a criminal offence. The passage cited from that case shows that the term includes an accessory after the fact, who certainly could not be convicted of the main offence. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case.

The substance of the case made against the appellant was that he had aided and abetted at the commission of delinquencies. The delinquencies consisted of various acts of sexual intercourse. Sexual intercourse was not involved in the first charge, in relation to Susanne Westfall, but she is the girl mentioned in the second charge and she gave evidence of sexual intercourse with Robert Miller. Terry

Lord, who is mentioned in the first charge, did not give evidence. Jack Best, who is mentioned in the last charge, and who did give evidence, was not a juvenile at the material time. In the result, each of the persons to whose delinquency the appellant was charged with contributing had been guilty of an offence under the *Juvenile Delinquents Act*, i.e., sexual immorality.

In addition, each of such persons, other than Janice Janes, mentioned in the last count, had aided and abetted another juvenile in the commission of an act of juvenile delinquency, an act which is made an offence by s. 33(1)(*a*). It appeared to be assumed in argument that only adults could be charged under that section, but, apart from the marginal note, which forms no part of the Act (*Interpretation Act*, R.S.C. 1952, c. 158, s. 14(2)), this section does not so provide.

In any event, the situation in this case is that all the material evidence tendered to establish that the appellant aided and abetted at the commission of delinquencies was given by persons who had knowingly and wilfully committed those very delinquencies, or, as in the case of Best, had been guilty of aiding and abetting. In the circumstances of this case, in my opinion they were particeps criminis and were accomplices. In saying this I do not contend that every child who becomes a juvenile delinquent is necessarily an accomplice of a person who contributes to such a delinquency. I say only that such a child may, depending upon the circumstances of the case, be an accomplice.

I recognize that the charges against the appellant were laid under para. (*b*) and not para. (*a*) of s. 33(1), but I repeat that the case, as presented, other than the first charge, related to an offence under para. (*a*). I agree, on this point, with what was said by Laskin J.A.:

> Crown counsel contended that the accused would be guilty of the offences charged by reason merely of giving the encouragement to the acts committed by the juveniles, regardless of whether they were committed or not. I do not disagree, but that is not how the case against him was proved; and it is the nature of the evidence given against the accused that has to be regarded in determining whether accomplice evidence is being adduced.

In the reasons of Evans J.A., in the Court below, the following proposition is stated:

> It is my view that the children under sixteen who testified cannot be considered as accomplices nor as particeps criminis. The *Juvenile Delin-*

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quents Act was specifically designed for the protection of such children and to hold that they are accomplices in the very act which contributed to their delinquency would be contrary to the intention expressed in the Act. They did not commit a crime by becoming involved in an action which forms the basis of a prosecution against the appellant.

I am not in agreement with this reasoning. The fact is that each of the witnesses whose evidence is in question here did commit an offence under the *Juvenile Delinquents Act*. Had proceedings been taken against them, they would have enjoyed the benefits afforded by ss. 2 and 38 in being treated not as criminals, but as misdirected children. But when they seek to place the responsibility for their conduct upon the appellant, I see no reason why, in relation to the charge brought against him, he is not entitled to the same protection, in relation to the evidence of accomplices, as he would be entitled to receive in respect of any other criminal charge and the reasons for such protection are certainly as valid, in relation to accomplices who are children, as they are with respect to accomplices who are adults.

In my opinion, there was an error in law in the failure by the learned trial judge, when weighing the evidence, to take account of his duty to assess the evidence of the participants in the sexual acts as being that of accomplices and not of independent witnesses.

This conclusion makes it unnecessary to deal with the ground of appeal based upon the refusal by the Court of Appeal to consider the self-contradicting evidence of two witnesses who testified at the trial. I would, however, like to express my view that the fact that the witnesses in question had testified at the trial on the issues on which further examination was sought, and had been subject at trial to cross-examination, is not a valid ground for the refusal to hear such evidence.

In my opinion the appeal should be allowed and a new trial directed.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment prepared by my brother Martland in which he recites much of the factual background giving rise to this appeal. I shall endeavour not to

duplicate this recital excepting in so far as it appears to me to be essential to an understanding of my views.

Although the accused was a man of 45 years of age and an ordained minister of the United Church of Canada, he was tried in the Juvenile and Family Court of the County of Kent on eight charges involving the alleged commission of 24 separate acts of contributing to children becoming juvenile delinquents or which were likely to make them juvenile delinquents contrary to s. 33(1)(*b*) of the *Juvenile Delinquents Act*. It was, in my view, unfortunate that all these charges were heard together but there was no motion for severance and no objection appears to have been raised to this procedure on behalf of the accused although in the result, in my opinion, its adoption made a difficult case more difficult for the judge to try.

Judge Fox, who presided at the trial, is described in the reasons for judgment of the majority of the Court of Appeal as "a learned and experienced Juvenile Court Judge" and I do not question this assessment. He appears to have been able to deal with each charge independently of the others and the fact that he only found 9 of the 24 alleged acts to have been committed and consequently dismissed 3 of the charges, is the best evidence of his approach to the matter.

The trial, which involved the taking of more than 1,600 pages of evidence, was characterized by a direct conflict of testimony between the Crown witnesses, many of whom were admittedly juvenile delinquents, and the evidence for the defence which consisted of a complete denial of all the charges by a minister of the Church whose integrity was vouched for by a number of respectable citizens.

This was preeminently a case which turned on the trial judge's assessment of the credibility of the witnesses and Judge Fox was careful to instruct himself in this regard in the following terms:

> Counsel for both the Crown and the defence referred to that issue in their arguments as the most important issue in the whole case and with that view I am in entire agreement for on that issue, solely, I think depends the accused's guilt or innocence.
>
> As the Honourable Mr. Justice Estey of the Supreme Court of Canada pointed out in the case of *Rex v. White*, 1947 S.C.R. 268 at 272:
>
> > 'the issue of credibility is one of fact and cannot be determined by following a set of rules which it has been suggested have the force of law.'

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In his judgment in that case Mr. Justice Estey quoted as follows from a judgment of Mr. Justice J. Anglin (later Chief Justice) in the case of *Raymond v. Township of Bosanquet* (1919) 59 S.C.R. 452:

> '...by that (in speaking of credibility) I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence. ...'
>
> 'Eminent Judges' Mr. Justice Estey says, 'have from time to time indicated certain guides that have been of the greatest assistance but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember, and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere or frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.'

...I respectfully adopt the decision in that case and particularly the statement of Mr. Justice Estey as my guide in determining the issue of credibility in this case.

I do not think that the comments made by the trial judge in the course of his detailed consideration of the evidence of the various witnesses indicate that he deviated, in assessing their credibility, from the standards which he found to have been laid down by this Court, and I therefore proceed on the assumption that in reaching his conclusions Judge Fox treated credibility as the most important issue in the whole case and that he evaluated the testimony of the witnesses having regard to (1) their demeanour in the witness box and their manner in giving evidence, (2) their general integrity and intelligence, (3) their powers to observe, (4) their capacity to remember, (5) their accuracy in statement, (6) whether they were honestly endeavouring to tell the truth and (7) whether they were sincere and frank, or whether they were biased, reticent and evasive. Applying these standards, the learned judge determined the issue of credibility against the accused.

As Mr. Justice Estey said, *supra,* "the issue of credibility is one of fact..." and it is not open to this Court to interfere with the conclusions reached by the trial judge in this regard unless it can be shown that he erred in law in his consideration of the evidence.

One of the chief errors in law alleged by counsel for the appellant was that the trial judge wrongfully directed himself on the issue of corroboration in relation to the evidence of the children who testified before him. In this regard it was contended that the trial judge should have found that corroboration of the children's evidence was necessary because of the sexual nature of the offences, the ages of the children, their bad character and the fact that they were accomplices.

The trial judge specifically directed himself on the question of corroboration and whether it was necessary having regard (*a*) to the nature of the offences and (*b*) to the ages of the witnesses for the prosecution, but he made no mention whatever of the rule relating to the danger of convicting on the uncorroborated evidence of an accomplice although, as will hereafter appear, I do not think that this affords any basis for the assumption that he was ignorant of that rule or that he ignored it in the present case.

In finding that corroboration was not made necessary by the nature of the offences here charged, the learned trial judge said:

> In the first place the accused is not charged with one of the sexual offences mentioned in the *Criminal Code*. Therefore, the possibility of false accusations of sexual crime does not exist in this case and there is no possibility of a conviction on the uncorroborated evidence of a possible victim, with respect to a sexual crime. The accused is simply charged with contributing to Juvenile Delinquency in connection with eight different counts. Because of the nature of the offences, therefore, I do not believe that corroboration is required.

The trial judge's concept of the "nature of the offences" is spelled out in the comments which he made on the third act alleged on the first charge. This act consisted in the accused placing a young man's arm around a girl whom he knew was "going with" somebody else, and then turning towards them, saying, "I want to see some action". Under all the circumstances, the trial judge found the accused guilty of this act although no sexual intercourse took place between the young people and no offence of delinquency was committed by either of them, and in so finding he said:

> With respect to act (3) in the first charge Counsel for the defence said in his summation that the act itself could not possibly make Susanne or cause her to become a juvenile delinquent, that unless there is direct evidence of sexual intercourse there is no act of contributing to juvenile

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delinquency. I cannot agree with the second part of this proposition. Subsection (4) of Section 33 is directly opposed to it, when it provides that it is not a valid defence to a prosecution under the section that the child, notwithstanding the conduct of the accused, did not in fact become a juvenile delinquent. Section 33 speaks of any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent. *This wording, in my view, defines precisely what an act of contributing is and it does not make it dependent upon an accomplished act of delinquency by the child.*

The italics are my own.

The contention of counsel for the appellant as to the necessity for self-instruction by the judge concerning the danger of convicting on the uncorroborated evidence of the children insofar as it relates to the nature of the offences and to the assumption that they were accomplices, is based on the fact that there was evidence of sexual intercourse having taken place between them and I think it to be of first importance to recognize at the outset that such intercourse was not an essential ingredient of the charges against the appellant. With the very greatest respect for those who may hold a different view, I do not think that the essence of the case made against the appellant was that certain children committed delinquencies; the essence of the case made against the appellant was that he "did unlawfully do an act or acts contributing to" children being or becoming juvenile delinquents or likely to make them juvenile delinquents, and I regard it as essential to the disposition of this case that the evidence of sexual intercourse having taken place between these children should not be treated as altering the rules of evidence which apply to the proof of the offences with which the accused was actually charged.

At common law the evidence of a complainant in a sexual case was always admissible but the rule requiring that the jury should be warned of the danger of convicting on such evidence without corroboration has long been recognized as a rule of practice. Section 131 of the *Criminal Code* requires corroboration in cases of incest, seduction, illicit sexual intercourse and in the case of a parent or guardian procuring the defilement of a female person, and section 134 provides that a jury must be instructed that it is not safe to find the accused guilty on the uncorroborated evidence of a female complainant in cases where he is charged with rape, attempted rape, inter-

course with children or indecent assault. These provisions, of course, have the force of law but they have no application to the present case as the appellant was not charged with any of the specified offences, and accordingly the only argument open to counsel for the appellant in this regard is that the trial judge *erred in law* in failing to instruct himself in respect of *a rule of practice*. This appears to me to be a *non sequitur*. The case which was chiefly relied upon in support of this branch of the argument is *Regina v. McBean*[1], where the accused had been charged under s. 33(1) of the *Juvenile Delinquents Act* and Mr. Justice Davey of the British Columbia Supreme Court said at page 30:

> It is a rule of practice that in trials without a jury the judge should keep in mind the danger of convicting a person charged with a sexual offence upon the uncorroborated evidence of the complainant. It appears that this rule of practice should be applied not only in charges under the Criminal Code but in all judicial inquiries involving sexual offences.

It will be noted that it is the evidence of a *complainant* which requires corroboration and in the *McBean* case, although the charge was one of "contributing" to delinquency, the contribution which McBean was alleged to have made to the delinquency of the child in question was "that he did have carnal knowledge of her" and the decision was based on the case of *Mattouk v. Massad*[2], where Lord Atkin, speaking on behalf of the Privy Council said, at page 591:

> It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age (15) in charging a man with sexual intercourse. No doubt there is no law against believing them but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law.

In the present case the accused is not charged with sexual intercourse with young girls and although the delinquency to which he is alleged to have contributed is "sexual immorality" the gravamen of the offences of which he was convicted is, as I have said, that he did "an act or acts contributing" to children being or becoming juvenile delinquents or likely to make them juvenile delinquents.

The reasons for the rule requiring corroboration of the evidence of a complainant in a sexual case do not appear to

[1] (1953), 107 C.C.C. 28, 17 C.R. 357, 10 W.W.R. (N.S.) 351
[2] [1943] A.C. 588.

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me to be clearly defined in any of the authorities, but it is suggested in Cross on Evidence, 2nd ed., page 177, that they are in some respects similar to those which apply to the uncorroborated evidence of an adulterer in that in both cases the charge is easy to make and difficult to refute "and could easily be concocted on account of hysterical or vindictive motives". In any event, it appears to me to be clear that the danger to be guarded against in cases of sexual offences is that the complainant, through a motive of spite, vengeance, hysteria or perhaps gain by way of blackmail, may make false accusations against which the accused, by reason of the nature of the charges, has no means of defence except his own unsupported denial. It is the fact of sexual misconduct which requires corroboration and this rule of practice can have no application to a case like the present in which such conduct is freely admitted by the persons concerned. I am satisfied that there was no error in law in the Judge failing to mention this rule in his reasons for judgment.

The passage from the trial judge's reasons for judgment in which he dealt with the question of "corroboration" in relation to the evidence of children was made the subject of bitter attack by counsel for the appellant. This passage reads as follows:

> But what of the evidence of children? Fourteen of them gave evidence for the Crown, only one of whom was under the age of fourteen years.
>
> Section 16 of the *Canada Evidence Act*, dealing with the evidence of a child provides that:
>
> > (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth.
> >
> > (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.
>
> By that is meant, of course, no case shall be tested upon the unsworn evidence alone.
>
> I have been unable to find any definition of the term 'tender years' but I think it is clear from the wording in the above section that it is only the evidence of a child who, after due inquiry, is permitted to give unsworn evidence, that must be corroborated by some other material evidence, before a conviction can be made on that child's evidence alone. In other words, once the judge has decided, after making due inquiry,

that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness. From my reading of the law, and, in particular, those cases which have been decided under Section (16) (above) noteably *R. v. Sankey* (1927) S.C.R. 436 such is the law with respect to the admissibility of the evidence of a child and, in particular, the necessity of corroboration of a child's evidence —qua child.

I do not think that in this passage the learned judge was doing more than stating that the sworn evidence of children differs from their unsworn evidence in that unsworn evidence must be corroborated before it can form the basis of a decision. I think that he was quite right in saying that a child who has been sworn as a witness is as *competent* a witness as any adult. In this regard, the distinction between "competency" and "credibility" must be borne in mind, and I refer to the judgment of Buller J. in the old case of *R. v. Atwood and Robins*[1], where he said:

> The distinction between competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of the objection go to his credit only, his testimony must be received and left with the jury, under such directions and observations from the court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision on that case.

As I have indicated, I think that the excerpt last above quoted from the reasons of the learned trial judge is to be taken as being confined to the *competency* of the child witnesses whose evidence was taken under oath, and I do not think that it is to be construed as meaning that he ignored the special considerations which apply to the *credibility* of such witnesses. These considerations are described in the reasons for judgment delivered on behalf of this Court by Judson J. in *Kendall v. The Queen*[2], where he said:

> The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness is the mental immaturity of the child. The difficulty is four-fold: (1) his capacity of observation, (2) his capacity of recollection, (3) his capacity to understand the questions put and frame intelligent answers, and (4) his moral responsibility.

In my view, all these considerations are included in the factors referred to by Mr. Justice Estey in *Rex v. White*[3]

[1] (1788), 1 Leach 464 at 465-6, 168 E.R. 334.
[2] [1962] S.C.R. 469 at 473, 37 C.R. 179, 132 C.C.C. 216.
[3] [1947] S.C.R. 268, 3 C.R. 232, 89 C.C.C. 148.

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and in the case of "an experienced Juvenile Court Judge" who had expressly directed himself in accordance with that case, I do not think that his failure to mention in his reasons for judgment the rule of practice with respect to the danger of convicting on the evidence of a child is to be treated as an error in law. In the nature of things Judge Fox must have had to deal with child witnesses daily in the course of discharging his duties.

As I have indicated, counsel for the appellant further alleged that the trial judge erred in law in failing to state in his reasons for judgment that he had taken into consideration the danger of convicting on the evidence of persons of bad character. It appears to me that Judge Fox, who spent his time trying cases under the *Juvenile Delinquents Act* must be taken to have been aware of the fact that the Crown witnesses in this case were mostly juvenile delinquents and must be taken also to have been aware of the danger of convicting on their evidence without giving it the most careful and anxious consideration. His reasons for judgment indicate to me that he did give this evidence just that kind of consideration and I am not prepared to hold that his failure to make any specific comment on the bad character of these children constituted an error in law.

Finally, appellant's counsel took the position that the evidence of those who had participated in the alleged delinquencies was the evidence of accomplices and that the trial judge erred in law in failing to mention the danger inherent in convicting on their uncorroborated evidence.

In so far as the evidence of the children under 16 years of age is concerned, I do not think that it is the evidence of accomplices.

Before considering this submission in relation to that evidence, I think it desirable to consider the reasons for the existence of the rule which is now recognized as a rule of law that a judge should always instruct a jury that although they may convict on the evidence of an accomplice, it is dangerous for them to do so unless that evidence is corroborated.

The rule appears to have its origin in the old law respecting approvers which fell into disuse during the first half of the 18th century and under which a person who was in custody and who had been indicted of the offence with

which the accused was charged could upon confessing his guilt and accusing accomplices obtain his pardon. By 1775 Lord Mansfield was able to say in the case of *Rex v. Rudd*[1]:

> Great inconvenience arose out of this practice of approvement.—No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections. And though, under the practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself.

By 1837 the rule had begun to take on something of the character of the rule of law as which it is presently recognized. In that year Lord Abinger in addressing the jury in *R. v. Farler*[2] observed at page 107:

> It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance.

and he pointed out at page 108 the nature of the danger against which the rule was designed to protect saying:

> the danger is, that when a man is fixed, and knows his own guilt is detected, he purchases impunity by falsely accusing others.

This observation is quoted by Wigmore in his work on evidence 3rd ed., (1940) at page 322, paragraph 2057 and is accompanied by the following comment:

> The essential element however, it must be remembered, is the suggested promise or expectation of conditional clemency. If that is lacking the whole basis of mistrust fails.

In Cross on Evidence, 1963, 2nd ed., page 172, the matter is approached from a slightly different angle. The author there says:

> The danger that the accomplice will minimize his role in the crime and exaggerate that of the accused is the usual justification for the requirement.

Different shades of meaning are to be found in the reasons given for the rule by other text writers, but running through them all is the thought that the accomplice's evidence is to be mistrusted because his testimony might be given in order to purchase lenient treatment for himself at the expense of the accused by co-operating with the authorities.

[1] (1775), 1 Cowp. 331 at 336, 98 E.R. 1114.
[2] (1837), 8 Car. and P. 106, 173 E.R. 418.

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It does not appear to me that any useful purpose is to be served by reviewing the history of the law as to who is and who is not an accomplice because I am satisfied to adopt the definition of that term which is found in the reasons for judgment of Lord Simonds L.C. in *Davies v. Director of Public Prosecutions*[1], to which reference has been made by my brother Martland. In that case Lord Simonds made it plain that he thought the natural and primary meaning of the term "accomplice" to be limited to

> ...persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors).

The Lord Chancellor, however, also recognized receivers of stolen goods and witnesses giving evidence of similar crimes committed by the accused to which they had been parties, as persons whose evidence required the same warning as that of accomplices.

It will be seen that apart from receivers of stolen goods and accessories after the fact to a felony (both of which offences are distinct from the main charge) the only witnesses who come within the meaning of "accomplices" as defined by Lord Simonds are those who have been *participes criminis* in respect of the actual crime charged against the accused or in respect of some similar crime concerning which they, being parties, have testified against him.

In the present case none of the witnesses were receivers of stolen goods and the fact that the appellant's "contribution" to their delinquency resulted in some of the child witnesses having sexual intercourse does not, in my opinion, make them accessories after the fact to the offence of making the "contribution" with which the appellant is charged. It follows, in my view, that in order to have been "accomplices" within the meaning of that word as defined in the *Davies* case, the child witnesses in the present case would have had to be *participes criminis* in *and therefore subject to prosecution for,* the offence of contributing to the delinquencies of the children named in the charges against the appellant or contributing to some other delinquencies concerning which they had testified as to his guilt to which they had been parties.

[1] [1954] A.C. 378 at 400-1.

As I take it to be obvious that the offence of contributing to the delinquency of children as specified in s. 33(1) of the *Juvenile Delinquents Act* is not an offence which can be committed by children under 16 years of age, I am satisfied that these children are not to be treated as "accomplices".

I am, with the greatest respect, unable to accept the suggestion that children are capable of committing this offence. The word "child" is defined in s. 2(1)(*a*) and I think that it is used in s. 33(1) in contradistinction to the word "person" as that word is employed in the same section. The only offence for which a child can be convicted under the *Juvenile Delinquents Act* is the offence of "delinquency" and s. 3(2) makes it plain that when a "child" has committed a delinquency "he will be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision". These latter provisions conform with the terms of s. 38 which defines the purpose of the Act as being:

> ...that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

All these provisions appear to me to conflict with the suggestion that it was intended that children should be exposed to being fined $500, imprisoned for two years or to both fine and imprisonment for contributing to the delinquency of other children. This in my view would be the effect of making s. 33(1) applicable to children.

It is said, however, that the essence of the case against the appellant is that certain children committed delinquencies and that although he is not charged with aiding and abetting the delinquencies to which these children confessed, the appellant is to be treated as having done so, so that he is *participes criminis* in relation to the commission of delinquencies by the children for which he could not himself be charged.

It is on this basis that it is contended that the children are to be treated as having been accomplices in the commission of offences of which the appellant was found guilty and with which they could not themselves have been charged.

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With the greatest respect for those who may take the opposite view, I do not think that, even if the appellant had been *participes criminis* in committing the delinquencies, it would follow that the juveniles were accomplices of his in committing the offences of which he was convicted.

The two things appear to me to be quite different and this is illustrated by the fact that the reasoning based on the appellant being *participes criminis* in the commission of the delinquencies could not, as it seems to me, have any application to his conviction on the first charge with respect to which the trial judge found no evidence of the commission of a delinquency by anyone.

The gravamen of each charge on which the accused was convicted was the same, namely, that he "knowingly or wilfully did unlawfully do an act or acts contributing to ...a child being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent". It is the act or acts of the appellant which were in question and I am unable to follow any reasoning which leads to the conclusion that when his "contribution" has resulted in a child committing a sexual delinquency that child is an accomplice in the doing of the appellant's acts which contributed to it, whereas when the appellant's "contribution" has not resulted in anyone committing a delinquency, the children in respect of whom the "contribution" was made are not accomplices.

It appears to me that the suggestion that because there was evidence of Susanne Westfall's delinquency in respect of the second charge she should therefore be treated as an accomplice in respect of the first charge, must be predicated on the assumption that the essence of the case made against the appellant was that the children committed delinquencies. If this indeed were the essence of the case then it would perhaps be understandable to treat the mere fact of a child having been guilty of sexual delinquency in respect of one charge as tainting her evidence and constituting her an accomplice in another offence with respect to which the accused is charged with contributing to her delinquency whether any delinquency was in fact involved in that offence or not. As I have indicated, with the greatest respect for those who hold a different view, I do not agree with this reasoning.

To treat children of tender years as untrustworthy witnesses on the ground that they have been concerned in contributing to their own delinquency by reason of the fact that the "contribution" made by the appellant to their immorality has actually resulted in their committing acts of sexual delinquency, is in my view inconsistent with the purpose of s. 33(1) of the *Juvenile Delinquents Act* which is clearly designed to protect children against being led astray by the bad influence of adults. The fact that they have actually gone astray does not, in my opinion, make the children accomplices of the adult accused in exercising the bad influence which led them to their state of delinquency.

It was strongly contended on behalf of the appellant that the judgment of Pickup C.J.O., speaking on behalf of the Court of Appeal for Ontario in *Reg. v. Gauthier*[1], constituted authority for enlarging the class of "accomplices" whose evidence requires corroboration so as to include all persons "concerned...in committing or attempting to commit" the offence with which the accused was charged. The *Gauthier* case was one in which charges had been withdrawn against two of the witnesses who had allegedly been engaged in the armed robbery for which the accused was indicted. In the course of his reasons for judgment, Chief Justice Pickup said:

> There was evidence tending to indicate the complicity of at least one of these witnesses, if not both, and in our opinion it was the duty of the learned trial judge to tell the jury what in law constitutes an accomplice, and direct their attention to any facts in evidence which would tend to indicate the witnesses' complicity and then submit to the jury the issue whether what a witness was proved to have done made her an accomplice...

This excerpt does not, in my view, indicate any broadening of the rule but it is contended that by adopting a sentence from the reasons for judgment of Chisholm J., (as he then was) in *The King v. Morrison*[2], Chief Justice Pickup approved an enlarged meaning of the word "accomplice". The sentence referred to reads as follows:

> An accomplice is one who is concerned with another or others in committing or attempting to commit any criminal offence whether treason, felony or misdemeanor.

[1] [1954] O.W.N. 428, 108 C.C.C. 390.
[2] (1917), 51 N.S.R. 253 at 270, 29 C.C.C. 6, 38 D.L.R. 568.

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This statement was made in relation to the effect of s. 69(2) of the *Criminal Code* (now s. 21(2)) and Mr. Justice Chisholm went on to say of the two witnesses (Burke and McNeil) who were alleged to be accomplices:

> I am of opinion that both Burke and McNeil were accomplices of the accused; that each is as liable to indictment as is the accused,—and this is sometimes made the test in deciding who is an accomplice—and that the requirements of the law as to the corroboration of the evidence of accomplices ought to have been observed...

There are two other cases decided in the Court of Appeal for Ontario, *R. v. Morin*[1] and *R. v. Fleming*[2], in both of which it was held that the evidence of certain prostitutes was to be taken as the evidence of accomplices in cases where the accused was charged with living on the avails of prostitution. These cases turned on their own particular facts but it is revealing to note that in the course of his reasons for judgment in the *Fleming* case, Porter C.J.O. put his decision on the ground that the witnesses whose evidence was there in question were accomplices because they were actual parties to the offence. He there said:

> I am of opinion that the witnesses in question in the case at bar were accomplices, being concerned with another in committing a criminal offence, and *being parties to the offence by aiding and assisting in its commission.*

The italics are my own.

I do not think that anything which was said in the last two cases alters the law applicable to the evidence of prostitutes testifying in respect of such charges as it was laid down by Lord Reading in *Rex v. King*[3] where he found no evidence that the prostitute there in question was an accomplice and where, at page 119, he applied this test:

> It is impossible to say that she is therefore an accomplice *in the crime with which the appellant was charged.*

The italics are my own.

I have said that the rule requiring a judge to direct a jury as to the danger of convicting on the uncorroborated evidence of an accomplice does not, in my opinion, apply to the children under 16 years of age who gave evidence in this case because they are not capable of committing the

[1] (1957), 118 C.C.C. 234, 26 C.R. 226.
[2] (1961), 129 C.C.C. 423, 34 C.R. 137, [1961] O.W.N. 9.
[3] (1914), 10 Cr. App. R. 117.

offence with which the appellant was charged, but the same considerations do not apply to the evidence of Jack Best, an adult of 19 years, who testified to having had sexual intercourse with a child named Janice Janes with the knowledge and encouragement of the accused. In so doing, he was, in my opinion, undoubtedly contributing to the child's delinquency and he was doing so in concert with Mr. Horsburgh and was therefore an accomplice. I think also that James Butler and Michael Bechard, who were both over 16 years of age and could thus have been guilty of contributing to the delinquency of young girls, must also be regarded as accomplices because they gave evidence of similar acts by the accused in which they had participated.

Although, as I have indicated, Judge Fox instructed himself carefully in respect of corroboration (*a*) in relation to the nature of the offences and (*b*) in relation to the evidence of children, *qua* children, he at no time made any reference to the law relating to accomplices.

The well-known rule concerning the evidence of accomplices was stated in this Court by Anglin C.J.C. in *Vigeant v. The King*[1], where it was recognized as a rule of law that where an accomplice has given evidence the judge must first instruct the jury as to what in law constitutes an accomplice and then proceed to tell them that although they are at liberty to do so, it is dangerous to convict on the uncorroborated evidence of such witnesses.

The rule there stated is so well known that it is difficult to imagine that a "learned and experienced Juvenile Court Judge" would not have it in mind and I would adopt the following statement of Martin C.J.B.C., speaking in the British Columbia Court of Appeal in *Rex v. Bush*[2] as being applicable to the present circumstances. The learned judge there said:

> . . . there is no obligation upon a Judge to exemplify his legal qualifications respecting the rules of evidence in trying a case, because his requisite knowledge of the law pertaining to the proper discharge of the duties of his office must be assumed, and it cannot be inferred that he does not possess a sufficient knowledge of the rules of evidence to try a case properly as regards the evidence of accomplices, or otherwise, without distinction. Nor can it be presumed that he has fallen into error and misdirected himself unless that error is made manifest, *e.g.* it has been in some appeals that have come before us wherein the reasons assigned themselves disclosed the self-misdirection.

[1] [1930] S.C.R. 396 at 399, 400, 54 C.C.C. 301, [1931] 3 D.L.R. 512.
[2] (1939), 71 C.C.C. 269 at 271, 1 D.L.R. 428, 53 B.C.R. 252.

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As I have said, the trial judge made no mention of accomplices and in my opinion the reasons which he assigned for his decision did not disclose any self-misdirection in this regard. If he had given no reasons at all, his decision would not, in my view, have been open to question and I do not think that what he did say afforded any ground for presuming that he fell into error in relation to one of the most elementary rules of evidence.

Judge Fox obviously gave the most careful consideration to the evidence of Jack Best and while I do not say that I would have reached the same conclusion as he did concerning that young man's evidence, the question of credibility is not before us on this appeal and the trial judge was certainly at liberty to convict on it.

In this regard it may also be observed that even Mr. Justice Laskin in the powerful dissent which he delivered in the Court of Appeal did not find the young girls to be accomplices although he did say that their evidence could not amount to corroboration against the accused because it did not itself confirm his participation or implicate him in the offences charged. I disagree with this latter finding and observe that Janice Janes stated that on more than one occasion on Saturday nights the accused had admitted Jack Best and herself to the church where they repaired to an apartment which was furnished with nothing but two couches and one chair, and there had sexual intercourse and remained until about 11:30 p.m. during all of which time Mr. Horsburgh was in the church and after which Janice Janes says: "I think we always went to say goodbye to him". In my opinion this evidence corroborates and confirms the evidence of Jack Best in relation to the accused's participation in the offence of contributing to the girl's delinquency.

The evidence of the youths Butler and Bechard was admissible as proving system and intent, but there is no way of knowing what weight was attached to it by the trial judge as he made no comment whatever on either of these witnesses. I am not prepared on this account to assume that he acted on it or that if he did act on it he failed to appreciate the danger of doing so. There was, in my view, ample other evidence that the accused committed the offences of which he was found guilty.

Counsel for the appellant advanced the further objection that the examination of the child witnesses on the question of whether or not they understood the nature of an oath was not sufficient to enable the judge to form an opinion in that regard as he is required to do under s. 19 of the *Juvenile Delinquents Act*. That section is almost identical with s. 16 of the *Canada Evidence Act* and reads as follows:

> 19. (1) When in a proceeding before a Juvenile Court a child of tender years who is called as a witness does not, in the opinion of the judge, understand the nature of an oath, the evidence of such child may be received, though not given under oath, if in the opinion of the judge such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
>
> (2) No person shall be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect.

The provisions of s. 16 of the *Canada Evidence Act* were considered in this Court in *Sankey v. The King*[1], where Anglin C.J. said at 439 and 440:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself on the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; *as to both he is entrusted with discretion, to be exercised judicially* and upon reasonable grounds. The term 'child of tender years' is not defined. Of no ordinary child over seven years of age can it be safely predicated from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *A very brief inquiry may suffice to satisfy the judge on this point.* But some inquiry would seem to be indispensable.

(The italics are my own.)

In my opinion, very special considerations apply to the determination of this issue when the child is appearing before "an experienced Juvenile Court Judge" who has the special advantage of having children come before him from day to day. A man of such experience should, indeed, be able to satisfy himself on this point after "a very brief inquiry". I am not prepared to find on the present record that Judge Fox acted otherwise than judicially in forming the opinions which he did with respect to the children who came before him.

[1] [1927] S.C.R. 436, 48 C.C.C. 97, 4 D.L.R. 245.

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Two affidavits were tendered before this Court, as they were before the Court of Appeal, sworn to by witnesses who had testified at the trial, both of which were to the effect that their evidence was untrue. We were asked to accept these affidavits, and while I do not for a moment suggest that there might not be cases where this kind of evidence should be accepted, I am nonetheless of opinion, for the reason stated by Mr. Justice Evans, whose conclusion was unanimously adopted by the Court of Appeal, that these affidavits should be rejected. As Mr. Justice Evans said: "I believe there must be some finality to the evidence of a trial."

For all these reasons I would dismiss this appeal.

SPENCE J.:—I have had the opportunity of reading the reasons of Mr. Justice Martland and I agree with his conclusion and also agree with the view which he expressed that it is not a valid ground for the refusal to hear the evidence of the two self-contradicting witnesses that the said witnesses had testified at the trial on the very issues where they now had expressed willingness to retract their previous evidence and contradict it.

In view, however, that a new trial may result, I think it proper to express my view on other submissions made by counsel for the appellant.

The said counsel submitted that five young witnesses who gave evidence for the Crown should not have been sworn in that the examination of the said witnesses failed to demonstrate that they understood the nature of an oath. These witnesses were the following persons:

Susanne Westfall who was, at the time of the trial, one month less than 15 years of age.

Robert Miller who was 16 years of age.

Judy Kibble who was 15 years of age.

Glen Eldridge who was 16 years of age, and

Janice Janes who was 15 years of age.

I have considered the authorities quoted by counsel for the appellant and it should be noted that none of them is concerned with children of such age, but on the other hand deal mostly with children much younger in years.

Mr. Justice Ritchie in his reasons for judgment herein has cited the judgment of Anglin C.J. in this Court in *Sankey v. The King*[1]. As the learned Chief Justice pointed out, the trial judge is entrusted with a discretion to determine whether or not a child offered as a witness understands the nature of an oath, and that such discretion, of course, must be exercised judicially and upon reasonable ground. The learned Chief Justice, however, noted that a very brief inquiry may suffice to satisfy the judge on this point.

Sankey v. The King was concerned with a child ten years of age, who indeed first gave her age as eight. I am of the opinion that a very brief inquiry indeed would have sufficed to satisfy the learned trial judge as to the ability of witnesses 15 and 16 years of age to understand the nature of an oath.

I have considered the examination of each of the witnesses by the learned trial judge and I have come to the conclusion, to use the words of the majority of this Court in *The Matter of a Reference concerning Steven Murray Truscott*[2], that "the learned trial judge properly exercised the discretion entrusted to him and that there were reasonable grounds for concluding that (the child witnesses) understood the moral obligation of telling the truth". I am of the opinion that the test so set out must be considered to be that upon which the competency of a child of tender years to be sworn must now be determined.

As Mr. Justice Ritchie notes, the statement in the learned trial judge's reasons in reference to the consideration of the evidence of children who had been sworn was made the subject of a vigorous attack by counsel for the appellant. I refer particularly to the sentence "in other words, once the judge has decided, after making due inquiry, that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness". With respect, I must differ from the view of Mr. Justice Ritchie that there the learned trial judge was doing no more than stating that the sworn evidence of children differs from unsworn evidence of children in that the latter requires corroboration.

[1] [1927] S.C.R. 436 at 439, 48 C.C.C. 97, 4 D.L.R. 245.
[2] [1967] S.C.R. 309, 1 C.R.N.S.1, 2 C.C.C. 285, 62 D.L.R. (2d) 545.

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The view expressed by the learned trial judge is not only that the evidence of children, once sworn, must be received, but it must be treated as that of a competent adult witness. In my opinion, this is a serious misdirection, as the witnesses, despite the fact that it was determined, in my opinion properly, that they were capable of being sworn, were nevertheless child witnesses and their testimony bore all the frailties of testimony of children, such frailties as Judson J. in this Court referred to in *Kendall v. The Queen*[1]. The evidence of such children was, as Judson J. pointed out, subject to the difficulties related to (1) capacity of observation, (2) capacity to recollect, (3) capacity to understand questions put and frame intelligent answers, and (4) the moral responsibility of the witness. It is this fourth difficulty which is very marked in the present case.

These five children particularly as well as other witnesses were all juveniles who had on their own repeated admissions been guilty of the most serious sexual misconduct. It was the whole import of their evidence that they had been encouraged or even led into that conduct by the words and acts of the accused. It would be natural that children making such confessions of their own misconduct would be only too anxious to seek excuse in attempting to put, whether it be to foist or not, the blame on the adult accused. To consider their evidence as that of competent adult witnesses under the circumstances, in my opinion, constituted the gravest error. Their testimony should have been weighed in the light of these most serious circumstances. With respect, I am of the opinion that the learned trial judge did not do so. Having noted the inconsistencies of their evidence, and having shown he was fully aware of their equivocal position, he nevertheless proceeded to assign credibility to their testimony, it would appear, basing such view upon their demeanour and not keeping in mind their history.

Findings of fact are, of course, for the learned trial judge but such findings must be made upon a consideration of the proper factors. I am of the opinion that the learned trial judge here, in the sentence I have quoted, deprived

[1] [1962] S.C.R. 469 at 473, 37 C.R. 179, 132 C.C.C. 216.

himself of one of the proper factors and proceeded, in his assignment of the credibility of the witnesses, to exhibit that he had so deprived himself.

I am further of the opinion that the learned trial judge erred in his assessing the credibility of the witnesses not only by failing to view with sufficient caution the evidence of children given in the circumstances to which I have referred but by failing to consider the evidence given by the accused in denial of such evidence of the children with any proper appreciation of the character of the accused who gave such evidence. There was adduced at trial for the defence not only the evidence of the accused but, inter alia, evidence testifying to the good character of the accused given by:

Mrs. Beatrice W. Fennell who had known the accused during the four years he occupied the position of pastor at this Church in Chatham;

The Reverend G. Morton Patterson, who had been acquainted with the accused since 1948 in the Sudbury area and in the City of Hamilton, and who had worked with him;

Reginald Johnson, a metallurgical chemist with the International Nickel Company at Copper Cliff, who had also worked with the accused in the Church at Sudbury;

David Innes, a barrister practising at Sudbury;

Cecil Robinson, Q.C., of Hamilton, who had been a member of the Trustees of the Church in Hamilton at which the accused was minister for some years;

Dr. Gordon Price, Director of Education in the City of Hamilton, a member of the same Church for many years;

Donald Fairfax, another member of the same Church in Hamilton;

The Reverend Donald Smeaton, a United Church clergyman who had been the accused's assistant when the accused had been pastor of a congregation in Waterloo, Ontario;

Mrs. Mae Hallman, who had been a member of the congregation in Waterloo;

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Jack Hansford, Sr., and *Jack Hansford, Jr.*, members of the same Church in Waterloo;

Mrs. Ida Davis, also a member of such Church;

Robert Lang, another member of such Church.

Without stating the evidence of these twelve witnesses in detail, suffice it to say they gave very strong character evidence in favour of the accused man. The learned trial judge, although he realized and acknowledged that the accused was a clergyman and had been so for years, did not, in weighing the evidence of the many child witnesses for the prosecution whose admitted conduct may well be characterized as disreputable, assess that evidence having in view the denial of it by the accused whose character was vouched for by the very large volume of evidence to which I have referred.

The learned trial judge did not refer at all to the character evidence in giving his reasons.

In *Rex v. Britnell*[1], Meredith J.A., in considering an appeal by a bookseller from a conviction for sale of obscene books, said at pp. 137-8:

> The convicted man is a reputable book-seller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, or the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

In *Regina v. Chapman*[2], O'Halloran J.A. said at p. 362:

> According to the rules which this Court recognizes as inherent in any finding of credibility, his professional reputation must stand unless it is shown by conclusive evidence beyond reasonable doubt, that he has engaged in some practice that denies the maintenance of that reputation.

And at 363:

> In the second place a man's professional reputation ought not to be taken away from him, except for conclusive reasons which in fairness to the man himself ought to be carefully set out by the trial judge whose decision deprives him of that reputation. It is to be regretted that was not done in this case.

[1] (1912), 26 O.L.R. 136, 20 C.C.C. 85, 4 D.L.R. 56.
[2] (1958), 121 C.C.C. 353, 29 C.R. 168, 26 W.W.R. 385.

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I am of the opinion that the accused on whose behalf such evidence had been adduced was entitled to have that evidence of his character cited and considered by the trial judge in arriving at his decision. As the record stands, there is no way of determining whether such evidence was given any consideration by the learned trial judge.

For these reasons, as well as for those outlined by Mr. Justice Martland, I would allow the appeal and direct a new trial.

Appeal allowed, new trial ordered, FAUTEUX, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellant: C. Dubin, Toronto and C. E. Perkins, Chatham.

Solicitor for the respondent: The Attorney General for Ontario.

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*May 23, 24, 25 Oct. 3

CYRIL McKENZIE and GEORGE McKENZIE (*Plaintiffs*) ..... APPELLANTS;

AND

HENRY BENJAMIN HISCOCK and CHARLES S. DOWIE (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Agreement to sell half-section of land—Property subsequently sold to third party—Action for specific performance—Quarter-section subject to provisions of The Homesteads Act—Wife's consent to sale not given—Discretionary power to award damages as to remaining quarter-section—The Queen's Bench Act, R.S.S. 1953, c. 67, s. 44(9).

Appeals—Appeal to Supreme Court of Canada—Jurisdiction—Amount in controversy—The Supreme Court Act, R.S.C. 1952, c. 259, s. 36(a).

In an action for specific performance of a contract for the sale by the respondent H to the appellants of the west half of a section of land, the trial judge in dismissing the action held that the negotiations between the parties had never ripened into contract. On September 26, 1961, H had given a signed note, addressed to the appellants, which read: "The price I am asking for the [land] is $13,500. This price is good until Nov. 30th, 1961." Tenders of the said purchase

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

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price in cash were made to H on November 17 and November 29, 1961. On October 2, 1961, H and his wife signed an agreement for the sale of the half-section to the respondent D for the price of $14,000 and on October 18, 1961, executed a transfer of title to him but this transfer was not registered until January 1962 and in the meantime the appellants had, on November 14, 1961, filed a caveat claiming as purchasers of the land in question.

The court of Appeal held, (i) that H had agreed to sell the half-section to the appellants but, (ii) that as the northwest quarter of the section had been a homestead of H and his wife and she had refused to consent to the sale to the appellants the agreement could not be enforced as to that quarter and, (iii) that in all the circumstances of the case the Court ought not to decree specific performance as to the southwest quarter but should award damages which it fixed at $800. In the result it was directed that judgment be entered against H for $800 with costs of the trial and of the appeal and that as against D the action and appeal stand dismissed without costs.

On appeal to this Court the appellants asked specific performance as to the half-section, alternatively specific performance as to the southwest quarter-section with compensation, in either case consequential relief and, as against D, that they be awarded costs throughout. The respondents, by notice to vary, asked that the action be dismissed as to both respondents with costs throughout.

At the opening of argument the question of the Court's jurisdiction to hear the appeal was raised from the bench and, after some discussion, it was decided that this question should be reserved and counsel were heard fully on the merits of the appeal as well as on the question of jurisdiction.

Held: The appeal and cross-appeal should be quashed.

There was in existence on November 30, a contract binding H to sell the half-section in question to the appellants for $13,500. This contract would *prima facie* have been specifically enforceable but for the facts that the northwest quarter of the section was subject to the provisions of *The Homesteads Act,* R.S.S. 1953, c. 111, as amended by 1954 (Sask.), c. 21, and the wife of H at no time consented to the sale thereof to the appellants. H's wife could not be compelled to consent to the sale of the said quarter-section to the appellants and without her consent there was no enforceable contract as to that quarter. The appellants were entitled neither to a decree of specific performance in regard to the northwest quarter nor to damages for failure to carry out the agreement to convey it. *Meduk v. Soja,* [1958] S.C.R. 167; *British American Oil Co. Ltd. v. Kos,* [1964] S.C.R. 167; *Halldorson v. Holizki,* [1919] 1 W.W.R. 472, affirmed [1919] 3 W.W.R. 86, applied; *Scott and Sheppard v. Miller,* [1922] 1 W.W.R. 1033, referred to.

As to whether the Court of Appeal had erred in not directing specific performance of the sale of the southwest quarter-section with compensation, that Court had fully recognized that while the jurisdiction conferred by *The Queen's Bench Act,* R.S.S. 1953, c. 67, to award damages in lieu of specific performance is discretionary, the discretion must be exercised judicially. That being so, this Court ought not to

interfere unless satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way. Far from being so satisfied, the Court agreed that in the circumstances of this case the award of damages was "not only an adequate but a more appropriate remedy". The amount at which the Court of Appeal assessed the appellants' damages had not been shown to be erroneous. Accordingly, assuming that the Court had jurisdiction, the appeal and cross-appeal should be dismissed.

On the matter of jurisdiction, the question raised was whether, as required by s. 36(*a*) of the *Supreme Court Act*, "the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars". Since the case of *Orpen v. Roberts*, [1925] S.C.R. 364, it has been settled that the amount or value of the matter in controversy is the loss which the appellant will suffer if the judgment in appeal is upheld. In the case at bar the loss which the appellants will suffer if the judgment is upheld is not $13,500, the price which they agreed to pay, but rather the difference between that sum and the value of the half-section, plus a possible award of damages in addition to the decree of specific performance. On the evidence, it appeared impossible to say that the total of these two amounts could amount to as much as $10,000. Jurisdiction could not be assumed in a doubtful case.

In the opinion of the Court, the amount or value of the matter in controversy in the appeal did not exceed $10,000 and the Court was without jurisdiction. *Tonks et al. v. Reid et al.*, [1965] S.C.R. 624; *Cully v. Ferdais* (1900), 30 S.C.R. 330, applied.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing in part an appeal from a judgment of Balfour J. Appeal and cross-appeal quashed.

Robert H. McKercher, Q.C., and *John A. Stack*, for the plaintiffs, appellants.

George J. D. Taylor, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] allowing in part an appeal from a judgment of Balfour J.

The action was for specific performance of a contract for the sale by the respondent Hiscock to the appellants of the west half of Section 31 in Township 30 in Range 12 west of the Third Meridian in the Province of Saskatchewan.

[1] (1966), 54 W.W.R. 163.

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The learned trial judge dismissed the action without costs, holding that the negotiations between the parties had never ripened into contract.

The Court of Appeal held, (i) that the respondent Hiscock had agreed to sell the half-section mentioned above to the appellants but, (ii) that as the northwest quarter of the section had been a homestead of Hiscock and his wife and she had refused to consent to the sale to the appellants the agreement could not be enforced as to that quarter and, (iii) that in all the circumstances of the case the Court ought not to decree specific performance as to the southwest quarter but should award damages which it fixed at $800. In the result it was directed that judgment be entered against the respondent Hiscock for $800 with costs of the trial and of the appeal and that as against the respondent Dowie the action and appeal stand dismissed without costs.

In this Court the appellants ask specific performance as to the half-section, alternatively specific performance as to the southwest quarter-section with compensation, in either case consequential relief and, as against Dowie, that they be awarded costs throughout.

The respondents, by notice to vary, ask that the action be dismissed as to both respondents with costs throughout.

At the opening of the argument before us the question of our jurisdiction to hear the appeal was raised from the bench and, after some discussion, it was decided that this question should be reserved and counsel were heard fully on the merits of the appeal as well as on the question of jurisdiction.

The facts are fully set out in the reasons for judgment of Brownridge J.A. with whom Hall J.A. agreed. Woods J.A. agreed in the result but for somewhat different reasons. A comparatively brief statement of the facts will be sufficient to indicate the reasons for the conclusion at which I have arrived.

The plaintiffs farmed the west half of the section in question as tenants of the respondent Hiscock during the years 1946 to 1961. From time to time during this period the matter of the sale of the land to the McKenzies was discussed and about the month of July 1961, Hiscock

informed the plaintiffs that he had decided to sell. At this time the Hiscocks were living in the City of Saskatoon and the McKenzies were farming the half-section together with other land which they owned in the district of Zealandia, Saskatchewan.

Commencing in July 1961, there were discussions and correspondence between the appellants and the respondent Hiscock looking to the sale of the half-section and seeking to fix the price. It is not necessary to set these out in detail.

Up to September 26, 1961, the price discussed had been $12,800 and the appellants had applied to the Farm Credit Corporation for a loan of that amount.

On September 26, 1961, the respondent Hiscock telephoned to the appellant George McKenzie and told him the price of $12,800 was not satisfactory and that the appellants would have to pay $13,500. The McKenzies asked to be assured that the price would not be raised again and later in the day drove to Saskatoon accompanied by a friend, Lyle Moen, to see the Hiscocks. After a conversation lasting some two hours a document filed as ex. P.1 was written out and signed. It reads as follows:

Sept. 26th, 1961.

George and Cyril McKenzie

The price I am asking for the W1/2-31-30-12-W3 is $13,500. Thirteen Thousand five hundred dollars.

This price is good until Nov. 30th, 1961.

G. W. McKenzie
per Cyril McKenzie

'Henry Benjamin Hiscock'
214 Ave. Q.N.,
Saskatoon

Lyle Moen
Sept. 26, 1961
Saskatoon

The appellants contend that a binding agreement to sell was made on September 26, 1961, of which ex. P.1 is a sufficient memorandum in writing and, alternatively, that ex. P.1 was an offer to sell at the price stated which was open for acceptance by them up to November 30, 1961, and which was accepted by tenders of the purchase price in cash made to the respondent Hiscock on November 17 and

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November 29, 1961. The second of these tenders was accompanied by a letter dated November 30, 1961, reading as follows:

November 30, 1961.

Mr. Henry Benjamin Hiscock,
214 Avenue Q. North,
Saskatoon, Sask.

Dear Sir:

We are hereby tendering Thirteen Thousand, Five Hundred ($13,500.00) Dollars in cash on behalf of George McKenzie and Cyril McKenzie, for the purchase of the West Half of Section 31, in Township 30, in Range 12, West of the Third Meridian, in compliance with your agreement dated the 26th of September, A.D. 1961.

In the event that you cannot sell the whole of the West half of Section 31, in Township 30, in Range 12, West of the Third Meridian because of homestead rights on one Quarter-Section of the said Half-Section, we hereby tender one-half of the sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars in cash for the purchase of the remaining Quarter Section of the said West Half of the Third Meridian, being Six Thousand, Seven Hundred and Fifty ($6,750.00) Dollars in cash.

The tender of the amount of Six Thousand, Seven Hundred and Fifty ($6,750.00) Dollars is based on the negotiated price for the One-Half Section of Forty ($40.00) Dollars per acre for approximately Three Hundred and Twenty (320) acres, and Seven Hundred ($700.00) Dollars in addition thereto, making the sum of Twelve Thousand, Eight Hundred ($12,800.00) Dollars plus Seven Hundred ($700.00) Dollars, amounting to Thirteen Thousand, Five Hundred ($13,500.00) Dollars for the said one-half Section, Six Thousand Seven Hundred and Fifty ($6,750.00) Dollars is the sum of Forty ($40.00) Dollars per acre for approximately One Hundred and Sixty (160) acres plus Three Hundred and Fifty ($350.00) Dollars.

We are making these tenders by way of a new tender and also by way of affirming our tender on the 17th day of November, A.D., 1961, of Thirteen Thousand, Five Hundred ($13,500.00) Dollars in cash on behalf of George McKenzie and Cyril McKenzie for the purchase of the West Half of Section 31, in Township 30, in Range 12, West of the Third Meridian, in compliance with your agreement dated the 26th day of September, A.D. 1961.

Yours truly,
MACKLEM & CUELENAERE
per 'M. C. Cuelenaere'
Solicitors for George
McKenzie and Cyril McKenzie.

On October 2, 1961, the respondent Hiscock and his wife signed an agreement for the sale of the half-section to the respondent Dowie for the price of $14,000 and on October 18, 1961, executed a transfer of title to him but this transfer was not registered until January 1962 and in the meantime the appellants had, on November 14, 1961, filed a caveat claiming as purchasers of the land in question.

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At the time of making the later of the two tenders mentioned above the appellants had not been given notice of the sale to Dowie or of any revocation by the respondent Hiscock of the offer (if such it was) contained in ex. P.1. Prior to agreeing to purchase the land in question Dowie had knowledge of the existence and contents of ex. P.1 and had obtained legal advice as to its effect.

Both the learned trial judge and the Court of Appeal found the facts to be as briefly summarized above. These findings are supported by the evidence and should not be disturbed.

The learned trial judge held that ex. P.1 was not an offer to sell but rather an indication of a willingness to negotiate or an invitation to the appellants to submit an offer to buy; he found the case to be indistinguishable from the judgment of the full Court of the North-West Provinces in *Blackstock v. Williams*.[1]

In the Court of Appeal Brownridge J.A., with whom Hall J.A. agreed, held that on September 26, 1961, the respondent Hiscock orally offered to sell the half-section to the appellants for $13,500, that they immediately accepted his offer, that in the evening of the same day an added term was agreed to and that thereupon there came into existence a contract for the sale of the half-section at the price mentioned a condition of which was that if the appellants could not raise the purchase money by November 30 neither party would be bound. He held further that ex. P. 1 constituted a sufficient memorandum in writing of this contract.

Woods J.A. took the view that ex. P.1 was an offer to sell the land for $13,500 open for acceptance at any time up to November 30, that it was accepted by the tender of the purchase price at a time when the appellants had not been notified that the offer was revoked and that accordingly the respondent Hiscock was bound by the contract.

While I incline to prefer the view of Woods J.A., I do not find it necessary to choose between these two views as on either there was in existence on November 30 a contract binding the respondent Hiscock to sell the half-section in question to the appellants for $13,500 and I agree with this

[1](1907), 6 W.L.R. 79, 7 Terr. L.R. 362.

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conclusion. This contract would *prima facie* have been specifically enforceable but for the facts that the northwest quarter of the section was subject to the provisions of *The Homesteads Act,* R.S.S. 1953, c. 111, as amended by 1954 (Sask.), c. 21, and Mrs. Hiscock at no time consented to the sale thereof to the appellants.

The relevant provision of *The Homesteads Act* is the first paragraph of subs. 1 of s. 3 which reads as follows:

> 3 (1) Every transfer, agreement for sale lease or other instrument intended to convey or transfer an interest in a homestead to any person other than the wife of the owner, and every mortgage intended to charge a homestead in favour of any such person with the payment of a sum of money, shall be signed by the owner and his wife if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and she shall appear before a district court judge, local registrar of the Court of Queen's Bench, registrar of land titles or their respective deputies or a solicitor or justice of the peace or notary public and, upon being examined separate and apart from her husband, she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent and without compulsion on the part of her husband.

While the form of this enactment differs considerably from the corresponding provisions of *The Dower Act* of Alberta which were considered by this Court in *Meduk v. Soja*[1] and in *British American Oil Co. Ltd. v. Kos*[2], in my opinion, the reasoning in those cases shews that Mrs. Hiscock could not be compelled to consent to the sale of the northwest quarter-section to the appellants and that without her consent there was no enforceable contract as to that quarter. The matter has been considered in the Courts of Saskatchewan in the case of *Halldorson v. Holizki*[3]. The *Act respecting Homesteads* there considered was 1915 (Sask.), c. 29, as amended by 1916 (Sask.), c. 27, and is in substantially the same terms as the Act with which we are concerned. In that case a husband had agreed to sell 400 acres part of which was the homestead and the wife did not consent to the sale. At. p. 477 of the trial judgment Taylor J. said:

> I conclude therefore that the assent of the husband alone to an agreement of sale respecting the homestead is an ineffectual assent. The bargain is inchoative until the wife assents in the manner required by the statute, and the husband is not liable for failure to perform the agreement in so far as it relates to the homestead.

[1] [1958] S.C.R. 167.
[2] [1964] S.C.R. 167.
[3] [1919] 1 W.W.R. 472, affirmed [1919] 3 W.W.R. 86.

In *Scott and Sheppard v. Miller*[1], the Court of Appeal for Saskatchewan left open the question whether a husband could be held liable in damages for failure to perform an agreement by him to sell the homestead when his wife refused to consent to the sale; but the reasoning of Lamont J., with whom Haultain C.J.S. agreed, appears to me to be persuasive for the view that the husband would not be liable. He said at pp. 1087 and 1088:

> Our *Homestead Act* was passed for the purpose of preventing a husband from disposing of the homestead without the consent of his wife, given without compulsion and of her own free will. Although the Act gives the wife an interest in the homestead independent of her husband, it must not be forgotten that they are still man and wife, with, in most respects, interests which are identical. The prosperity of the husband generally speaking means the prosperity of the wife, while any losses sustained by him are losses which she must share. If, therefore, the husband enters into an agreement to sell the homestead, and if it be held that his wife's refusal to consent to the sale results in the husband being mulcted in heavy damages for breach of his contract, which damages will be so much loss to their joint estate, it seems to me that the freedom of will and the absence of compulsion which the statute requires on the part of the wife would be very greatly interfered with. In many of such cases I fear the wife would be found making a declaration that she was signing the conveyance of her own free will, when, in fact, she was doing so very reluctantly, and under the compulsion, which threatened loss by way of heavy damages for her husband's breach of contract, would exert upon her. To put this species of compulsion upon a wife seems to me to be entirely inconsistent with the spirit of the Act.

In my view, in the case at bar, the appellants were entitled neither to a decree of specific performance in regard to the northwest quarter nor to damages for failure to carry out the agreement to convey it.

Before leaving this point mention should be made of the argument developed in the appellants' factum, but not referred to in the judgments below, to the effect that because Mrs. Hiscock consented to the sale to Dowie her refusal to consent to the sale to the appellants cannot be relied upon as a defence to their action. This argument should, in my opinion, be rejected. If the appellants are to be awarded specific performance the sale and transfer to Dowie would of necessity have to be set aside. The circumstance that a wife is willing to consent to the sale of the homestead to one person is no ground for holding that her consent to its sale to another person at a lower price is unnecessary.

[1] [1922] 1 W.W.R. 1083.

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Turning now to the question whether the Court of Appeal erred in not directing specific performance of the sale of the southwest quarter-section with compensation, it may first be observed that s. 44(9) of *The Queen's Bench Act*, R.S.S. 1953, c. 67, provided:

> 44. The law to be administered in this province as to the matters next hereinafter mentioned shall be as follows:
>
> (9) In all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement, the court may if it thinks fit award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such a manner as the court may direct, or the court may grant such other relief as it may deem just;

The jurisdiction conferred by this section to award damages in lieu of specific performance has existed in England since the enactment of 21 & 22 Vict., c. 27 (commonly called *Lord Cairn's Act*). While the jurisdiction conferred is discretionary the discretion must be exercised judicially and this was fully recognized in the judgments delivered in the Court of Appeal in the case at bar. That being so, it is my view that we ought not to interfere unless satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way. Far from being so satisfied, it is my opinion that in the particular circumstances of this case which are examined at length in the reasons of Brownridge J.A. the award of damages is as he found "not only an adequate but a more appropriate remedy". I find no error in the reasoning which led him to this result.

The amount at which the Court of Appeal assessed the appellants' damages has not been shown to be erroneous.

For these reasons, assuming that we have jurisdiction, I would dismiss the appeal. On the same assumption, I would dismiss the cross-appeal raised by the notice to vary. I have already stated my agreement with the finding of the Court of Appeal that the respondent Hiscock did agree to sell the lands in question to the appellants and with its decision to award damages in lieu of specific performance. The figure at which the damages were fixed has not been shown to be excessive. I would not interfere with the orders as to costs made by the Court of Appeal.

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It remains to consider the question of our jurisdiction to entertain the appeal. Upon this question being raised counsel for the appellants submitted that we have jurisdiction while counsel for the respondents argued to the contrary.

The relevant provision of the *Supreme Court Act*, R.S.C. 1952, c. 259, is clause (*a*) (substituted 1956, c. 48) of s. 36. The judgment of the Court of Appeal is a final judgment of the highest Court of final resort in the province pronounced in a judicial proceeding and the question is whether "the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars".

While, in my opinion, on the facts as found it was impossible for the appellants to be awarded a decree of specific performance as to the whole of the half-section that claim was put forward in the appeal and I cannot say that this was done frivolously or otherwise than in good faith. Had the appeal succeeded *in toto* the appellants would have been awarded specific performance of the agreement to convey the half-section, plus perhaps some damages for delay in performing the contract, but would, of course, have had to pay the purchase price of $13,500. In *Tonks et al. v. Reid et al.*[1], it was said, in a unanimous judgment of this Court, at p. 627:

> Since the case of *Orpen v. Roberts*, [1925] S.C.R. 364, it has been settled that the amount or value of the matter in controversy is the loss which the appellant will suffer if the judgment in appeal is upheld.

In the case at bar the loss which the appellants will suffer if the judgment is upheld is not $13,500, the price which they agreed to pay but rather the difference between that sum and the value of the half-section, plus, as mentioned above, a possible award of damages in addition to the decree of specific performance. On the evidence in the record it appears to me impossible to say that the total of these two amounts could amount to as much as $10,000. In *Cully v. Ferdais*[2], Taschereau J., as he then was, delivering the unanimous judgment of the Court said at p. 333, after stating that the question of jurisdiction in that case might not be free from doubt:

> However the right to appeal is not clear, and the rule as to appeals is that the Court cannot assume jurisdiction in a doubtful case.

[1] [1965] S.C.R. 624.

[2] (1900), 30 S.C.R. 330.

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In my opinion, the amount or value of the matter in controversy in the appeal does not exceed ten thousand dollars and we are without jurisdiction. Had this question been raised at an early stage by a motion to quash substantial expense would have been saved.

I would quash both the appeal and the cross-appeal. In the somewhat unusual circumstances of this case I would make no order as to costs in this Court.

Appeal and cross-appeal quashed.

Solicitors for the plaintiffs, appellants: Wedge, McKercher & McKercher, Saskatoon.

Solicitors for the defendants, respondents: Goldenberg, Taylor, Tallis & Goldenberg, Saskatoon.

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*Mar. 8, 9, 10, 13, 14, 15 Nov. 7

IN THE MATTER OF A REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL CONCERNING THE OWNERSHIP OF AND JURISDICTION OVER OFFSHORE MINERAL RIGHTS AS SET OUT IN ORDER IN COUNCIL P.C. 1965-750 DATED APRIL 26, 1965.

Constitutional law—Offshore mineral rights—Whether federal or provincial property—Territorial Sea and Fishing Zones Act, 1964 (Can.), c. 22—B.N.A. Act, 1871—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

The Governor General in Council, pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259, has requested this Court to give its opinion on questions concerning the respective proprietary rights and legislative jurisdiction of Canada and British Columbia in relation to certain lands adjacent to the coast line of that Province. [These questions are cited in full at the beginning of the joint opinion delivered by the Court]. Only Quebec, Manitoba, Saskatchewan and Alberta were not represented on this reference. The Attorney General for Canada submitted that the answer to all the questions should be "Canada". The province of British Columbia, whose position was supported by the other provinces, submitted that it possesses exclusive proprietary rights and sole legislative jurisdiction in relation to the lands in question and enjoys the sole right to exploration and exploitation within the limits defined by the terms of reference.

Held: All questions were answered in favour of Canada.

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*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

As to the Territorial Sea.

The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands.

It is the sovereign state of Canada that has the right to explore and exploit these lands.

Canada has exclusive legislative jurisdiction in respect of these lands either under s. 91(1)(*a*) of the *B.N.A. Act* or under the residual power in s. 91. British Columbia has no legislative jurisdiction since the lands in question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province. Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada". The mineral resources of these lands are of concern to Canada as a whole and go beyond local or provincial concern or interests.

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Canada is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

As to the Continental Shelf.

The rights now recognized by international law to explore and exploit the natural resources of the continental shelf do not involve any extension of the territorial sea. The superjacent waters continue to be recognized as high seas. There is no historical, legal or constitutional basis upon which the province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf. There are two reasons why British Columbia lacks these rights: (i) the continental shelf is outside the boundaries of British Columbia, and (ii) Canada is the sovereign state which will be recognized by international law as having the rights stated in the 1958 Geneva Convention, and it is Canada that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by that convention.

Droit constitutionnel—Droits minéraux au large des côtes—Propriété fédérale ou provinciale—Loi sur la Mer territoriale et les zones de pêche, 1964 (Can.), c. 22—Loi de l'Amérique du Nord britannique, 1871—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 55.

Conformément à l'art. 55 de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259, le Gouverneur Général en Conseil a demandé à cette Cour de lui donner son opinion sur des questions concernant les droits de propriété respectivement du Canada et de la Colombie-Britannique ainsi que leur juridiction législative en regard de certains terrains adja-

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cents au littoral de cette province. [Ces questions sont citées au long au commencement de l'opinion collective qui a été rendue par la Cour]. Seules les provinces de Québec, du Manitoba, de la Saskatchewan et de l'Alberta n'ont pas été représentées à l'audition. Le procureur général du Canada a soutenu que la réponse à toutes les questions devait être «Canada». La province de la Colombie-Britannique, dont la position est supportée par les autres provinces, a soutenu qu'elle possède des droits de propriété exclusifs et la juridiction législative exclusive en regard de ces terrains et qu'elle jouit du droit exclusif d'explorer et d'exploiter dans les limites définies par les termes des questions déférées.

Arrêt: Les réponses à toutes les questions doivent être en faveur du Canada.

Quant à la mer territoriale

L'état souverain qui a la propriété du lit de la mer territoriale adjacent à la Colombie-Britannique est le Canada. A aucun moment de son existence, soit comme colonie soit comme province, la Colombie-Britannique a-t-elle eu la propriété de ces terrains.

C'est l'état souverain du Canada qui a le droit d'explorer et d'exploiter ces terrains.

Le Canada a la juridiction législative exclusive en regard de ces terrains, soit en vertu de l'art. 91(1)(*a*) de l'*Acte de l'Amérique du Nord britannique* ou en vertu du pouvoir résiduaire dans l'art. 91. La Colombie-Britannique n'a pas la juridiction législative puisque les terrains en question sont au-delà de ses frontières. Les terrains sous la mer territoriale ne tombent sous aucun des sujets énumérés à l'art. 92 puisqu'ils ne sont pas situés dans la province. La juridiction législative à l'égard de ces terrains doit, en conséquence, appartenir exclusivement au Canada parce que la matière n'est pas une de celles tombant dans les catégories de sujets attribués exclusivement aux législatures des provinces dans le sens des mots que l'on trouve au début de l'art. 91 et que cette matière peut, en conséquence, être considérée avec raison comme étant une matière affectant le Canada généralement et tombant sous l'expression «la paix, l'ordre et le bon gouvernement du Canada». Les ressources minérales de ces terrains sont l'affaire du Canada entier et vont au-delà des intérêts purement locaux ou provinciaux.

De plus, les droits dans la mer territoriale proviennent du droit international et doivent être reconnus par les autres états souverains. Le Canada est un état souverain reconnu par le droit international et conséquemment a la compétence de passer des ententes avec les autres états concernant les droits dans la mer territoriale.

Quant au plateau continental

Les droits maintenant reconnus par le droit international d'explorer et d'exploiter les ressources naturelles du plateau continental ne comportent pas une extension de la mer territoriale. Les eaux surjacentes continuent d'être reconnues comme étant la haute mer. La province de la Colombie-Britannique ne peut s'appuyer sur aucune base historique, légale ou constitutionnelle pour réclamer le droit d'explorer et d'exploiter, ou pour réclamer la juridiction législative sur les

ressources du plateau continental. Il y a deux raisons pour lesquelles la Colombie-Britannique ne peut pas avoir ces droits: (i) Le plateau continental est au-delà des frontières de la Colombie-Britannique et (ii) le Canada est l'état souverain qui sera reconnu par le droit international comme ayant les droits définis à la Convention de Genève de 1958, et c'est le Canada qui devra repousser les réclamations des autres membres de la communauté internationale pour toute violation des obligations et des responsabilités imposées par cette convention.

Son Excellence le Gouverneur Général en Conseil a déféré à la Cour suprême du Canada, conformément aux pouvoirs conférés par l'art. 55 de la *Loi sur la Cour suprême,* S.R.C. 1952, c. 259, pour audition et examen, les questions citées au long au commencement de l'opinion collective qui a été rendue par cette Cour.

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act,* R.S.C. 1952, c. 259, to the Supreme Court of Canada for hearing and consideration of the questions cited in full at the beginning of the joint opinion delivered by this Court.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., D. S. Maxwell, Q.C., Marguerite E. Ritchie, Q.C., and *J. R. Houston,* for the Attorney General of Canada.

W. G. Burke-Robertson, Q.C., A. W. Hobbs, M. H. Smith, for the Attorney General of British Columbia.

F. W. Callaghan, Q.C., and *A.E. Charlton,* for the Attorney General of Ontario.

J. A. Y. Macdonald, Q.C., and *Graham D. Walker,* for the Attorney General of Nova Scotia.

A. W. Matheson, Q.C., for the Attorney General of Prince Edward Island.

Keith Eaton and *G. V. Laforest,* for the Attorney General of New Brunswick.

Hazen Hansard, Q.C., for the Attorney General of Newfoundland.

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THE JOINT OPINION OF THE COURT:—By Order in Council P.C. 1965-750 of April 26, 1965, the Governor in Council referred the following questions to this Court for hearing and consideration:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(*a*) Are the said lands the property of Canada or British Columbia?

(*b*) Has Canada or British Columbia the right to explore and exploit the said lands?

(*c*) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?

2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

(*a*) Has Canada or British Columbia the right to explore and exploit the said mineral and other natural resources?

(*b*) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?

Section 3 of the *Territorial Sea and Fishing Zones Act*, 1964 (Can.), c. 22, reads as follows:

3. (1) Subject to any exceptions under section 5, the territorial sea of Canada comprises those areas of the sea having, as their inner limits, the baselines described in section 5 and, as their outer limits, lines measured seaward and equidistant from such baselines so that each point of the outer limit line of the territorial sea is distant three nautical miles from the nearest point of the baseline.

(2) The internal waters of Canada include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada.

All the provinces of Canada, with the exception of Quebec, Manitoba, Saskatchewan and Alberta were represented on this Reference. Argument was heard from their counsel, who all supported the position taken by the Province of British Columbia. The Attorney General of Canada submitted that the answer to all the questions should be "Canada". British Columbia submitted it possesses exclusive proprietary rights and sole legislative jurisdiction in relation to the lands in question and enjoys the sole right to exploration and exploitation within the limits defined by the terms of reference.

Historical Outline

For some years before 1849, the Hudson's Bay Company carried on trading activities in various parts of the land area now known as British Columbia but it was not until July 16, 1849, that a Civil Government was established by the Queen by the appointment of Richard Blanshard as Governor and Commander-in-Chief of the Colony of Vancouver's Island. In the same month of the same year, the Imperial Parliament enacted a statute to provide for the administration of justice in Vancouver's Island. This statute is to be found in the Revised Statutes of British Columbia, 1911, vol. IV, p. 115, published in 1913.

On January 13, 1849, the Crown granted Vancouver's Island to the Hudson's Bay Company. On April 3, 1867, the Company reconveyed to the Crown whatever lands it had not disposed of.

On August 2, 1858, an Act was passed by the Imperial Parliament "to provide for the Government of British Columbia", that is, the mainland colony. Section 1 of this enactment defines the western boundary of the colony as "the Pacific Ocean".

On November 19, 1858, a proclamation by the then Governor, Sir James Douglas, introduced into the colony of British Columbia the law of England as of November 19, 1858, (Vancouver Island and British Columbia Statutes, 1858-1871).

On December 2, 1858, Sir James Douglas issued a proclamation making it lawful for the Governor of the colony

> by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony;

and providing that

> every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the land therein described. (Vancouver Island and British Columbia Statutes 1858-1871)

On February 14, 1859, Sir James Douglas issued a proclamation the first paragraph of which read as follows:

> 1. All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee. (Vancouver Island and British Columbia Statutes 1858-1871)

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On July 28, 1863, the Imperial Parliament passed an Act to define the boundaries of the colony of British Columbia and to continue an Act to provide for the government of the said colony. Section 3 of this enactment again defines the western boundary of the colony as "the Pacific Ocean". (Revised Statutes of British Columbia, 1911, vol. IV, p. 266.)

On August 6, 1866, the Imperial Parliament passed an Act for the union of the colony of Vancouver Island with the colony of British Columbia. Again, the western boundary of British Columbia was defined in the same way. With the proclamation of this Act by the Governor of both colonies on November 19, 1866, the boundaries of British Columbia as we now know them came into being; no changes were made at the time of Confederation. (Revised Statutes of British Columbia, 1911, vol. IV, p. 273).

In 1866, when the present boundaries of British Columbia were established, the Crown in the right of the Colony owned in fee all the unalienated land in British Columbia and all the mines and minerals therein. This was the opinion of the Privy Council in *Attorney General of British Columbia v. The Attorney General of Canada*[1], where Lord Watson, in giving judgment at p. 301, used the following language:

> The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union.

In *Attorney General of British Columbia v. Pacific Railway* Co.[2], Sir Arthur Wilson, in giving the judgment of the Privy Council, at p. 208, makes the following statement:

> Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The *British North America Act* passed in 1867 contemplated the possibility of British Columbia being admitted into the Union. Section 146 of that Act reads as follows:

> 146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces,

[1] (1889), 14 App. Cas. 295. [2] [1906] A.C. 204.

or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

The Terms of Union whereby the Colony of British Columbia was admitted into and became part of the Dominion of Canada became effective on July 20, 1871. Paragraph 10 of the Terms of Union made the provisions of the *British North America Act, 1867,* applicable in the following language:

10. The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia, in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.

Section 109 of the *British North America Act, 1867* was thus made applicable to British Columbia. That section reads as follows:

109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

The Privy Council interpreted the above section and has held that whatever Proprietary Rights were vested in the Provinces at the date of Confederation remain so vested unless by the express provisions of the Act transferred to the Dominion: *Attorney General of the Dominion of Canada v. The Attorney General for the Provinces of Ontario, Quebec and Nova Scotia*[1].

An example of the express transfers referred to above is contained in s. 108 of the Act, which provided that "The Public Works and Property of each Province enumerated in the Third Schedule to this Act, shall be the Property of Canada."

[1] [1898] A.C. 700.

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The judgment of Chief Justice Rinfret in *Attorney General of Canada v. Higbie et al.*[1], is to like effect:

> Up to the time when British Columbia entered Confederation the title to public lands was in the Crown, and the latter's prerogative in respect thereof was in full effect. The Crown lands remained vested in His Majesty in right of the Province and His Royal prerogative to deal therewith remained unaltered, subject to any provincial statutory provisions binding the Crown, of which there were none.

This historical survey shows that:

1. Before Confederation all unalienated lands in British Columbia including minerals belonged to the Crown in right of the colony of British Columbia;
2. After union with Canada such lands remained vested in the Crown in right of the Province of British Columbia.

But it leaves untouched the problem that we have to face—whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation.

QUESTION 1—The Territorial Sea

It will be noted that Question 1(a) asks whether the lands are the "property" of Canada or British Columbia. The word "property" is susceptible of two meanings here. Canada says that it means rights recognized by international law as described in the Geneva Convention of 1958. The alternative meaning is property in the common law sense, i.e., ownership. British Columbia can only succeed on this branch of the case if it is found that the solum was situate in British Columbia in 1871 at the time of British Columbia's entry into Confederation. This is the whole purpose of the historical survey set out in the British Columbia factum. British Columbia takes the position that the Province of British Columbia included the territorial sea in 1871. Canada, on the other hand, argues that in 1871 at the time of British Columbia's entry into the Union, land below the low-water mark was regarded at common law as being outside the realm; that it was not part of the Colony of British Columbia in 1871, and that at, or following Union, it did not become part of the Province of British Columbia.

[1] [1945] S.C.R. 385 at 409, 3 D.L.R. 1.

The *British North America Act 1871*, 34-35 Vict., c. 28, makes provision in s. 2 for the establishment by the Parliament of Canada of new provinces. By s. 3 it provides for the alteration of the limits of the provinces in the following terms:

> 3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

There has never been any alteration of the limits of the Province of British Columbia pursuant to this section and there is no provision for extending the limits in any other way. The history of the province affords no assistance in settling the problem whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation. Section 109 of the *British North America Act* 1867 affords no assistance in the solution of this problem. Therefore, to succeed on this Reference, British Columbia must show that the territorial sea was, in 1871, part of the territory of British Columbia.

The question was raised in the Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*[1], but it was left unanswered at p. 174:

> In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league... Their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low-water mark to what is known as the three-mile limit, because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries, and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land. They desire, however, to point out that the three-mile limit is something very different from the narrow seas limit discussed by the older authorities such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it... Until then the conflict of judicial opinion which arose in *R. v. Keyn*, 2 Ex. D., 63, is not likely to

[1] [1914] A.C. 153 at 174.

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be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low-water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn C.J., in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

The question was again raised in *Attorney General for Canada v. Attorney General for the Province of Quebec*[1], but was left unanswered at p. 431:

> The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

The question came up again in *Re Dominion Coal Company Limited*[2]. That case had to do with the right of the County of Cape Breton to assess for municipal taxation under-sea coal workings of the company. Part of these workings were under inland waters and therefore within the County of Cape Breton and assessable by it. (There was no evidence that these workings formed part of a public harbour within the Third Schedule (s. 108) of the *British North America Act* so as to involve the Federal Crown Proprietary rights.) Other workings carried on under Spanish Bay were held not to be under inland waters. They were, therefore, outside the municipality and not subject to assessment by that authority. Currie J. dissented on this point and would have held that this part of the operations which was under Spanish Bay was also under inland waters and consequently within the county.

The ratio of the judgment was confined within the narrow limits that we have stated. There was, however, a wider discussion in the reasons of MacDonald J. and Currie J. which dealt with the issues with which we are concerned. MacDonald J. stated these issues, including the effect of the decision in *Reg. v. Keyn*[3] and the effect of the

[1] [1921] 1 A.C. 413 at 431.
[2] (1963), 40 D.L.R. (2d) 593, 48 M.P.R. 174.
[3] (1876), 2 Ex. D. 63.

enactment of the *Territorial Waters Jurisdiction Act* 1878, c. 73. He regarded *Reg. v. Keyn* as settling the common law rule that the territory of the realm ends at low-water mark and that territorial waters within three miles of this limit are not within the body of adjacent counties or of the realm (p. 629). The *Territorial Waters Jurisdiction Act* 1878, he said, was directed to redefining criminal jurisdiction as to offences in territorial waters and did not purport to affect, nor did it affect, the juridical character of those waters as being outside the territorial limits of the realm and the adjoining counties or confer property rights therein (p. 630). But he was careful to define the problem at p. 626 in these terms:

> Basically the problem is whether one or both of the submarine workings can be said to be within the limits of the municipality.

And again at p. 632:

> Accordingly this Court should refuse to be drawn unnecessarily into a pronouncement of such a nature as the proprietary interest in the maritime belt. Moreover, the *Assessment Act* in any case does not purport, expressly or by necessary implication, to bring such beds within the territorial limits of the county defined in the Order in Council of 1824, nor to authorize taxation of the property of others situate therein.

Currie J. also had an obiter opinion:

> Prior to Confederation, Nova Scotia exercised jurisdiction over territorial waters three miles in width measured from its coasts, bays and rivers, and under s. 109 of the *B.N.A. Act*, all property rights held by Nova Scotia before Confederation were retained. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act*.

We have already stated the obiter opinion of MacDonald J. delivered in the *Dominion Coal* case upon the effect of *Reg. v. Keyn*. This case was argued before the Court of Crown Cases Reserved and the reported judgments are lengthy and diverse. The facts were that the Commander of a foreign ship, the *Franconia*, was indicted for manslaughter before the Central Criminal Court arising from the loss of life on a British ship which was sunk by the *Franconia* within three miles of the Port of Dover. The accused was a German national and his ship was on a voyage to a foreign country and was merely passing through English territorial waters at the time of collision. The accused set up a plea of jurisdiction, saying that as

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the offence was committed out of the United Kingdom by a foreigner on board a foreign ship, it was not within the jurisdiction of the English Criminal Courts.

The English Criminal Courts would have had jurisdiction if the act had occurred within the body of a county of England. The question whether the territorial sea was within the body of a county was, therefore, directly in issue. If it had been within the body of the county, the Court of Oyer and Terminer would have had jurisdiction. The majority decision of the court was that the territory of England ends at low-water mark. There was, therefore, no jurisdiction in the Court of Oyer and Terminer. The court also held that the case did not fall within the historical jurisdiction of the Lord High Admiral. That court would have had jurisdiction if the accused had been a British national. The jurisdiction of the Admiral, which begins at low-water mark, did not extend to foreign nationals on foreign ships.

The lengthy reasons of the majority are summarized on the branch of the case in which we are particularly interested in the brief judgment of Lush J., which we quote in full:

> I have already announced that, although I had prepared a separate judgment, I did not feel it necessary to deliver it, because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons upon which those conclusions are founded. I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the

Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament.

As a result of this decision, Parliament enacted the *Territorial Waters Jurisdiction Act* 1878, 41-42 Vict., c. 73. This Act declares that all offences committed on the open sea within one marine league of the coast of any part of Her Majesty's Dominions to be within the jurisdiction of the Admiral. The Act did no more than deal with what was regarded as a gap in the Admiral's jurisdiction. It did not enlarge the realm of England, nor did it purport to deal with the juridical character of British territorial waters and the sea-bed beneath them.

We have to take it, therefore, that even after the enactment of the *Territorial Waters Jurisdiction Act* the majority opinion in *Reg. v. Keyn* that the territory of England ends at low-water mark was undisturbed.

The application of the Act of 1878 is relevant to the problem under consideration here. The Admiral's jurisdiction was made to extend to all offences committed on the open sea within one marine league of the coast of any part of Her Majesty's Dominions. The term "offence" was defined in the Act as "any act of such a nature that it would, if committed within the body of an English county, be punishable on indictment according to the law of England at the time being in force". What would have happened in 1879 if an offence had been committed within one marine league of the coast of British Columbia? Had the case come up in a British Columbia court, the applicable law would not have been the criminal law of Canada but the law of England for the time being in force. If the territory of British Columbia had extended one marine league from low-water mark, the offence would have occurred within Canada and Canadian criminal law ought to have been applicable, but by the express terms of the *Territorial Waters Jurisdiction Act* it was the law of England that applied. The legislation is inconsistent with any theory that in 1878 the Province of British Columbia possessed as part of its territory the solum of the territorial sea.

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Equally inconsistent with any such theory is early Canadian legislation. The *Customs Act 1867*, 31 Vict., c. 6, s. 83, deals with vessels "hovering (in British waters) within one league of the coasts or shores of Canada".

An *Act respecting Fishing by Foreign Vessels*, 1868, 31 Vict., c. 61, s. 1, empowers the Governor to grant licences to foreign vessels to fish

> in British waters, within three marine miles of any of the coasts, bays, creeks or harbours whatever, of Canada, not included within the limits specified and described in the first article of the convention between His late Majesty King George the Third and the United States of America, made and signed at London on the twentieth day of October, 1818.

In contrast, *An Act to amend The Customs Act*, Statutes of Canada 1928, 18-19 Geo. V., c. 16, s. 1, speaks on two occasions of vessels hovering in "territorial waters of Canada" and proceeds to define for the purposes of the section and s. 207 of the *Customs Act* the territorial waters of Canada in the following terms:

> "Territorial waters of Canada", shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.

Regina v. Keyn was decided in 1876. In the following year it was considered in two reported cases: *Harris v. Franconia*[1] and *Blackpool Pier Co. v. Fylde Union*[2]. In *Harris v. Franconia* there was a motion to set aside an order for the service of a writ on a foreigner residing abroad in respect of a cause of action arising at sea below low-water mark though within three miles of the English coast. The judges were Lord Coleridge C.J., Grove J., and Denman J. These were three minority judges in *Reg. v. Keyn* and they were all of the opinion that that case decided that the territory of England and the sovereignty of the Queen stopped at low-water mark (except where under special circumstances and in special Acts, Parliament had thought fit to extend it).

In the *Blackpool Pier* case Lord Coleridge held that the pier extended 500 feet beyond low-water mark and was therefore beyond the realm of England and was not assessable to that extent for poor rate under the *Poor Law Amendment Act* of 1867. The other judge was Grove J.

[1] (1877), 2 C.P.D. 173, 46 L.J.Q.B. 363.
[2] (1877), 36 L.T. 251, 46 L.J.M.C. 189.

To express our conclusion up to this point, we adopt the summary in Coulson & Forbes on Waters and Land Drainage, 6th ed., 1952, at p. 12:

1. The realm of England where it abuts upon the open sea only extends to low water mark; all beyond is the high sea.

2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.

3. This concession is evidenced by treaty or by long usage.

4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the Legislature.

We do not intend to trace the history of the claims to the territorial sea in International Law. That history is conveniently summarized in the work, published in 1965, by D. P. O'Connell on International Law, vol. I, pp. 523-528. Very wide claims have been made from time to time. In *Attorney General for British Columbia v. Attorney General for Canada*[1], as we have observed, the Privy Council said:

They desire, however, to point out that the three-mile limit is something very different from the narrow seas limit discussed by the older authorities such as Selden and Hale, a principle which may safely be said to be now obsolete.

The logical starting point is now the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which may now be regarded as defining the present state of international law on this subject. We set out Articles 1 to 4(1). (The rest of Article 4 deals with methods of drawing baselines):

Article 1. 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

Article 2. The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

Article 3. Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4. 1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

[1] [1914] A.C. 153.

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This Convention was signed by Canada on April 29, 1959, but not yet ratified. It came into force on September 10, 1964, upon ratification by a sufficient number of nations.

The Convention does not state the width of the territorial sea over which the sovereignty of the state is recognized. A second conference which was held in 1960 was unable to reach any agreement on this subject. The claims of the various states of the world as to the extent of the territorial sea are set out in D. P. O'Connell's International Law, Vol. I, pp. 531-2. Canada claims three nautical miles plus nine nautical miles for fishing. (*Territorial Sea and Fishing Zones Act,* 13 Eliz. II, Statutes of Canada 1964, c. 22, s. 3 (quoted at the beginning of these reasons) and s. 4 as to the extent of the fishing zones.)

We have already said that, in our opinion, in 1871 the Province of British Columbia did not have ownership or property in the territorial sea and that the province has not, since entering into Confederation, acquired such ownership or property. We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the colony rights to which the British Crown was entitled under international law but the historical record of the colony does not disclose any such action.

This brings us to the Conception Bay case, *The Direct United States Cable Company v. The Anglo-American Telegraph Company.*[1] The Supreme Court of Newfoundland had granted an injunction to prevent the appellant, The Direct United States Cable Company, from infringing certain rights which Newfoundland had granted to the respondent company, Anglo-American Telegraph. The appellant had laid a telegraph cable to a buoy more than thirty miles within Conception Bay, which is on the east coast of Newfoundland between two promontories which are slightly more than twenty miles apart. The average width of the Bay is fifteen miles. The distance from the head of the Bay to the two promontories is forty miles on one side and fifty miles on the other. The buoy and cable were more than three miles from the shore of the Bay.

[1] (1877), 2 App. Cas. 394, 46 L.J.P.C. 71.

The appeal was dismissed in the Privy Council and the injunction upheld. This was done for two reasons. First, there was legislation of Newfoundland, 17 Vict., c. 2, which authorized the prohibition of the laying of the cable. Second, there was legislation of the Imperial Legislature, 59 Geo. III, c. 38, which asserted exclusive dominion over the Bay. This legislation had never been questioned by any foreign state and, by 35-36 Vict., c. 45, the Imperial Legislature conferred upon the Legislature of Newfoundland the right to legislate with regard to Conception Bay as part of the territory of Newfoundland. This is the ratio of the case and it does not carry with it any general delegation by the British Crown over the territorial sea surrounding Newfoundland.

Rex v. Burt[1] was concerned with the seizure of a ship carrying a cargo of intoxicating liquor off Chance Harbour in the County of Saint John within approximately one and three-quarter miles from shore. The Appellate Division of the Supreme Court of New Brunswick held that the locus of the seizure was part of the Province of New Brunswick and that the offence, as set forth in the conviction under appeal, was committed within the Province of New Brunswick and within the body of a county.

This case is within the principle of the *Conception Bay* case. It is based upon the fact that

> by the Royal Instructions issued to Governor Carleton upon the separation of what is now the Province of New Brunswick from the Province of Nova Scotia, the southern boundary of the new Province was defined as "a line in the centre of the Bay of Fundy from the River Saint Croix aforesaid to the mouth of the Musquat (Missiquash) River" clearly indicating the claim of Great Britain at that time to the whole of the Bay of Fundy as a portion of her territory.

The place of seizure was therefore within the Province of New Brunswick. As in the *Conception Bay* case, this case did not involve a delegation by the British Crown of its rights in the territorial sea.

In *Capital City Canning and Packing Company, Limited v. Anglo-British Columbia Packing Company, Limited*[2], the British Columbia Court was concerned with a fishing lease granted by the province entitling the plaintiff to erect and operate traps for the purpose of taking salmon on certain foreshore and tidal lands. The defendant also had a similar lease. The decision of Duff J. was that there was no

[1] (1932), 5 M.P.R. 112. [2] (1905), 11 B.C.R. 333, 2 W.L.R. 59.

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right to grant these leases in the province because they did not come within the terms of the enabling legislation, but he did say at p. 339:

> By that clause it is enacted that, "'Crown lands' shall mean all lands of this Province held by the Crown without incumbrance". The site of the defendant's trap is not, in my opinion, within this definition. It was not disputed, and I assume for the purpose of this application, that this site is *intra fauces terrae*. The bed of the sea in such places is part of the territorial possessions of the Crown; and—except in the case of public harbours, within the disposition of the Provincial Legislature—is comprehended within the terms of the description, "lands of this Province held by the Crown". But this ownership of the soil, is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them; and I apprehend that property held under a title so weighted, cannot (in the ordinary meaning of the words or within any signification fairly to be imputed to them as they stand in the clause I am discussing) be said to fall within the qualification expressed by the phrase, "held without incumbrance".

The concession and assumption that the *locus quo* in the case was *intra fauces terrae* is fundamental to the judgment finding that this was Crown property in right of the province. It is no authority for any general statement that the territorial sea was ever within the limits of the Province of British Columbia.

Closely related to these cases is *Reg. v. Cunningham*[1], where the whole of the Bristol Channel was stated to be within the bodies of the Counties of Glamorgan and Somerset. In that case, the crime, which was tried at the Glamorgan Assizes, was committed on board an American ship in the Penarth Roads in Bristol Channel three-quarters of a mile from the coast of Glamorganshire at a spot never left dry by the tide but within one-quarter of a mile from the land, which is left dry by the tide. *The Fagernes*[2] is inconsistent with *Reg. v. Cunningham* as to the status of the Bristol Channel. *The Fagernes* was decided upon the admission by the Attorney General and the acceptance of that admission by the majority of the Court as conclusive that the spot where this collision was alleged to have occurred was not within the limits to which the territorial sovereignty of His Majesty extended. The spot in question was $10\frac{1}{2}$ to 12 miles from the English coast and $7\frac{1}{2}$ or $9\frac{1}{2}$ miles from the Welsh coast.

The Attorney General for British Columbia relied on certain dicta in some mid-19th century cases which are contrary

[1] (1859) Bell's C.C. 72 at 86, 169 E.R. 1171.
[2] [1927] P. 311, 96 L.J.P. 183.

to the majority judgment in *Reg. v. Keyn*. These dicta have all to be taken subject to the caution expressed by the Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*[1] and quoted above.

In *Attorney General v. Chambers*[2], Lord Cranworth said at p. 212-3:

> The Crown is clearly in such a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What then, according to the authorities in our law, is the extent of this *littus maris*?

The point at issue in the case was the ownership of certain coal seams lying under "that part of the Parish of Llanelly which was contiguous to the seashore and particularly under the land known by the name of Old Castle Farm." The actual decision was that in the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is prima facie limited by the line of the medium high tide between the springs and the neaps.

The *Cornwall Submarine Mines Act 1858*, 21-22 Vict., c. 109, is no authority of general application in support of British Columbia's claim of ownership of the territorial waters. The dispute was between the Crown and the Duchy of Cornwall concerning the ownership of mines below low-water mark. The Duchy of Cornwall extends to low-water mark. The mines had been carried out beyond the low-water mark. An arbitrator decided that the mines and minerals below low-water mark belonged to the Crown, on the landward side to the Duchy of Cornwall. The legislation above referred to was enacted to give statutory effect to the award. We adopt the analysis of Cockburn C.J. in the *Keyn* case, at p. 201, as follows:

> This was a bill for the settlement of the question as to the right to particular mines and minerals between the Crown and the duchy, a measure in which both the royal personages particularly concerned and their respective advisers concurred, and in which no other person whatever was interested . . . To whom would it occur that, in passing it, Parliament was asserting the right of the Crown to the bed of the sea over the three-mile distance, instead of settling a dispute as to the specific mines which were in question?

In *Gammell v. Woods and Forest Commissioners*[3], the question was the exclusive right of the Crown to the

[1] [1914] A.C. 153 at 174.
[2] (1854), 4 De G.M. & G. 206, 43 E.R. 486.
[3] (1859), 3 Macq. 419.

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salmon fishery on the coast of Scotland. Lord Wensleydale expressed the following opinion:

> That it would be hardly possible to extend fishing seaward beyond the distance of three miles, which, by the acknowledged law of nations, belongs to the coast of the country—that which is under the dominion of the country by being within cannon range—and so capable of being kept in perpetual possession.

The actual decision in the case was made on the following propositions:

1. The salmon-fishings in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the Crown, and form part of its hereditary revenue.

2. This right of the Crown is not merely a right of fishing for salmon, but "a right to the salmon-fishings around the sea-coast of Scotland".

3. It is not to be regarded simply as an attribute of sovereignty, but rather as a *patrimonium*, a beneficial interest constituting part of the regal hereditary property.

4. Salmon fishings in the open sea around the coast of Scotland may not only become the subject of a royal grant, but they may be feudalized.

5. The assertion that the sea is common to all, and that there can be no appropriation of it, except where it adjoins the shore, is an erroneous assertion.

6. The Statute 7 & 8 Vict., c. 95, recognizes and proceeds on these principles.

In *Gann v. Whitstable Free Fishers*[1], there are similar *dicta* on Crown ownership of the three-mile limit. The plaintiffs, who were the owners of an oyster bed in Whitstable Bay, claimed tolls for anchorage. The plaintiffs claimed as owners of a free fishery within the Manor of Whitstable. They proved their title from 1775 onwards. They were held not to be entitled to these tolls because whatever their grant was, they took subject to the public right of navigation, which included the right to anchor. Again, this case is no authority for any general proposition that, *contrary to Keyn*, the soil of the sea outside the body of a county and within the three-mile limit was vested in the Crown.

Between 1891 and 1916 there were four cases containing judicial *dicta* asserting Crown ownership of the territorial sea. These are: *Lord Advocate v. Clyde*[2]; *Lord Advocate v. Wemyss*[3]; *Lord Fitzhardinge v. Purcell*[4]; *Secretary of State for India v. Rao*[5].

[1] (1865), 11 H.L. Cas. 192, 35 L.J.C.P. 29, 11 E.R. 1305.
[2] (1891), 19 Rettie, 174 at 177, 183, 29 Sc. L.R. 153.
[3] [1900] A.C. 48 at 66.
[4] [1908] 2 Ch. 139 at 166, 77 L.J. Ch. 529.
[5] (1916), 32 T.L.R. 652 at 653, 85 L.J.P.C. 222.

Lord Advocate v. Clyde dealt with Crown rights in Loch Long. The decision was that the solum of Loch Long was vested in the Crown, the loch being *intra fauces terrae*. The opinion of Lord Justice-Clerk at p. 180 was that it was unnecessary to consider ownership of the solum of the territorial sea. Two judges, however, stated their opinion on this matter to the effect that ownership was in the Crown.

In *Lord Advocate v. Wemyss*, a proprietor of estates adjoining the sea claimed the coal below low-water mark. The decision was in favour of the Crown that baronies of Wemyss, on an interpretation of the grants, included the minerals under the foreshore only. The case also held that the Crown lease granted to the trustees of a minor for the benefit of the minor could not be repudiated after the minor had obtained his majority and had affirmed the lease. Lord Watson's dictum is at p. 60:

> I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown.

In *Fitzhardinge v. Purcell*, the defendant claimed the right to hunt for ducks on the foreshore of the River Severn, a tidal and navigable river. He was sued for trespass by the lord of certain manors adjoining the river. The judgment was that the plaintiff had proved his title to the foreshore as part of the manors. The rights of the public were confined to navigation and fishing on the foreshore. Mr. Justice Parker expressed the opinion that "the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown . . ." The manors were in the County of Gloucester. The river was tidal and navigable at this point. The waters were clearly inland waters and not part of the territorial sea.

In the *Indian* case, the dispute was over the ownership of three small islands which had appeared between 1840 and 1860 off the coast of Madras. They were within three miles of the shore. Certain parcels of the land were claimed by two zemindars. The High Court of Madras had awarded these parcels to the zemindars. The Privy Council based

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its decision upon the following proposition taken from Hale's de Juris Maris:

> The lands in dispute fall under the third category, which is thus dealt with by Hale:—
>
> 3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water.

The reasons of Lord Shaw also quoted with approval all the dicta that we have referred to in the three previous cases and are undoubtedly based on the proposition that the islands were Crown land because located in the territorial sea. This is Hale's proposition. An alternative explanation is given in Oppenheim's International Law, vol. 1, 8th ed., p. 565:

> 234. The natural processes which create alluvions on the shore and banks, and deltas at the mouths of rivers, together with other processes, may lead to the birth of new islands. If they rise on the high seas outside the territorial maritime belt, they belong to no State, and may be acquired through occupation on the part of any State. But if they arise in rivers, lakes, or within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land.

So far, we are of the opinion that the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over the territorial sea following union with Canada.

After 1871, the extent of the jurisdiction of the Province of British Columbia is to be found in the *British North America Act*. The effect of the union was that the former Colony of British Columbia became part of the larger Dominion of Canada. At that date Canada was not a sovereign state.

As late as 1926, the Privy Council decided in *Nadan v. The King*[1] that s. 1025 of the *Criminal Code* of Canada if and so far as it was intended to prevent the King in Council from giving leave to appeal against an order of a

[1] [1926] A.C. 482, 95 L.J.P.C. 114, 28 Cox C.C. 167.

Canadian Court in a criminal case, was invalid. The ratio is contained in the following extract at p. 492 of the report:

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters". But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal.

On the other hand, in *Croft v. Dunphy*[1], the Privy Council decided that in order to support Dominion legislation enacted in 1928 against hovering in "Canadian waters" within twelve miles of the Canadian coast, it was unnecessary to argue that the Statute of Westminster had retrospective operation.

It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy: cf. *Att.-Gen. for Canada v. Cain* (1906) A. C. 542. The *British North America Act* imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not in pari materia.

The rights in the territorial sea formerly asserted by the British Crown in respect of the Colony of British Columbia were after 1871 asserted by the British Crown in respect of the Dominion of Canada. We have already dealt with the *Territorial Waters Jurisdiction Act* of the Imperial Parliament in 1878. To summarize, its effect was that the United Kingdom clearly claimed jurisdiction over a territorial sea in respect of the Dominion of Canada. During the period prior to 1919, Canada had only limited

[1] [1933] A.C. 156, 102 L.J.P.C. 6.

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rights to legislate in respect of the territorial sea. Legislation of the Dominion Parliament in 1867 and 1868, previously quoted, referred to these waters as "British waters". Not until 1928 did Canadian legislation refer to these waters as the "territorial waters of Canada".

There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931, 22 Geo. V., c. 4. Section 3 of the Statute of Westminster provides in an absolutely clear manner and without any restrictions that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia. Canada signed and implemented by legislation the Pacific Salmon Fisheries Convention and the Pacific Fur Seals Convention, 1957 (Can.), c. 11 and c. 31. The first of these was between Canada and the United States in respect of the salmon fisheries in the Fraser River system, and the second was a convention among the governments of Canada, Japan, the Union of Soviet Socialist Republics and the United States of America.

Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law. The territorial sea now claimed by Canada was defined in the *Territorial Sea and Fishing Zones Act* of 1964 referred to in Question 1 of the Order-in-Council. The effect of that Act, coupled with the Geneva Convention of 1958, is that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada.

The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands. It is the sovereign state of Canada that has the right, as between Canada and British Columbia, to explore and exploit these lands, and Canada has exclusive legislative jurisdiction in respect of them either under s. 91(1)(*a*) of the *British North America Act* or under the residual power in s. 91. British Columbia has no legislative jurisdiction since the lands in

question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province.

Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada".

The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests.

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

Canada is a signatory to the Convention on the Territorial Sea and Contiguous Zone and may become a party to other international treaties and conventions affecting rights in the territorial sea.

We answer Questions 1(a), 1(b) and 1(c) in favour of Canada.

QUESTION 2—The Continental Shelf

International law in relation to the continental shelf is a recent development. Lord Asquith said in the *Abu Dhabi Arbitration*[1] that in the year 1939 it did not exist as a legal doctrine. It was foreshadowed by the agreement between Great Britain and Venezuela—"Treaty Relating to the Submarine Areas of the Gulf of Paria", February 26, 1942,—and the Truman Proclamation of 1945 No. 2667, September 28, 1945, Code of Federal Regulations 12303, 1943-48, Title 3, p. 67. We will deal with these two briefly in order.

Venezuela had annexed certain parts of the submarine areas of the Gulf of Paria. The two states, Great Britain acting on behalf of Trinidad and Tobago, then made the

[1] (1952), 1 Int. & Comp. L.Q. 247

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above recited agreement. Following the agreement, an Order-in-Council was issued (United Kingdom (Trinidad and Tobago) Submarine Areas of the Gulf of Paria (Annexation)) dated August 6, 1942. The Order-in-Council recites:

> . . . and whereas the Government of the Republic of Venezuela have annexed to Venezuela certain parts of the submarine areas of the Gulf of Paria: and whereas it is expedient that the rest of the submarine area of the Gulf of Paria should be annexed to and form part of His Majesty's dominions and should be attached to the Colony of Trinidad and Tobago for administrative purposes . . .

We set out the Truman Proclamation of 1945 in full:

PRESIDENTIAL PROCLAMATION 2667, SEPTEMBER 28, 1945, WITH RESPECT TO NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF

10 Federal Register 12303(1945)

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by

the United States and the state concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The 1958 Geneva Convention on the Continental Shelf defines the rights that a coastal state may exercise over the continental shelf for the purpose of exploring and exploiting its natural resources. Articles 4 and 5 deal with the obligations and responsibilities which must be assumed. Article 6 deals with the problem of delimiting the boundaries of the shelf when it is adjacent to the territories of two or more states which are opposite or adjacent to each other. We set out Articles 1 to 5.

Article 1. For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar areas adjacent to the coasts of islands.

Article 2. 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 3. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 4. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.

Article 5. 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the

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continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

The responsibilities of the coastal state under international law set out in Articles 4 and 5 are many and onerous.

This Convention has been signed by Canada but to date has not been ratified. It came into force on June 10, 1964, upon ratification by a sufficient number of states and it defines the present state of international law on these matters. The United States had anticipated the jurisdiction given by this Convention as early as 1953 by the *Outer Continental Shelf Lands Act*, Laws of 83rd Congress, First Session, 1953, ss. 2 and 3.

Sec. 3. Jurisdiction Over Outer Continental Shelf.—

(*a*) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

The United Kingdom enacted the *Continental Shelf Act* in 1964, (Imp.), c. 29. There was similar legislation enacted in New Zealand in the same year (Statutes of New Zealand, 1964, No. 28).

The rights now recognized by international law to explore and exploit the natural resources of the continental shelf do not involve any extension of the territorial sea. The superjacent waters continue to be recognized as high seas.

As with the territorial sea, so with the continental shelf. There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:

(1) The continental shelf is outside the boundaries of British Columbia, and

(2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.

There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.

We answer Questions 2(a) and 2(b) in favour of Canada.

Answers to the questions submitted on the Reference

Our answers to the questions submitted to the Court are, therefore, as follows:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(*a*) Are the said lands the property of Canada or British Columbia?
Answer: Canada.

(*b*) Has Canada or British Columbia the right to explore and exploit the said lands?
Answer: Canada.

(*c*) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?
Answer: Canada.

2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada

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referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

(*a*) Has Canada or British Columbia the right to explore and exploit the said mineral and other natural resources?
Answer: Canada.

(*b*) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?
Answer: Canada.

We hereby certify to His Excellency the Governor General in Council that the foregoing are our reasons for the answers to the questions referred herein for hearing and consideration.

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* May 18
Nov. 7

EVERETT GEORGE KLIPPERT .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Criminal law—Dangerous sexual offender—Homosexual—Preventive detention—Whether a dangerous sexual offender—Criminal Code, 1953-54 (Can.), c. 51, ss. 149, 659(b) [as enacted by 1960-61 (Can.), c. 43, s. 32], 661.

The appellant pleaded guilty to four charges of gross indecency under s. 149 of the *Criminal Code*. Following the imposition of a sentence, an application was made under s. 661 of the *Criminal Code* to have him declared a dangerous sexual offender within the meaning of s. 659(*b*) of the Code. The appellant's previous record showed a conviction some five years before on eighteen charges for similar offences. The evidence of the two psychiatrists was to the effect that the appellant was likely to commit further sexual offences of the same kind with other consenting adult males, that he had never caused injury, pain or other evil to any person and was not likely to do so in the future. The judge imposed a sentence of preventive detention. His appeal to the Court of Appeal for the Northwest Territories was dismissed. He was granted leave to appeal to this Court on the following questions of law: (i) whether there was evidence that he was a person who had shown a failure to control his sexual impulses, and (ii) whether the evidence could support the conclusion that he had shown such a failure and was likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or was likely to commit a further sexual offence.

Held (Cartwright and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Spence JJ.: Under the new definition of "dangerous sexual offender", as enacted by 1960-61 (Can.), c. 43, s. 32,

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*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

the likelihood of the commission of a further sexual offence has been added and made an alternative element to that of the danger of injury to others. Applied to this case, this new definition justified the concurrent findings of the Courts below that the appellant, having shown a failure to control his sexual impulses and that he was likely to commit further sexual offences of the same kind, was a dangerous sexual offender within the meaning which Parliament ascribed to this expression. The intent and object of the provisions dealing with dangerous sexual offenders is not solely to protect persons from becoming the victims of those whose failure to control their sexual impulses rendered them a source of danger.

Per Cartwright and Hall JJ., *dissenting*: The intent and object of the sections of the Code dealing with dangerous sexual offenders is to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger. The words "a further sexual offence" are general words wide enough to embrace every type of offence containing a sexual element. Applying the maxim *verba generalia restringuntur ad habilitatem rei vel personae* to s. 659(*b*) of the Code, the concluding words of the section should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person". On this view of s. 659(*b*), it was clear that the finding that the appellant was a dangerous sexual offender could not stand as it would be directly contrary to the evidence.

Droit criminel—Délinquant sexuel dangereux—Homosexuel—Détention préventive—Est-il un délinquant sexuel dangereux—Code Criminel, 1953-54 (Can.), c. 51, arts. 149, 659(b) [tel que décrété par 1960-61 (Can.), c. 43, art. 32], 661.

L'appelant a admis sa culpabilité sur quatre chefs d'accusation de grossière indécence sous l'art. 149 du *Code Criminel*. Une fois la sentence imposée, une demande a été présentée en vertu de l'art. 661 du *Code Criminel* pour qu'il soit déclaré que l'appelant était un délinquant sexuel dangereux dans le sens de l'art. 659(*b*) du Code. Le dossier antérieur de l'appelant montrait une condamnation, quelque cinq ans plus tôt, sur dix-huit chefs d'accusation pour des infractions semblables. Le témoignage des deux psychiatres fut à l'effet que l'appelant commettrait vraisemblablement d'autres infractions sexuelles de la même nature avec d'autres adultes mâles consentants, qu'il n'avait jamais causé de lésions corporelles, douleurs ou autre mal à quelqu'un et que vraisemblablement il n'en causerait pas à l'avenir. Le juge a imposé une sentence de détention préventive. L'appel à la Cour d'Appel des Territoires du Nord-Ouest a été rejeté. Il a obtenu la permission d'en appeler devant cette Cour sur les questions de droit suivantes: (i) Existait-il une preuve à l'effet que l'appelant était une personne ayant manifesté une impuissance à maîtriser ses impulsions sexuelles? (ii) Existait-il une preuve pouvant supporter la conclusion qu'il avait démontré une telle impuissance et qu'il causerait vraisemblablement des lésions corporelles, des douleurs ou autre mal à quelqu'un, à cause de son impuissance à l'avenir à maîtriser ses impulsions sexuelles ou qu'il commetrait vraisemblablement une autre infraction sexuelle?

Arrêt: L'appel doit être rejeté, les Juges Cartwright et Hall étant dissidents.

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Les Juges Fauteux, Judson et Spence: Dans la nouvelle définition de l'expression «délinquant sexuel dangereux» telle que décrétée par 1960-61 (Can.), c. 43, art. 32, on a ajouté comme élément alternatif à la probabilité de lésions corporelles à d'autres personnes, la probabilité de la commission d'une autre infraction sexuelle. L'application de cette nouvelle définition au cas présent justifie les conclusions concordantes des Cours inférieures à l'effet que l'appelant, ayant démontré son impuissance à maîtriser ses impulsions sexuelles et que vraisemblablement il commettrait d'autres infractions sexuelles de la même nature, était un délinquant sexuel dangereux dans le sens que le Parlement a attribué à cette expression. L'intention et le but des dispositions se rapportant aux délinquants sexuels dangereux n'est pas seulement d'empêcher les autres de devenir les victimes de ceux dont l'impuissance à maîtriser leurs impulsions sexuelles en fait une source de danger.

Les Juges Cartwright et Hall, *dissidents*: L'intention et le but des articles du Code se rapportant aux délinquants sexuels dangereux est d'empêcher les autres de devenir les victimes de ceux dont l'impuissance à maîtriser leurs impulsions sexuelles en fait une source de danger. Les mots «une autre infraction sexuelle» sont des mots au sens général et ayant une portée assez grande pour englober toute offense ayant un élément sexuel. Appliquant la maxime *verba generalia restringuntur ad habilitatem rei vel personae* à l'art. 659(*b*) du Code, on doit donner aux derniers mots de l'article la signification «ou qui commettrait vraisemblablement une autre infraction sexuelle comportant un élément de danger pour une autre personne». Si l'on interprète l'art. 659(*b*) de cette manière, il est clair que la conclusion que l'appellant était un délinquant sexuel dangereux ne peut pas être maintenue puisqu'elle serait directement en conflit avec la preuve.

APPEL d'un jugement de la Cour d'Appel des Territoires du Nord-Ouest, confirmant une sentence de détention préventive. Appel rejeté, les Juges Cartwright et Hall étant dissidents.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories, affirming a sentence of preventive detention. Appeal dismissed, Cartwright and Hall JJ. dissenting.

B. A. Crane, for the appellant.

John A. Scollin, for the respondent.

The judgment of Cartwright and Hall JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for the Northwest Territories pronounced on October 26, 1966, dismissing an appeal from a judgment of Sissons J. pronounced on March 9, 1966, finding that the appellant was a dangerous sexual offender within the meaning of the *Criminal Code*

and imposing a sentence of preventive detention upon him in lieu of the sentences imposed by Magistrate Parker to be mentioned hereafter.

The appeal to this Court was by leave granted on March 22, 1967, under the provisions of s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259. The order of this Court granted leave to appeal on the following questions of law:

(1) Whether there was evidence before Mr. Justice Sissons that Klippert was a person who had shown a failure to control his sexual impulses.

(2) Whether the evidence before Mr. Justice Sissons can support the conclusion that the accused "has shown a failure to control his sexual impulses and is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence".

The facts are not in dispute and may be stated briefly.

On the morning of August 16, 1965, the appellant was arrested by the R.C.M.P. at Pine Point, N.W.T., as a result of an investigation with respect to a charge of arson (in which he was not involved). In the evening of August 16 he was taken to Hay River after he had given the police a statement. On August 17 the accused was arraigned before Magistrate Parker on four charges of gross indecency under s. 149 of the *Criminal Code* as follows:

1. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 21st day of December, 1964 and the 6th day of August 1965 at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with William Gordon Mellett, another male person, contrary to Section 149 of the *Criminal Code*.

2. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 1st day of May, 1965 and the 15th day of July, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with Patrick Betty, another male person, contrary to Section 149 of the *Criminal Code*.

3. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 10th day of July, 1965, and the 31st day of July, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with David Frank L'Heureux, another male person, contrary to Section 149 of the *Criminal Code*.

4. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 1st day of July, 1965 and the 10th day of August, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with Christopher Logan Wolff, another male person, contrary to Section 149 of the *Criminal Code*.

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Cartwright J.

Pleas of guilty were entered to each charge and the appellant was remanded in custody until August 24, 1965, at Fort Smith, at which time Magistrate Parker imposed a sentence of three years concurrent with respect to each charge.

Following such conviction and sentence a notice of application under s. 661 of the *Criminal Code* to have the appellant declared a dangerous sexual offender was served on him. The appellant was examined by two psychiatrists on behalf of the Crown, Dr. Donald Griffith McKerracher, nominated by the Attorney General pursuant to s. 661(2) of the *Criminal Code*, and Dr. Ian McLaren McDonald.

The application was heard before Sissons J. The Crown proved the four convictions before Magistrate Parker. Corporal Armstrong of the R.C.M.P., who had laid the information and had been present at the trial before the Magistrate, identified the appellant as the person convicted but was not asked by either counsel for the Crown or for the defence for any particulars of the offences to which the appellant had pleaded guilty. Corporal Armstrong produced the fingerprints and fingerprint certificates of the appellant which included a record of his conviction on May 4, 1960, on eighteen charges of gross indecency contrary to s. 149 of the *Criminal Code* on which he was sentenced to four years imprisonment on each charge, the sentences to run concurrently.

No evidence was adduced as to the nature of the acts committed by the appellant in respect of either the four substantive charges to which he had pleaded guilty before Magistrate Parker or the eighteen other charges upon which he had been convicted in 1960.

The Crown called the evidence of the two psychiatrists mentioned above, each of whom gave evidence as to, *inter alia*, statements made to him by the appellant during his examination.

It was held by this Court in *Wilband v. The Queen*[1], that a psychiatrist acting pursuant to s. 661(2) of the *Criminal Code* is not a person in authority to whom the rule as to proof by the Crown of the voluntary nature of a statement applies and no question is raised as to the admissibility of any of the evidence which these two witnesses gave.

[1] [1967] S.C.R. 14.

The effect of their evidence is shown by the following extracts.

Dr. Donald Griffith McKerracher testified:

He (the appellant) did say that he had had homosexual activities at the age of 15 for the first time;...

* * *

Further that he had not married; that sexual behaviour, homosexual behaviour had existed since the age of 15; that to him homosexual activity provided his only satisfactory method of the release of sexual tensions. It was his only satisfactory sexual outlet. He found the thought of heterosexual conduct abhorrent. He told me he never had had heterosexual relations, that during 24 years of fairly active homosexual practice he had many partners whose ages varied from the middle teens to 30 or 35. He obtained his sexual partners through previous contacts through some, what I would judge, was discreet soliciting because others in the same pattern of behaviour would, one would judge, be tending to make contacts too. There was no suggestion whatsoever of any violence at any time; that he was most co-operative throughout the interview, restrained in manner, courteous, coherent, relevant and frank.

* * *

Q. What are your conclusions from those observations?

A. Well in the first place my opinion is that Mr. Klippert is not inhibited, let us put it this way, his sexual drive is not inhibited and it is my opinion based on my experience with others with similar patterns of conduct that he would have difficulty in inhibiting them in the future.

* * *

DR. McKERRACHER: Yes. My conclusion was in terms of this pattern of sexual behaviour that he would have the same drive—a drive toward homosexual relations in the future that he had had in the past. I also concluded that in my opinion there was no danger, this is strictly my opinion, of him doing physical violence or injury to anyone. He did not fit that pattern. If I might put it the same way, if I might make an analogy with the heterosexual activity of a man with heterosexual drives he will continue to seek heterosexual outlets for those drives, some men would do it violently, some would not. I did not feel the accused showed any evidence that he would behave in a violent fashion.

* * *

Q. On the question of his sexual conduct in the past what are you able to conclude from that?

A. I conclude—it is based on a homosexual pattern and has been since he was sexually active.

Q. Has he been able to control this?

A. No—I would put it inhibit. He has not inhibited these drives.

Q. Now as to...

THE COURT: Just to make it clear what do you mean by "not inhibited"? A. The drive is a desire, to inhibit it is to refuse to follow the desire. It is like a heterosexual drive—most people do not inhibit their heterosexual drives, they follow their drives, the impulse is a drive to seek heterosexual relief.

Dr. Ian McLaren McDonald testified:

Q. And what information did you receive on those points? A. He informed me that he had pleaded guilty to four charges of

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having engaged in homosexual activity; that he was sentenced in August of 1965. He told me that this was the second sentence for similar behaviour. He told me that he had engaged in homosexual activity since the age of 14 or 15. He told me that the people with whom he engaged in these activities ranged in age from 15 to the mid or late 30's. The 15 year old, he said, took part in an incident when he was 17 or 18. He had little or no heterosexual experience, certainly no complete heterosexual experience never having completed a sexual act with a female. He said that he had no desire to partake in heterosexual activity. He said this filled him with revulsion, as I believe his words were "some people are revolted at the idea of having homosexual relations while I am revolted at the idea of having heterosexual relations". He stated that he had engaged in homosexual activity actively when he started work in the dairy in Calgary which would be about the age of 16 or 17; that he had continued this up until his being confined to the penitentiary I believe in 1960. Having been discharged from the penitentiary he was aware of the need to refrain from engaging in this behaviour again. He stated that some attempt, some contacts had been made with him by ex-friends and for this reason, as well as the feeling of his continued presence bringing shame on his family, he decided to leave Calgary and head North.

He acknowledged that he had been warned, or at least a discussion had taken place between himself and a member of the Mounted Police Force at Pine Point some time in the summer of 1964, the implication being that his record was known and that he should more or less watch his behaviour. He said he was able to do this until these events transpired of which he was charged and sentenced.

In describing his behaviour, his homosexual behaviour, he said first of all that he was very careful of the person whom he approached, he was very careful to ascertain whether or not they preferred heterosexual outlets and if they did then he didn't make an overture. If they were ambivalent, that is they had no strong feelings one way or the other then he would make some overtures, generally conversationally. He denied ever having physically assaulted or coerced any of these people he engaged in these pursuits. He acknowledged that in the past he had a good number of short term affairs. These were not lasting relationships.

Q. Short term affairs with whom? A. The men. He also stated that he denied having any preference for young men, his preference was for people who were responsive, that is people who shared his enthusiasm about the endeavour. As a result of this information that he told me, and based on past experience with people who have presented this kind of sexual behaviour pattern I came to the conclusion that Mr. Klippert was (*a*) primarily and essentially a homosexual, that this was the prime outlet for sexual drives (*b*) I thought it unlikely that he could refrain from indulging in this behaviour again without assistance, that is assistance from other people, trained people. I felt that this man was not the type who would physically injure or coerce people to take part in these activities.

Q. Dr. McDonald then on the point of past sexual conduct and the question of control, briefly what can you tell us about his control from his past conduct? Does he have control, I mean can

> he stop, as indicated from his past conduct? A. He obviously cannot stop for long periods of time on past performance, on his own.

I have perhaps quoted at unnecessary length from the evidence of these witnesses as it is clear from reading their testimony as a whole that in the opinion of each of them there was no danger of the appellant using violence of any sort or attempting coercion of anyone. They do not suggest that he sought out youthful partners for his misconduct. What they did foresee was the likelihood of the appellant committing further acts of gross indecency with other consenting adult males.

The question before us is whether on this state of facts the finding that the appellant is a dangerous sexual offender can be sustained in law.

In the case of an application under s. 661 of the *Criminal Code* the onus lies upon the Crown to establish beyond a reasonable doubt that the accused is a dangerous sexual offender. In the case at bar not only is there no evidence that the accused if at liberty would constitute a danger to any person but the evidence of the two psychiatrists, quoted from and summarized above, expressly negatives the existence of any such danger. This would be an end of the matter if it were not for the definition of the phrase "dangerous sexual offender" contained in s. 659 which reads as follows:

> 659. In this Part,...
>
> (*b*) "dangerous sexual offender" means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.

For the purposes of this appeal I will assume that the evidence in the record was sufficient to support a finding that the accused has shown a failure to control his sexual impulses and that, if at liberty, he is likely to commit a further sexual offence of the same sort as those to which he pleaded guilty; there is not a tittle of evidence to suggest that he is likely to commit any other type of sexual offence.

In construing the definition of "dangerous sexual offender" it must be borne in mind that by the combined effect of s. 2(2), s. 2(3) and s. 2(1)(*a*)(i) and (ii) of the *Interpretation Act*, R.S.C. 1952, c. 158, s. 659(*b*) of the

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Criminal Code must be read as if it concluded with the words "except in so far as this definition is inconsistent with the intent or object of this Part or would give to the expression 'dangerous sexual offender' an interpretation inconsistent with the context".

The intent and object of those sections in the *Criminal Code* which deal with dangerous sexual offenders is to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger. To construe the definition as compelling the Court to impose a sentence of preventive detention on a person shown by the evidence led by the Crown not to be a source of danger would be to give it an effect inconsistent with the intent or object of the Part.

The words "a further sexual offence" are general words wide enough to embrace every type of offence containing a sexual element and in construing them resort may properly be had to the maxim *verba generalia restringuntur ad habilitatem rei vel personae* (Bac. Max. reg. 10). The following statement, now found in Maxwell on Interpretation of Statutes, 11th ed., at pages 58 and 59, is supported by the authorities cited and has often been quoted with approval:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the legislature intended, they frequently express more in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject-matter in the mind of the legislature, and limited to it.

A case often referred to on this point is *Cox v. Hakes*[1], in which it was held by the House of Lords that the following words in s. 19 of the *Judicature Act*, 36 & 37 Vict., c. 66: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice or any Judges or Judge thereof" did not confer jurisdiction to hear an appeal from an order discharging a prisoner

[1] (1890), 15 App. Cas. 506.

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under a *habeas corpus* although such an order fell plainly within the literal meaning of the words of the enactment.

Applying this principle to s. 659(*b*) it is my opinion that the concluding words "or is likely to commit a further sexual offence" should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person".

If this is the right construction of s. 659(*b*), as I think it is, it is clear that the finding that the appellant is a dangerous sexual offender cannot stand; it would be directly contrary to the evidence.

I am glad to arrive at this result. It would be with reluctance and regret that I would have found myself compelled by the words used to impute to Parliament the intention of enacting that the words "dangerous sexual offender" shall include in their meaning "a sexual offender who is not dangerous".

Before parting with the matter I wish to mention a further consideration which is not, I think, irrelevant in seeking to ascertain the intention of Parliament. It is not wholesome that the existing criminal law should not be enforced. A law which ought not to be enforced should be repealed. If the law on this subject matter is as interpreted by the Courts below, it means that every man in Canada who indulges in sexual misconduct of the sort forbidden by s. 149 of the *Criminal Code* with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life. However loathsome conduct of the sort mentioned may appear to all normal persons, I think it improbable that Parliament should have intended such a result. It may be that we cannot take judicial notice of the probable effect which such an interpretation would have on the numbers of those confined to penitentiaries; no one, I think, would quarrel with the suggestion that it would bring about serious overcrowding.

I would allow the appeal and quash the sentence of preventive detention.

The judgment of Fauteux, Judson and Spence JJ. was delivered by

FAUTEUX J.:—The circumstances giving rise to this appeal can be briefly stated. In August 1965, the appellant

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pleaded guilty before Magistrate Parker on four charges under s. 149 of the *Criminal Code,* namely gross indecency, and on August 24, he was sentenced to three years concurrent with respect to each charge. On an application, subsequently made under s. 661 Cr. C., before Sissons J., he was declared a *dangerous sexual offender* within the meaning of s. 659(*b*) of the *Criminal Code.* Being of the view that a penitentiary term would be harmful rather than beneficial to the appellant, the learned judge sentenced him to preventive detention,—a detention for an indeterminate period —cf. 659(*c*), in lieu of the sentence of three years in penitentiary imposed by Magistrate Parker, and recommended to the Minister of Justice to review the case of the appellant, at the earliest possible moment, and that he be released on licence on condition that he submit himself to such treatment which, in the opinion of psychiatrists, could be helpful to him.

An appeal from the decision of Mr. Justice Sissons was launched and was, ultimately, unanimously dismissed by the Court of Appeal for the North West Territories.

Leave to appeal to this Court was thereafter sought and granted on the two following questions of law:

> (i) Whether there was evidence before Mr. Justice Sissons that Klippert was a person who had shown a failure to control his sexual impulses.
>
> (ii) Whether the evidence before Mr. Justice Sissons can support the conclusion that the accused has shown a failure to control his sexual impulses and is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.

The evidence before Sissons J. consists of the four convictions before Magistrate Parker, a conviction in 1960 on eighteen charges for similar offences—for which appellant was sentenced to four years' imprisonment with respect to each charge, sentences to run concurrently,—and, as required by s. 661(2), the evidence of two qualified psychiatrists, namely Dr. Donald Griffith McKerracher and Dr. Ian McLaren McDonald. The substance of the evidence of these doctors appears in the excerpts from their testimony, quoted in the reasons for judgment of my brother Cartwright. Considered as a whole, the evidence reasonably indicates that the appellant is a person who, by his conduct in sexual matters, has shown a failure to control

his sexual impulses and that he is likely to commit further sexual offences of the same kind, though, he never did cause injury, pain or other evil to any person and is not likely to do so in the future through his failure to control his sexual impulses.

On this state of facts, the determination of the questions of law mentioned above, depends on the meaning given by Parliament to the expression *dangerous sexual offender*.

Part XXI of the *Criminal Code*, which deals with Preventive Detention, contains its own interpretation provisions in s. 659. Section 659(*b*) defines *dangerous sexual offender* as follows:

> 659. In this Part,
> (*a*) . . .
> (*b*) "dangerous sexual offender" means a person who, (i) by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and (ii) who (*a*) is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or (*b*) is likely to commit a further sexual offence, and
> (*c*) . . .

Underlining, numerals and letters have been added to point out the necessary or alternative constituent elements in the definition.

This is a new definition. It was enacted by Parliament in 1961, by 9-10 Elizabeth II, c. 43, s. 32, of which the opening words are:

> 32. Paragraph (*b*) of section 659 of the said Act is repealed and the following substituted therefor:

Prior to this change, s. 659(*b*) read:

> 659. In this Part,
> (*a*) . . .
> (*b*) "criminal sexual psychopath" means a person who, (i) by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who (ii) as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Underlining and numerals have been added to point out the necessary constituent elements in this former definition.

Thus, it appears that, under the new definition, (i) the element of psychological ability to control has been replaced by that of a straight factual investigation and (ii) the likelihood of the commission of a further sexual offence, has been added and made an alternative element to that of the danger of injury to others.

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Applied to this case, the new definition justifies the concurrent finding of the Courts below, that the appellant who, on the evidence, (i) has shown a failure to control his sexual impulses and (ii) is likely to commit further sexual offences of the same kind, is a *dangerous sexual offender* within the meaning which Parliament itself ascribed to this expression.

During the hearing of this appeal, reference was made to a certain part of the French version of the former and of the new definition and some reliance appears to have been placed, by counsel for the appellant, on a lack of difference between the two texts to support the contention that the psychological ability to control has not been replaced by a straight factual investigation and is still a constituent element in the definition. The part of the definition to which we were referred reads as follows:

in the former definition:

> "...qui, d'après son inconduite en matière sexuelle, a manifesté une impuissance à maîtriser ses impulsions sexuelles ..."

and in the new definition:

> "...qui, d'après sa conduite en matière sexuelle, a manifesté une impuissance à maîtriser ses impulsions sexuelles ..."

Both texts are obviously identical in substance. In my opinion, this, in no way, supports the proposition contended for by the appellant. We are not dealing here with a situation where each of the English and of the French text is capable of assisting the other, in a matter of interpretation, but with a situation where one has to elect between either the English text, which manifests the actual intervention of Parliament to change the existing law with respect to one of the constituent elements in the definition, or the French text, which is indicative of no change at all. In *Blachford v. McBain*[1], Taschereau J., as he then was, disposed of a similar question by ignoring the version which left the law in the state in which it was, prior to the Act adopted to change it, cf. p. 275. Indeed, to give priority to the French version would, in this case, render the change made in the English version meaningless and the actual intervention of Parliament, to make this change, futile.

With deference, I cannot either agree with the view that the intent and object of the provisions dealing with *dan-*

[1] (1892), 20 S.C.R. 269.

gerous sexual offenders, is solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger and that to apply the definition to a person, who is not to be a source of danger, would give the definition an effect inconsistent with the intent or object of these provisions. Obviously, the intent and object of an Act is to be found in its provisions and, in the case of this particular legislation, the provisions which are relevant in this respect are those of s. 659—the interpretation section—and those of s. 661—the operative section. Section 659(*b*), as above indicated, clearly added, as an alternative element in the definition to the danger of injury to others, that of the likelihood of the commission of a further sexual offence, and a consideration of s. 661 shows that the operative provisions are only consistent with this view of the matter. Section 661 reads as follows:

661. (1) Where an accused has been convicted of

(*a*) an offence under

(i) section 136,

(ii) section 138,

(iii) section 141,

(iv) section 147,

(v) section 148, or

(vi) section 149; or

(*b*) an attempt to commit an offence under a provision mentioned in paragraph (*a*),

the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.

(2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.

(4) At the hearing of an application under subsection (1), the accused is entitled to be present.

In some of the offences referred to in s. 661(1)(*a*), such as *rape, indecent assault on female, indecent assault on male,* violence is involved to a variable degree as an element of the offence. In others, such as *sexual intercourse with a female under 14, sexual intercourse with a female between*

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14 and 16, buggery and *gross indecency,* violence is not an element of the offence. Particularly, the offence of gross indecency, in which appellant has indulged, is one which necessarily implies consent of the person which must participate with the accused for its commission and one which excludes danger of injury to the participants. With respect to the offences of the first category, it may well be said that the object and intent of Parliament is, as indicated by my brother Cartwright, *to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger,* but, in my respectful view, the same thing cannot be said with respect to the offences of the second category which also includes the offence of *bestiality.* The language of s. 661 is clear; if an accused is convicted of one of the offences mentioned in the section, be that one of the first or of the second category, the Court shall, upon application, hear evidence and decide whether the accused is a person who, (i) by his conduct, has shown a failure to control his sexual impulses, and (ii) who (*a*) is either likely to cause injury, pain or other evil to any person through his failure in the future to control his sexual impulses or (*b*) is likely to commit a further sexual offence. The general words *further sexual offence* are clearly embracing the offences mentioned in s. 661(1) of which, as above indicated, many exclude, as being one of their constituent elements, a source of danger of injury to other persons.

I would, therefore, affirmatively answer the two questions of law upon which leave to appeal was granted.

Whether the criminal law, with respect to sexual misconduct of the sort in which appellant has indulged for nearly twenty-five years, should be changed to the extent to which it has been recently in England, by the *Sexual Offences Act* 1967, c. 60, is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.

I would dismiss the appeal.

Appeal dismissed, CARTWRIGHT *and* HALL JJ. *dissenting.*

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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